

FEDERAL CIRCUIT COURT OF AUSTRALIA

LABELLA & LABELLA

[2020] FCCA 948

Catchwords:

FAMILY LAW – Property – undefended – where response entered – where respondent stopped engaging in proceedings – where service demonstrated on respondent – court satisfied that respondent had made choice not to appear – final hearing proceeding undefended – where husband made greater contribution – where the wife has predominant care of children – husband pays no child support – addbacks asserted by the wife – whether wastage of property by husband – where it is just and equitable to make property adjustments – property adjustments made in favour of wife.

Legislation:

Child Support Assessment Act 1987 (Cth) s.58

Family Law Act 1975 (Cth), ss.75(2), 78, 79, 117

Federal Circuit Court Rules 2001 (Cth), rr.1.05(2), 13.04

Income Tax Assessment Act 1936 (Cth), ss.3.10, 4.1, 118-195

Taxation Administration Act 1953 (Cth), s.8C

Cases cited:

In the Marriage of Kowaliw, J.I. and Kowaliw, A.G [1981] FLC 91-092

Oriolo and others & Oriolo (1985) 10 Fam LR 665

Black & Kellner (1992) 15 Fam LR 343

Weir & Weir (1992) 16 Fam LR 154

Hickey & Hickey & Attorney-General for the Commonwealth of Australia (2003) FLC 93-143

Stanford & Stanford [2012] 247 CLR 108

Bevan & Bevan [2013] FamCAFC 116

Dickons & Dickons (2014) 50 Fam LR 244

Marsh & Marsh (2014) FLC 93-576

Fields & Smith (2015) FLC 93-638

Masoud & Masoud [2016] FamCAFC 24

Waterman & Waterman [2017] FamCAFC 23

Pendleton & Pendleton [2017] FamCAFC 108

Grier & Malphas (2017) 55 Fam LR 107

Trevi & Trevi [2018] FamCAFC 173

Jabour & Jabour [2019] FamCAFC 78

Yannes & Judkins [2019] FCCA 1656

Applicant:

MS LABELLA

Respondent: MR LABELLA
File Number: WOC 1080 of 2018
Judgment of: Judge Morley
Hearing date: 24 October 2019
Date of Last Submission: 24 October 2019
Delivered at: Sydney
Delivered on: 1 June 2020

REPRESENTATION

Counsel for the Applicant: Ms Eldershaw
Solicitors for the Applicant: Heard McEwan Legal
No appearance for the Respondent.

ORDERS

THE COURT NOTES THAT:

- (A) For the proper interpretation of these Orders the following defined terms apply:
- (1) “A Street, Suburb B property” means the property known and situate at A Street, Suburb B, in the State of Queensland, being the whole of the land in Lot ... Registered Plan ..., Title Reference ..., of which the Husband is the sole registered proprietor;
 - (2) “Caveats” means the caveat registered on the title of the property situate at C Street, City D, in the State of New South Wales, by Access Law Group registered no. ... and the caveat

registered on the title of the A Street, Suburb B Property, F Street, Suburb G Property, H Street, Suburb G Property and J Street, Suburb K Property by Access Law Group registered no. ...;

- (3) “L Street, City D Property” means the property known and situate at L Street, City D, in the State of New South Wales, being the whole of the land in folio identifier Lot ... Strata Plan ..., of which the Wife is the sole registered proprietor;
- (4) “J Street, Suburb K Property” means the property known and situate at J Street, Suburb K, in the State of Queensland, being the whole of the land in folio identifier Lot ... Registered Plan ..., Title Reference ..., of which the Husband is the sole registered proprietor;
- (5) “F Street, Suburb G Property” means the property known and situate at F Street, Suburb G, in the State of Queensland, being the whole of the land in folio identifier Lot ... Survey Plan ..., Title Reference ..., of which the Husband is the sole registered proprietor;
- (6) “the Act” means the *Family Law Act 1975* (Cth);
- (7) “the Agent” means the real estate agent or agents appointed by the Wife to assist with the sale of the Properties;
- (8) “the Auctioneer” means the auctioneer appointed by the Wife or the Agent to effect the auctioning off of any of the Properties;
- (9) “the Fund” means the Labella Family Superannuation Fund;
- (10) “the Net Sale Price” means the remainder of the proceeds of sale from each of the Properties after orders (5)(a)-(6)(a) have been followed after the sale of each property;
- (11) “the Operative Time” means four (4) business days from the date of these orders;
- (12) “the Parties” means the Applicant Wife and the Respondent Husband as set out in the Reasons;

- (13) “the Properties” means the A Street, Suburb B Property, the J Street, Suburb K Property, the F Street, Suburb G Property and the H Street, Suburb G Property collectively;
- (14) “the Property” means each and any of the A Street, Suburb B Property, the J Street, Suburb K Property, the F Street, Suburb G Property, and the H Street, Suburb G Property as each is placed on the market for sale and as each is sold;
- (15) “the Reasons” are the Reasons for Judgment delivered by Judge Morley on 1 June 2020 in the matter of *Labella & Labella* [2020] FCCA 948;
- (16) “the Regulations” means the *Family Law (Superannuation) Regulations* (Cth) 2001;
- (17) “the Wife’s Solicitors” means the solicitors instructed by the Wife in these proceedings, or such other solicitor or solicitors that may be instructed by the Wife to carry out these orders;
- (18) “H Street, Suburb G Property” means the property known and situate at H Street, Suburb G, in the State of Queensland, being the whole of the land in folio identifier Lot ... Registered Plan ..., Title Reference ..., of which the Husband is the sole registered proprietor.

THE COURT ORDERS THAT:

- (1) Upon receipt by them of a written request from the solicitors for the Wife, Access Law Group are to provide a Withdrawal of Caveat in relation to any of the Caveats registered by Access Law Group on title to any of the Properties, in circumstances where the Property has been sold and the Withdrawal of Caveat is required for settlement.
- (2) The Wife is appointed as the Trustee for sale of the Properties and the Wife, as Trustee for sale, shall forthwith do all things and sign all documents necessary to place the J Street, Suburb K Property, the A Street, Suburb B Property, the H Street, Suburb G Property, and the F Street, Suburb G Property on the market for sale as soon as practicable after the making of these orders, but not later than 90 days from the date of these orders, and for the purposes of each sale:

- (a) The Property shall be listed with the Agent;
 - (b) The Property shall be sold by private treaty or by auction, as determined by the Wife, with the recommendation of the Agent as to the method of sale;
 - (c) The listing or reserve price of the Property shall be as determined by the Wife on the recommendation of the Agent;
 - (d) The solicitors instructed to act on the sale of the property shall be appointed by the Wife;
 - (e) The Parties shall pay equally for all reasonable expenses necessary to prepare the Property for sale including cosmetic repairs and painting, sale costs, legal costs and, if applicable, auction costs, provided that if either party fails to meet their share of such costs, then the party incurring those costs shall be entitled to recover them from the Net Sale Price, prior to the disbursement of those proceeds to the Parties; and
 - (f) The Wife shall execute any contract for sale of the Property at or above the listed or reserved price within two (2) days of a request being made of her.
- (3) In the event that Contracts for Sale of the Property have not exchanged by, or before, a date two (2) months from the date of first listing, then the Wife shall, unless otherwise agreed or recommended by the Agent, make all arrangements and do all such actions and sign all such documents necessary to procure a sale by public auction or further public auction of the Property upon the following terms:
- (a) The Auctioneer shall be as determined by the Wife in writing and failing agreement as nominated by the Agent;
 - (b) The auction shall take place within four (4) months of the date of first listing;
 - (c) The reserve price shall be 95% of the previous listing or reserve price;
 - (d) The Parties shall equally pay and be responsible for payment of all auction expenses payable before the Property is auctioned,

provided that if either party fails to pay such costs, then the party incurring those costs shall be entitled to recover them from the Net Sale Price, prior to the disbursement of those proceeds to the Parties; and

- (e) That in the event that the Property does not reach the reserve price at the auction, the Wife shall negotiate with the highest bidders or any such interested persons and effect the sale of the Property at a selling price as recommended by the Agent and/or the Auctioneer as to the selling price of the Property and shall sell the Property at that price, provided that the selling price is not less than 95% of the reserve price; and
 - (f) That in the event that the Property is not sold by auction or by private negotiation within fourteen (14) days after the said auction then the Parties shall do all acts and sign all necessary documents and pay all moneys as necessary to procure a second auction within a further five (5) weeks of the date otherwise upon the same terms and conditions as applied to the first auction.
- (4) Upon completion of the individual sale of each of the Properties to be sold, whichever they may be, the proceeds of sale are to be applied as follows:
- (a) Firstly, to pay all costs, commissions, the costs of the Agent, legal fees and expenses of the sale and in adjustment of rates on sale;
 - (b) Secondly, to repay the loan accounts secured by way of mortgage on the Property to the extent required by the lender so as to obtain a Discharge of Mortgage.
- (5) Upon completion of Order (4) herein, if there are any funds remaining from the proceeds of sale they are to be applied as follows:
- (a) Firstly, to set aside in the Wife's solicitor's trust account, in trust for the parties jointly, a sum calculated as the capital gains tax payable by the Husband in consequence of the sale of the Property, calculated in accordance with Order 19 herein; and

- (b) Secondly, of the then remaining Net Sale Price, one half be paid to the Wife, and the other half be held upon trust for the Husband by the Wife's Solicitors, to be applied by the Wife's Solicitors in the following way:
 - (i) Firstly, to pay to Access Law Group so much of the sum of \$11,530.84 as remains owing by the Husband to those solicitors;
 - (ii) Secondly, to pay to the Wife a sum equal to 50% of the amount paid by the vendor on the sale in adjustment of water rates and council rates on the Property;
 - (iii) Thirdly, in payment to the Wife of any amounts paid by the wife on behalf of the Husband under Orders (2)(e) or (3)(d) of these Orders; and
 - (iv) Fourthly, any remaining money to be held in the trust account of the Wife's Solicitors as part of the Husband's share of the property pool, and dealt with by the Wife's Solicitors in accordance with these Orders.
- (6) Upon completion of the sale of the last of the Properties to be sold, whichever that may be, the Wife's Solicitors are to do the following:
 - (a) Firstly, replace the values of the Properties in the balance sheet in paragraph 141 of the Reasons with the Net Sale Price of each Property;
 - (b) Secondly, delete from the balance sheet in paragraph 143 of the Reasons all of the liabilities except for the two "*Debts for Outstanding School Fees*";
 - (c) Thirdly, adjust accordingly the figures in paragraphs 142, 144 and 145 of the Reasons so as to ascertain at paragraph 145 the net matrimonial assets, not including superannuation entitlements, available for distribution between the parties in the real figures consequent upon the sales of the Properties;
 - (d) Fourthly, calculate a sum being 63% of that net matrimonial asset pool, not including superannuation entitlements, available for distribution between the Parties; and

- (e) Fifthly, pay to the Wife from the moneys held by them upon trust for the Husband pursuant to Order (5)(b)(iv) such sum as will result in the Wife ultimately receiving in total value 63% of the net matrimonial assets, not including superannuation entitlements, available for distribution between the Parties.
- (7) The funds held in the Wife's Solicitors trust account on behalf of the parties jointly pursuant to Order 5(a) and held on behalf of the Husband pursuant to Order (5)(b)(iv) after Order (4) has been fulfilled are to be dispersed in the following way:
 - (a) Upon presentation by the Husband to the Wife's Solicitors of his Notices of Assessment issued by the Australian Taxation Office for each year from Tax Year ended 30 June 2007 to Tax Year ended 30 June 2020, inclusive:
 - (i) The money held in the Wife's Solicitor's trust account pursuant to Order (5)(a) herein is to be paid towards any capital gains tax payable by the Husband arising from the sale of the Properties only;
 - (ii) The money held in the Wife's Solicitor's trust account pursuant to order (5)(b)(iv) is to be paid toward any other capital gains tax, personal income tax, fee, fine, penalty or any other debt referred to in these Orders or otherwise owed by the Husband to the Australian Taxation Office, including capital gains tax which is left outstanding in the event that the moneys held by the Wife's Solicitors under Order (5)(a) are exhausted, such moneys to be paid out by the Wife's Solicitors only by cheque or cheques made payable to the Australian Taxation Office;
 - (iii) Any moneys remaining in the Wife's Solicitor's trust account pursuant to Order (5)(b)(iv) herein after the Husband has paid off all debts owed by him to the Australian Taxation Office are to be paid to the Husband; and
 - (iv) Once the capital gains tax payable by the Husband arising from the sale of the Properties only has been paid, if there is any money remaining in the Wife's Solicitor's trust account

pursuant to Order (5)(a) herein those moneys are to be paid out as to 63% thereof to the Wife and as to 37% thereof to the Husband.

- (b) In the event that the Husband fails to present to the Wife's solicitors his Notices of Assessment issued by the Australian Taxation Office for each year from Tax Year ended 30 June 2007 to Tax Year ended 30 June 2020, inclusive, by a date being two (2) years from the date of settlement of the sale of the last Property to sell, the Wife's Solicitors shall then:
 - (i) Transfer the money held by them upon trust for the Husband pursuant to Order (5)(b)(iv) to NSW Revenue to be held as unclaimed moneys; and
 - (ii) Pay to the Wife 63% of the moneys held upon trust for the parties jointly pursuant to Order (5)(a), and transfer the balance to the NSW Revenue to be held as unclaimed moneys.
- (c) The Wife's Solicitors may pay to themselves from the moneys held by them upon trust for the Husband pursuant to Order (5)(b)(iv) such money as is proper to pay their costs and disbursements, as invoiced to the Husband, incurred by them in complying with this Order ,Order (7), and Orders (5)(a), (5)(b)(i), and (5)(b)(iv).
- (8) As between the Parties the Husband is responsible for paying the sum of \$6,395 to E School and M School and he shall indemnify the Wife and keep her indemnified in relation to that sum.
- (9) As between the Parties the Wife is responsible for paying the sum of \$4,601 to E School and M School and she shall indemnify the Husband and keep him indemnified in relation to that sum.
- (10) Unless otherwise specified in these Orders, the Wife shall retain and be declared to be the sole legal and beneficial owner of all her right, title and interest in and to:
 - (a) The L Street, City D Property;
 - (b) All cash at bank and other moneys invested by her;

- (c) All shares registered in her name;
 - (d) All personal effects in her possession;
 - (e) Her motor vehicle being the Motor Vehicle 1 registered in her name;
 - (f) Her superannuation entitlements; and
 - (g) All other personal and real property in her possession, custody or control as at the date of these Orders.
- (11) Unless otherwise specified in these Orders, the Husband retain and be declared to be the sole legal and beneficial owner of all his right, title and interest in and to:
- (a) All shares registered in his name;
 - (b) All cash at bank and other moneys invested by him;
 - (c) His motor vehicle being the Motor Vehicle 2 registered in his name; and
 - (d) All other personal and real property in his possession, custody or control as at the date of these Orders.
- (12) Pursuant to subsection 90XT(4) of the Act, a base amount, being 50% of the amount in dollars by which the balance of the Husband's member account in the Labella Family Superannuation Fund exceeds the Wife's member account in the Fund as at 30 June 2019 is allocated to the Wife out of Husband's member account in the Fund.
- (13) Pursuant to paragraph 90XT(1)(b) of the Act, whenever the Trustees of the Fund make a splittable payment out of the Husband's interest in the Fund the Trustees shall:
- (a) Pay to the Wife or her administrators, executors, beneficiaries, heirs or assigns the entitlement calculated in accordance with Part 6 of the Regulations, using a base amount in accordance with Order (12) herein; and
 - (b) Make a corresponding reduction in the entitlement the Husband would have had in the Fund but for these Orders.

- (14) These Orders have effect from the Operative Time.
- (15) Having been accorded procedural fairness in relation to the making of these Orders, these Orders bind the trustees of the Fund.
- (16) Simultaneously with Order (13) herein:
- (a) The Parties will do all things necessary to roll out of the Fund the Wife's then member balance in the Fund into a compliant superannuation fund of her selection; and
 - (b) Within a further 21 days, the Wife will do all acts and things and sign all such documents as are necessary to resign as a member and trustee of the Fund, and relinquish any rights or interests in the Fund.
 - (c) The Husband indemnifies the Wife and keeps her indemnified from and against any breach of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), together with any penalty, claim or loss therefrom, if any, in relation to the Fund.
- (17) In the event that the Husband or Wife refuses or neglects to comply with any of the provisions of these Orders within seven (7) days of a document being forwarded to either of them for their completion, the Registrars of the Federal Circuit Court of Australia at Sydney are appointed pursuant to subsection 106A(1) of the Act, to execute all such deeds and documents in the name of the defaulting party and to do all acts and things necessary to give validity to the said Orders.
- (18) That the Registrars are authorised to execute any such necessary instrument upon being satisfied by Affidavit that refusal, neglect or default, as the case may be, has occurred.
- (19) That for the purposes of the calculation by the Wife's Solicitors of the amount to be retained for payment of capital gains tax pursuant to Order (5)(a) herein, the calculation for each of the Properties upon sale is to be as follows:
- (a) The sale price of the Property, minus the purchase price of the Property by the Husband, divided by two, multiplied by 48.5%.

- (20) The Parties are at liberty to restore these proceedings to the list in relation to the implementation of these Orders on seven (7) days notice to the Court.

IT IS NOTED that publication of this judgment under the pseudonym *Labella & Labella* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT WOLLONGONG**

WOC 1080 of 2018

MS LABELLA
Applicant

And

MR LABELLA
Respondent

REASONS FOR JUDGMENT

Introduction

1. The Applicant wife, Ms Labella ('the wife'), and the Respondent husband, Mr Labella ('the husband'), were married in 1999. They did not cohabit prior to marriage. They separated in June 2018 under the same roof, and then the husband vacated the home, leaving the wife and children in the home, on 21 August 2018.
2. There are two children of the parties' marriage, X, born in 2003, 16 years of age, and Y, born in 2006, 13 years of age. Both children have lived with the wife since the parties separated. Y spends two nights per fortnight with the husband, and X spends equal time between the parties.
3. The wife commenced property settlement proceedings in the Court on 19 October 2018 seeking orders under section 79 of the *Family Law Act 1975* (Cth) ('the Act'). The husband filed his response on 21 January 2019. The matter went to a final hearing on an undefended basis as against the husband on 24 October 2019. The wife was represented by Ms Eldershaw of counsel. There was no appearance at the final hearing by or on behalf of the husband.

Proceeding undefended

4. It is necessary to trace the procedural history of the matter and the history of service on the husband, setting out reasons why it was appropriate to proceed with the final hearing on an undefended basis.
5. The wife filed her Initiating Application together with an affidavit in support and Financial Statement in compliance with the *Federal Circuit Court Rules 2001* (Cth) ('the Rules') on 19 October 2018. Those documents, together with the Court brochure entitled 'Marriage, Families and Separation', were served on the husband personally on 14 November 2018 by a licenced process-server. The husband confirmed his identity to the licenced process-server at the time of service, and the husband signed an acknowledgment-of-service form. An affidavit of service and the acknowledgment-of-service form were filed on 20 November 2018.
6. The matter had its first mention before the Court on 3 December 2018. The wife appeared, represented by her solicitor, and there was no appearance by or on behalf of the husband. The matter was adjourned to 14 December 2018 for possible undefended hearing. An order was made for the solicitor for the wife to notify the Respondent of the orders made that day.
7. On 14 December 2018 the wife appeared, represented by her solicitor, and the husband appeared, represented by his solicitor. The parties entered into some consent orders that included an order restraining the parties from dealing with any of the six real-estate properties standing in either of the parties' names (there were no jointly held real properties), and a declaration pursuant to section 78 of the Act¹ that (each of) the parties had a right to have an interest in each of the six real-estate properties "...by virtue of a constructive trust and/or implied or resulting trust arising by operation of law".²
8. The parties also agreed to an order that the husband pay all regular instalments relating to loans, mortgages, statutory rates and charges, utilities, house and contents insurance, and outgoings including water

¹ *Family Law Act 1975* (Cth) s 78.

² Consent Orders made on 14 December 2018, Order 2.

rates, council rates and the like in respect of the five real-estate properties that stood in his sole name.

9. A further order was made that within 28 days:

*...pursuant to rule 13.04 of the Family Law Rules, the Respondent Husband produce to the Applicant Wife's Solicitor and give full and frank disclosure of all documents and information in relation to his financial affairs, whether held jointly or severally, or as tenants in common; and including any company, trust, business or other entity to which he has any direct or indirect interest or benefit.*³

10. An order was made requiring the parties to do all things necessary to liquidate and wind up Labella Business Number 1 Trust, and Labella Business Number 2 Trust and N Pty Ltd ('N Pty Ltd').
11. An order was made, with imperfect wording, but with the obvious intent, that the parties do all things necessary as directors of N Pty Ltd to cause the business known as O Pty Ltd to be transferred on an unencumbered basis to the wife or such other entity as the wife directs.
12. The husband was ordered to file and serve a Response, Financial Statement and affidavit by no later than 18 January 2019. An order was made for the parties to attend a conciliation conference with a registrar on 13 May 2019.
13. The husband filed a Response, Financial Statement and affidavit on 21 January 2019, three days late. The Response document did not move the Court for any final orders, simply stating in the applicable place in the form "*...that leave be granted to the respondent to amend the orders he is seeking following receipt of the applicant's financial disclosure documents*",⁴ but no final orders were sought by the husband other than the order seeking leave to amend. Similarly, the only interim order sought by the husband in the Response was an order discharging the interim consent order made on 14 December 2018 requiring the parties to do all things necessary to liquidate and wind up Labella Business Number 1 Trust, Labella Business Number 2 Trust and N Pty Ltd, together, again, with a purported order "*that leave be granted to*

³ Consent Orders made on 14 December 2018, Order 4.

⁴ Response to Application for Final Orders filed 21 January 2019, p 4.

the respondent to amend the orders he is seeking following receipt of the applicant's financial disclosure documents.”⁵

14. No further Response document has been filed by the husband in the proceedings. The husband at no time particularised any final orders for adjustment of property interests between the parties.
15. A Notice of Address for Service was filed for the husband on 13 December 2018 indicating that Access Law Group were acting as solicitors on his behalf in the proceedings. A Notice of Withdrawal as Lawyer as Lawyer was filed by Access Law Group on 8 April 2019. Attached to that document was a Notice of Withdrawal as Lawyer served to the husband by email and by posting it to the husband's last known address seven days before the filing of the Notice of Withdrawal as Lawyer.
16. On the Notice of Withdrawal as Lawyer, the husband's last known residential or business address and telephone number were stated as P Street, Suburb Q, mobile telephone number ... and an email addresscom.au.
17. Paragraph 4 of the Notice of Withdrawal as Lawyer advised the husband:

If you neither appoint another lawyer nor file a notice of address for service within seven days from the date on which you receive this notice, then you may not be served with any further documents in this case. Regardless [of the preceding sentence] the court and other parties involved in the case can use the following address and telephone number (which is your last known residential or business address and telephone number) as your address for service (your contact address) until you appoint another lawyer or file a notice of address for service: address: P Street, Suburb Q. This matter is next listed before the court at: address of the court: Commonwealth Government Centre, level 1, 43 Burelli St, Wollongong, NSW, 2500 on 13 May 2019 at 11 am for conciliation conference.⁶

18. In an affidavit by the wife's solicitor, Nathan John McEwan, sworn 1 October 2019, relied upon by the wife on final hearing, Mr McEwan

⁵ Response to Application for Final Orders filed 21 January 2019, Orders Sought 1.

⁶ Notice of Withdrawal as Lawyer filed by Access Law Group on 8 April 2019.

gives evidence that he attended with the wife before a Registrar for the conciliation conference on 13 May 2018 and that the husband did not appear.

19. On 21 May 2019, Mr McEwan forwarded a letter to the husband of that date advising, amongst other things,

*The matter is listed before Judge Altobelli on Monday 3 June 2019 at 9.30 am; at which time we will seek that the case be listed for hearing forthwith; and seek indemnity costs thrown away due to your delinquency, estimated at \$25,000 plus GST to date.*⁷

20. On 31 May 2019, Mr McEwan sent an email to the husband at three email addresses, being ...com.au; ...com.au and ...com.au with the text:

*We ask that you provide updated disclosure including copies of your tax returns as a matter of urgency and we ask you provide your financial disclosure documents as a matter of urgency. The matter is listed before Judge Altobelli on Monday 3 June 2019 at 9.30 am; at which time we shall seek that the case be listed for hearing forthwith; and seek indemnity costs thrown away due to your delinquency, estimated at \$25,000 plus GST to date.*⁸

21. Later on the day of 31 May 2019, Mr McEwan telephoned to Employer R, the husband's employer according to detail in his Financial Statement filed 21 January 2019, and inquired as to the husband's whereabouts and email address. Mr McEwan was told by the receptionist who answered the telephone call, "*Mr Labella still works here, but he is onsite again. The email address you have is correct.*"⁹

22. The matter was next before the court on 3 June 2019 at which time the wife appeared represented by her solicitor, and there was no appearance by or on behalf of the husband. Judge Altobelli listed the matter for a one-day final hearing on 18 October 2019 at 10:00AM. Directions were made for filing of documents in preparation for final hearing, including an order "*Within seven days, the solicitor for the applicant is to notify the respondent of the orders made today and*

⁷ Exhibit A4, p31, [6].

⁸ Exhibit A4, p32.

⁹ Affidavit of Nathan McEwan sworn 1 October 2019, [60].

likely consequences of the respondent's non-attendance on the adjourned date."¹⁰

23. Notations were included in the entered and settled form of order as follows:

There was no appearance by or on behalf of the respondent husband when the matter was called today at 10 am

If the respondent fails to comply with these orders or fails to appear on that date the matter will proceed on an undefended basis and orders may be made in accordance with the applicant's application.

*A party's trial affidavits will not be read until the case outline document has been filed and served in accordance with these directions, which may result in the final hearing dates being vacated, other matters being listed with priority, or the matter becoming part-heard.*¹¹

24. On 3 June 2019, the wife's solicitors forwarded a letter of that date addresses to the husband at P Street, Suburb Q advising him that the matter was listed for final hearing on Friday 18 October 2019 at the Federal Circuit Court at Wollongong commencing at 9.30AM and advising him in summary form of the other orders made that day. The letter also advised the husband:

*We confirm our previous warning to you that if the matter proceeds to final hearing, an order for indemnity costs is being sought by the applicant. You are required to participate in a meaningful manner and comply with the above orders. You are also required to comply with the orders made by consent on 14 December 2018, which you have failed to date. The hearing of this matter will be conducted on 18 October 2019 whether you are present or not, together with a claim for costs. It is with that in mind that we strongly refresh our advice that you must obtain independent legal advice as soon as possible and participate in the matter.*¹²

25. Subsequent to the orders made on 3 June 2019 setting the matter down for a final hearing on 18 October 2019, the wife through her solicitors prepared the matter for final hearing, including obtaining single expert

¹⁰ Orders made 3 June 2019, order 9.

¹¹ Orders made 3 June 2019, note A-C.

¹² Exhibit A4, p33.

valuations of the six rural properties owned by the parties, at her sole cost.

26. In evidence on behalf of the wife at the final hearing was an affidavit of service sworn by her solicitor, Nathan John McEwan, on 11 June 2019 giving evidence that a letter was forwarded to the husband by Mr McEwan on 7 June 2019 enclosing a sealed copy of the orders made by the Court on 3 June 2019 in a prepaid post envelope addressed to P Street, Suburb Q, NSW.
27. Further, in evidence on behalf of the wife on the final hearing was an affidavit of service by her solicitor, Nathan John McEwan, sworn or affirmed on 14 October 2019, detailing service on the husband – by post to P Street, Suburb Q, NSW; and care of Employer R at S Street, Town T; and the three email addresses previously referred to – of all of the subpoenas issued at the request of the wife in preparation for the hearing and all of the affidavits relied on by the wife at the final hearing.
28. The husband was present at Court and represented by his solicitor on 14 December 2018 when the date was set for the conciliation conference and the matter was adjourned for further mention to 3 June 2019. The husband did not appear and was not represented at the conciliation conference. The husband did not appear and was not represented before the Court on 3 June 2019.
29. The husband was served, in compliance with the Court’s order, with a copy of the sealed orders made 3 June 2019 which clearly set out that the matter was listed for a one-day final hearing on 18 October 2019 at 10:00AM.
30. On 16 October 2019 orders were made in chambers by his Honour Judge Altobelli to the effect that he was unable to deal with the matter on 18 October 2019 due to a lack of capacity to reach the matter in his list and administratively adjourning the matter to 10.00AM on 24 October 2019 before me. The chamber order notes: “*parties emailed*”.¹³

¹³ Orders made by Judge Altobelli dated 16 October 2019, [A].

31. On the Court file is a print of an email dated 16 October 2019 at 11.42AM from the associate to Judge Altobelli to email addresses for Ms Eldershaw (counsel for the wife), Mr McEwan (solicitor for the wife), ...com.au, andcom.au and ...com.au. The email advised:

We advise that due to unforeseen circumstances and changes in the judicial calendar, his Honour no longer has capacity to deal with this matter on 18 October 2019. Accordingly, the matter has been administratively adjourned for hearing on Thursday, 24 October 2019 at 10 am before Judge Morley at the Wollongong Registry of the Federal Circuit Court, noting that the Court is more likely to have sufficient capacity on that day to adequately deal with the matter.

32. In view of all the above, I am satisfied and I find that the husband was aware that the matter was listed for a conciliation conference on 13 May 2019 at 11:00AM at the Wollongong Registry of the Court and that he did not appear. I am satisfied that the husband was aware that the matter was listed for further mention before the Court at Wollongong on 3 June 2019 and that he did not appear. I am satisfied that the husband was aware the matter was listed for a final hearing at 10:00AM on 18 October 2019 at the Wollongong Registry of the Court, and that the husband had notice that the matter was administratively adjourned from 18 October 2019 to 24 October 2019 at the Wollongong Registry of the Court. I am satisfied that the husband was on notice of the final hearing on 24 October 2019 at 10:00AM and the husband did not appear.
33. Parties are not compelled to take part in property settlement proceedings under the Act, whether they are proceedings that they themselves commenced or proceedings commenced by the other party to the relevant relationship.¹⁴ However, in this matter the husband did take part, appearing, represented by his solicitor, on 14 December 2018 and filing a Response (such as it was), an affidavit by him and his Financial Statement on 21 January 2019. At no time has the husband filed a Notice of Discontinuance in relation to his Response. The husband has ignored the proceedings following his appearance on 14 December 2018.

¹⁴ *Yannes & Judkins* [2019] FCCA 1656.

34. Whilst the husband is not compelled to take part in the matter, and in this regard I note the reasons of his Honour Judge Jarrett in *Yannes & Judkins*,¹⁵ he chose to take part between 14 December 2018 and 21 January 2019 and then to ignore the matter.
35. I find that it was appropriate to proceed to a final hearing on an undefended basis as against the husband.

The evidence relied upon by the wife on final hearing

36. In relation to the issue of proceeding on an undefended basis on final hearing the wife relied upon the following documents:

- a) Affidavit of Service of Mr U sworn 15 November 2018, filed 20 November 2018;
- b) Acknowledgment of Service signed by the husband on 14 November 2018 and filed 20 November 2018;
- c) Affidavit of the wife sworn 11 December 2018 and filed 12 December 2018, and including the following evidence:

*We do, however, communicate in relation to the children by email. Mr Labella set up an email for that purpose. The email address is ...com.au, and we exchange emails with one another about the needs of our children;*¹⁶

- d) Notice of Address for Service filed for the husband by Access Law Group on 13 December 2018.
- e) Notice of Withdrawal as Lawyer filed by Access Law Group on 8 April 2019.
- f) Affidavit of Nathan John McEwan, sworn 1 October 2019, and the exhibit bundle “NJM-1” referred to in that affidavit, which was entered as exhibit A4 in that hearing;
- g) Affidavit of Service of Nathan John McEwan, sworn 11 June 2019; and

¹⁵ *Yannes & Judkins* [2019] FCCA 1656.

¹⁶ Affidavit of Ms Labella sworn 11 December 2018, [3].

- h) Affidavit of Service of Nathan John McEwan, sworn or affirmed 14 October 2019.
37. In relation to the hearing of the wife's application for property settlement orders under section 79 of the Act, the wife relied upon the following documents:
- a) Case Outline document prepared by Ms Eldershaw, counsel for the wife;
 - b) Final Minute of Orders sought by the wife on final hearing.
 - c) Amended Initiating Application filed 30 September 2019;
 - d) Affidavit of Ms Labella, sworn 27 September 2019 and filed 30 September 2019;
 - e) Financial Statement of Ms Labella, sworn 27 September 2019 and filed 30 September 2019;
 - f) Affidavit of Ms V sworn 27 September 2019 and filed 30 September 2019;
 - g) Affidavit of Mr W sworn 30 September 2019 and filed that day;
 - h) Affidavit of Ms Z sworn 18 September 2019 (valuer), filed 1 October 2019;
 - i) Affidavit of Ms AA, sworn 20 September 2019 and filed that day; and
 - j) Affidavit of Mr BB, sworn 18 September 2019 and filed that day.
38. The wife also relied on final hearing on the following exhibits:
- a) Exhibit A1, a letter dated 17 October 2019 from Access Law Group to Stacks Heard McEwan (solicitors for the wife) and an email dated 17 October 2019 from the solicitors for the wife to Access Law Group. These emails go to the issue of fees owed by the husband to his former solicitors, Access Law Group, and their security for those costs by way of caveats registered on title to the four real estate properties in the husband's sole name and the real estate property in the name of the husband jointly with his two

sisters. The issue of the husband's liability to his former solicitors will be dealt with later in these reasons.

- b) Exhibit A2, documents produced on subpoena by Bank CC;
- c) Exhibit A3, a letter dated 8 May 2019 from DD Proprietary Limited (accountants for the husband up to sometime in 2007) dated 8 May 2019 and addressed "To whom it may concern";
- d) Exhibit A5, an 'aide-mémoire' forming written submissions on behalf of the wife relating to her assertion of an add-back to the matrimonial asset pool in relation to 'rental losses' on the property at H Street, Suburb G, Queensland ('the H Street, Suburb G Property');
- e) Exhibit A6, documents produced on subpoena by City EE Regional Council;
- f) Exhibit A7, an evaluation of the H Street, Suburb G Property as at 24 August 2019 prepared by Ms AA, valuer, of FF Pty Ltd – a copy of which is included in the affidavit of Ms AA relied on by the wife);
- g) Exhibit A8, documents produced on subpoena by Employer R;
- h) Exhibit A9, the Financial Statement sworn by the husband on 18 January 2019 and filed in the proceedings on 21 January 2019; and
- i) Exhibit A10, a letter dated 14 October 2019 from the solicitors for the wife to the wife by way of costs notification.

The law

39. These are proceedings for property settlement under section 79 of the Act.¹⁷ I am guided in the matter by the decision of the High Court of Australia in *Stanford & Stanford*¹⁸ and the later decision of the Full

¹⁷ *Family Law Act 1975* (Cth) s 79.

¹⁸ *Stanford & Stanford* [2012] 247 CLR 108.

Court of the Family Court of Australia in *Bevan & Bevan*¹⁹ discussing the decision in *Stanford*.

40. I must first determine if in all the circumstances it is just and equitable to make an order under section 79 affecting the property of the parties. To do that I must first identify, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in their property.²⁰ Then, having regard to the existing interests of the parties in their property, and taken into account the evidence in the matter I must determine if I am satisfied that it is just and equitable to make a property settlement order.²¹
41. In ascertaining the parties existing interests and deciding if I am satisfied that it is just and equitable to make a property settlement order, I must keep in mind that there is no community of ownership arising from marriage in relation to the property of the parties to a marriage.
42. If I find that I am satisfied that it is just and equitable to proceed to make a property settlement order under section 79, then I will proceed by application of the ‘four-step process’ as referred to by the Full Court of the Family Court of Australia in *Hickey & Hickey & Attorney-General for the Commonwealth of Australia*,²² the first step of which, ascertaining the matrimonial asset pool, I will have begun in the process of deciding if I am satisfied that it is just and equitable to make an order under section 79. I will then determine the contribution-based entitlements of the parties as a percentage of the net value of the property of the parties. Then I will identify and assess any relevant matters referred to in section 79(4)(d), (e), (f) and (g) and section 75(2) of the Act and determine the adjustment, if any, that should be made to the contribution-based entitlements of each party as a percentage of the property of the parties.²³
43. Lastly, I will determine what orders altering the parties interests are appropriate as just and equitable to enable the parties’ entitlements as determined at steps 2 and 3 to be achieved.

¹⁹ *Bevan & Bevan* [2013] FamCAFC 116.

²⁰ *Bevan & Bevan* [2013] FamCAFC 116.

²¹ *Bevan & Bevan* [2013] FamCAFC 116.

²² *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* (2003) FLC 93-143.

²³ *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* (2003) FLC 93-143.

44. In relation to my assessment of the parties contributions as referred to in section 79(4)(a) to (c) of the Act there are many Full Court authorities that endorse that a ‘holistic approach’ is to be taken when weighing the contributions of the parties initially, during their cohabitation and following separation up to the time of the hearing. As the Full Court said in *Fields & Smith*²⁴:

the task is to consider the contributions holistically over the whole period from the commencement of cohabitation to trial and the analysis requires the Court to weight all of the contributions of all types prescribed by section 79(4) made by both parties across the entirety of the relationship until the time of hearing, including the post-separation period.

45. I note the similar comments made by the Full Court of the Family Court of Australia in *Dickons & Dickons*,²⁵ *Marsh & Marsh*,²⁶ *Grier & Malphas*²⁷ and recently in *Jabour & Jabour*.²⁸

The evidence

46. I find on the evidence that the following are relevant facts in this matter.
47. The husband was 51 years of age and the wife 47 years of age at the time of the final hearing. Prior to the marriage, the wife completed a university degree, but finding that she did not like that career, she commenced a another university degree and she continued to study for that degree after the parties’ marriage.
48. The husband qualified as a professional prior to marriage and at the time of marriage he was working on a full-time basis as a professional for Employer GG and also conducting a business called HH Pty Ltd with the wife’s brother-in-law and another person. The parties married in 1999 without cohabiting prior to marriage.
49. At the time of marriage, the husband had some savings, though the amount is not known. Shortly prior to marriage, in 1998 the parties purchased L Street, City D, NSW (‘the L Street, City D Property’) for \$135,000 as an investment. They applied \$70,000 from savings, though

²⁴ *Fields & Smith* (2015) FLC 93 – 638.

²⁵ *Dickons & Dickons* (2014) 50 Fam LR 244, [20] to [26].

²⁶ *Marsh & Marsh* (2014) FLC 93 – 576, [60], [64] and [75].

²⁷ *Grier & Malphas* (2017) 55 Fam LR 107.

²⁸ *Jabour & Jabour* [2019] FamCAFC 78.

there is no evidence in relation to which I can make a finding as to how or by whom those savings had been accumulated, and they obtained a loan of \$66,000 from Bank JJ. The bank took a first registered mortgage over the property as security. The home was purchased in the wife's sole name as registered proprietor. However, the parties were both liable parties on the loan account with Bank JJ.

50. The parties' first child, X, was born in 2003 and their second child, Y, was born in 2006.
51. The husband ceased the HH Pty Ltd business in 2001 and continued to work full-time as a professional for Employer GG until late 2004. At that time he left that employment and set up his own business through a franchise known as N Pty Ltd. The husband ceased trading in this business in 2010 and took up a business that failed in 2011.
52. Sometime in 2010 or 2011, the husband commenced employment full-time as a professional with Employer KK and remained in that employment for five years until he was retrenched in 2015. At the time the husband was retrenched, he received a retrenchment package of \$70,000.
53. The husband was out of employment between his retrenchment in 2015 and June 2018, when he again took up employment on a full-time basis as a professional with Employer R. The husband continues in that employment up to the hearing.
54. At the time of the marriage, the wife was a student at university studying for a degree and working part-time in her father's shop. Prior to the marriage she also assisted the husband on occasions with the HH Pty Ltd business by undertaking bookkeeping and other duties.
55. By late 2002, the wife had completed her degree and she obtained work on a full-time basis as a health care worker until 2003 when she left that employment in preparation for the birth of the parties' first child, X. The wife was on maternity leave from 2003 until mid-2004.
56. In mid-2004 the wife again took up part-time work and commenced to operate her own business as a sole trader, trading as LL Pty Ltd, later renamed O Pty Ltd.

57. The wife again took maternity leave for the birth of their second child, Y, from 2006 until 2007. In 2007, the wife recommenced part-time work as a consultant. In 2015 the wife took on extra work with Employer MM as a professional to assist with the parties' living expenses during the period the husband was out of employment. This was the time between the husband taking redundancy from Employer KK and commencing his employment with Employer R.
58. The husband had commenced his employment with Employer R at about the time of the parties' separation under one roof in June 2008. The wife was continuing in part-time employment as a health care worker, as a retail assistant, and conducting the business O Pty Ltd.
59. In 2001, the husband and wife set up the Labella Family Superannuation Fund with the husband and wife as the trustees and members. The wife had all of her employer compulsory superannuation entitlements paid into the self-managed super fund until separation in June 2018. All those contributions by the wife were paid into an account in the name of the Labella Family Superannuation Fund with Bank CC. The husband also made contributions to the fund between the fund being set up and separation, and continuing on occasions thereafter.
60. Between 2004 and 2012 the husband purchased four real estate properties in Queensland as investments. On each occasion he did so without consulting the wife or discussing the details of the purchases with her. Each of the properties was purchased in the husband's sole name and the husband did not reveal to the wife details of the purchase prices or funding arrangements for each purchase.
61. In 2014 the wife's father paid a sum of \$10,000 of her HECS debt as a gift to her.
62. On 4 July 2016 the husband's mother passed away and he inherited a one-third interest in her home at C Street, City D, NSW ('the C Street, City D Property') and some savings in the estate that were applied by the husband and his sisters, who were the co-owners of the property, toward renovation of the C Street, City D Property between April and December 2017.

63. In November 2017 the wife received a phone call from the managing agent of two of the husband's Queensland properties indicating that one of those properties, being the H Street, Suburb G Property (near City EE), was in a state of extreme disrepair, was being damaged, and that the husband was in arrears of payment of the council rates for the property. At about the same time the wife also received a telephone call from a person who identified herself as a neighbour of the H Street, Suburb G Property who also indicated that the property was in a derelict condition.
64. On 28 February 2018, the husband withdrew \$5,000 from the Bank JJ loan account secured on the L Street, City D Property, after having the necessary withdrawal form co-signed by the wife, and then again on 29 May 2018 he withdrew a sum of \$8,000 from the same account. There is no evidence and the wife has no knowledge of how the said sums were applied.
65. The parties separated under the one roof in June 2018 and then the husband vacated the premises, leaving the wife and the two children in occupation, on 21 August 2018.
66. Almost immediately on separation in June 2018, the wife sought legal advice in relation to property settlement and a course of one-way correspondence commenced between solicitors acting on behalf of the wife and the husband in which those solicitors sought financial disclosure so as to commence negotiations for property settlement on behalf of the wife.
67. The wife commenced these proceedings on 22 October 2018, and after her solicitor was informed by the solicitor for the husband that he did not have instructions regarding service, the service was effected personally upon the husband. I have detailed the course of these proceedings earlier in these reasons.
68. On 11 January 2019, some disclosure was received by the wife's solicitors from the husband's solicitors, principally by way of bank account statements. Specific detail of the disclosure provided is given in the wife's evidence in the matter, and it is easily ascertained that it is by no means full and frank disclosure. As stated earlier, on 14 December 2018, an order had been made by consent that:

*Within 28 days of the date of these orders, pursuant to Rule 13.04 of the Family Law Rules, the respondent husband produce to the applicant wife's solicitors and give full and frank disclosure of all documents and information in relation to his financial affairs, whether held jointly or severally, or as tenants in common; and including any company, trust, business or other entity to which he has any direct or indirect interest or benefit.*²⁹

69. Unfortunately, the *Family Law Rules 2004* (Cth) ('the Family Law Rules') do not apply to these proceedings unless:

- a) Rule 1.05(2) of the Rules applies by reason of those rules being insufficient or inappropriate,³⁰ in which case the Court may apply the Family Law Rules in whole or in part and modified or dispensed with as necessary; or
- b) They are parts of the Family Law Rules referred to in Schedule 3 of the Rules.³¹

Rule 13.04 is not brought in by either of these provisions, but nevertheless, all financial proceedings, including for property settlement, under the Act entail an obligation of full and frank disclosure by each party.³²

70. I find that in this matter the husband has failed to make full and frank disclosure after having joined in the proceedings by filing a Response and supporting documents and appearing before the Court. The husband has not lodged his tax returns for the financial years completed for 30 June 2007 up to date.

71. Since the parties separated, the husband has not paid any child support to the wife and has not provided any financial assistance to the wife for the support of the children. The wife gives evidence that the husband's failure to lodge income tax returns has prevented her obtaining an assessment of child support under the *Child Support (Assessment) Act 1987* (Cth) ('the Child Support Act').

²⁹ Consent Orders made by Judge Altobelli on 14 December 2018, [4].

³⁰ *Federal Circuit Court Rules 2001* (Cth) r 1.05(2).

³¹ *Federal Circuit Court Rules 2001* (Cth) r 13.04.

³² See *Oriolo and others & Oriolo* (1985) 10 Fam LR 665, *Masoud & Masoud* [2016] FamCAFC 24, *Pendleton & Pendleton* [2017] FamCAFC 108 and *Waterman & Waterman* [2017] FamCAFC 23.

72. However, there is a mechanism in the Child Support Act whereby an assessment can still be made in a circumstance where a party has not lodged tax returns, by use of the calculations referred to in section 58 of the Child Support Act.³³ In these circumstances where the husband has failed to file tax returns for more than 12 years, an assessment could be made based on an assumed income of the husband at a rate of two-thirds of the annual MTAW - *Average weekly earnings – trends – males – all employees total earnings* - as published by the Australian statistician in Average Weekly Earnings Australia.
73. I find that the husband has been the lesser financial contributor to the children's wellbeing since separation.
74. X is in year 11 at E School in City D, a private fee-paying school, and both the husband and the wife are contractually responsible for payment of the school fees, which are currently in arrears.
75. Y is in year 8 at M School at Town NN near City D, a private fee-paying school, and both parties are contractually liable for payment of the fees, which are in arrears.
76. The wife was the primary carer for the children throughout cohabitation. Since separation the husband spends time with Y on two nights a fortnight, and therefore the wife has been the primary carer for Y since separation. Since separation the parties have cared for X on an equal basis.
77. The \$70,000 redundancy received by the husband on termination of his employment with Employer KK was applied by the parties toward their living expenses in the period between the husband being made redundant, which on the evidence was either in June 2015 or June 2016, and June 2018 when he commenced work for Employer R and the parties separated. During that time the wife continued to work at multiple jobs, and run her business, and apply her income to the support of the family unit.
78. The husband's H Street, Suburb G Property in Queensland, as stated above, has been untenanted and in an increasingly derelict condition for at least five years, perhaps longer. The husband's other Queensland

³³ *Child Support (Assessment) Act 1987* (Cth) s 58.

properties –F Street, Suburb G, A Street, Suburb B, (‘the A Street, Suburb B Property’) (near Brisbane); and J Street, Suburb K, (‘the J Street, Suburb K Property’) (near Brisbane) – have all been tenanted since the time of purchase and the rent applied toward the outgoings on the properties, including payments of the loan accounts secured on those properties.

79. Each of the properties have been in a ‘negative gear’ circumstance since purchase in that the outgoings payable on each of the properties is in excess of the income received by way of rent. I qualify that last statement by saying that the properties have not been formally considered by the ATO on a negative gearing basis as the husband has not lodged tax returns for in excess of the past 12 years. It is possible that on lodgement of all of the overdue tax returns, the husband may be entitled to a refund of tax paid from his employment consequent upon the negative gear status of the four investment properties. Nevertheless, the Court does not have sufficient evidence to make any calculation in that regard.

The matrimonial asset pool

80. The matrimonial asset pool contended for by the wife in her evidence, and as set out in the case-outline document prepared by the wife’s counsel and forming part of her submissions, contains a number of matters in relation to which findings need to be made either because the detail in the draft balance sheet in the case outline does not match with the available evidence or because they are asserted to be add-backs.
81. I find in this matter that the proper approach to dealing with the matrimonial asset pool is to take a two-pool approach with the parties’ assets and liabilities in one pool and the parties’ superannuation entitlements in the other pool. I take a global approach to the assets contained in each pool.

The real-estate properties

82. The wife, at her sole expense, obtained valuations of each of the six real-estate properties in the matrimonial asset pool and relied on affidavit evidence by her expert witnesses in relation to those

valuations. Based on that evidence, I find that the real properties have the following values:

- a) The L Street, City D Property, \$500,000;
- b) The C Street, City D Property (one-third interest), \$258,333;
- c) The A Street, Suburb B Property, \$320,000;
- d) The J Street, Suburb K Property, \$360,000;
- e) The H Street, Suburb G Property, \$185,000;
- f) F Street, Suburb G, Queensland, ('the F Street, Suburb G Property') \$295,000.

83. I find that Labella Number 1 Trust and Labella Number 2 Trust and N Pty Ltd and O Pty Ltd, if they have not been already liquidated or wound up pursuant to order 7 in the consent orders made by the Court on 14 December 2018, have no value, other than as referred to in paragraph 85 in relation to bank accounts under the husband's control.

Savings

84. The wife has savings of \$14,816.
85. The husband has savings to which he is solely entitled of \$16,446.91, (including the N Pty Ltd account ...6 with Bank CC as at 27 June 2019, being \$13,886.91).
86. Amongst the husband's savings is an account with the Commonwealth Bank of Australia ending ...2 that he holds jointly with his sisters and being funds in relation to the C Street, City D property, with a credit balance for relevant purposes of \$5,828 and I therefore find that the husband's interest in that account is \$1,942.66. Accordingly I find that the husband has \$18,389.57 in savings.

Motor vehicles

87. I find that the husband has a Motor Vehicle 2 valued at \$30,000 and the wife has a Motor Vehicle 1 valued at \$8,000.

Furniture and contents

88. I find that each of the parties has furniture and contents in their respective possession valued at \$5,000 each.

Liabilities

89. I find that the liabilities of the parties are as follows:
- a) Westpac Bank loan account ending in ...9 secured on the A Street, Suburb B and the J Street, Suburb K in the amount of \$314,562;
 - b) Commonwealth Bank of Australia loan account ending in ...5 secured on the H Street, Suburb G and F Street, Suburb G Properties in the amount of \$151,527;
 - c) Commonwealth Bank of Australia loan ending in ...3 secured on the H Street, Suburb G and F Street, Suburb G Properties in the amount of \$183,005;
 - d) Bank JJ loan account ending in ...3 secured on the L Street, City D property in the amount of \$20,199;
 - e) Total arrears of school fees owing by the husband in the amount of \$6,395;
 - f) Total arrears of school fees owing by the wife in the amount of \$4,601;
 - g) Arrears of council rates owed by the husband on H Street, Suburb G \$5,039 in the amount of; and
 - h) Arrears of council rates owing on the F Street, Suburb G property by the husband in the amount of \$8,484.

The add back issues

90. The wife contends that there has been a wastage on the part of the husband through his failure to obtain tenants for the H Street, Suburb G Property between early 2014 and the time of hearing. The wife estimates the 'lost rent' for the H Street, Suburb G Property for that period to be \$94,380. In support of that contention, the wife relies on exhibit A5, being an aide-mémoire setting out submissions by the wife

based on facts and assumptions and giving detail of comparable rental properties and calculation tables.

91. The wife asserts another add back by reason of wastage on the part of the husband due to the deterioration by neglect of the H Street, Suburb G Property. In support of that contention, the wife relies on the valuation of the H Street, Suburb G Property as at 24 August 2019 prepared by Ms AA, and in particular paragraph 16.1 in that valuation in these terms:

*We have also been asked to provide an indicative assessment of the property on the basis that the property was in a habitable condition. We have made an assessment of \$225,000 on this basis, assuming that the property would be in an average condition and presentation, being habitable and of an average presentation.*³⁴

The actual valuation ‘as is’ in that valuation is \$185,000, being a difference from the indicative assessment valuation of \$40,000.

92. The wife also seeks to add back the interest charged by the City EE Regional Council on the arrears of council rates for the H Street, Suburb G and F Street, Suburb G Properties, being in a total sum of \$6,168. In support of that contention, the wife relies on exhibit A5, which contains tables showing the interest charged on the outstanding council rates from time to time and on the documents produced on subpoena by the City EE Regional Council, being exhibit A6.
93. Finally, the wife contends as an add back the interest charged by City EE Regional Council on arrears of water rates for the F Street, Suburb G property in a sum of \$984.
94. The law relating to the treatment of ‘add backs’ in property settlement matters has been in a state of some flux for the past several years, on an increasing basis since comments made by the Full Court of the Family Court of Australia in *Bevan & Bevan*³⁵. The Full Court of the Family Court of Australia recently examined the state of the authorities in relation to add backs in *Trevi & Trevi*³⁶.

³⁴ Affidavit of Ms AA sworn 20 September 2019, p 25, [16.1].

³⁵ *Bevan & Bevan* [2013] FamCAFC 116.

³⁶ *Trevi & Trevi* [2018] FamCAFC 173, [27] to [82].

95. After the toing and froing of recent years in the authorities, one species of add back which appears to have survived is moneys paid by a party for legal fees. The rationale is that if moneys paid for legal fees have been paid from a source that would otherwise form part of an asset in the matrimonial asset pool, and are not added back, then in effect a de facto costs order under section 117 of the Act has been made against the other party. I am not asked to add back any paid legal fees in this matter.
96. One of the original bases for adding back a sum or a value of an asset to the matrimonial asset pool before division was in relation to anything in the nature of wastage in the sense discussed in *In the Marriage of Kowaliw, J.I. and Kowaliw, A.G.*³⁷ It is on this basis that the wife contends that it would be appropriate for the Court to add back to the matrimonial asset pool before division:
- a) Moneys wasted by the husband on the H Street, Suburb G Property by allowing it to deteriorate so that its value has decreased by \$40,000;
 - b) Moneys wasted by incurring interest charges on outstanding council rates on the H Street, Suburb G and F Street, Suburb G Properties in a sum of \$6,168,
 - c) Moneys wasted in relation to interest charged on outstanding water rates on the F Street, Suburb G Property in a sum of \$984; and/or
 - d) Moneys lost by the husband's failure, as the sole registered proprietor, to obtain tenants for the H Street, Suburb G property for a period from 2014 to the time of hearing, calculated to be in the sum of \$94,380.
97. The total sum sought to be added back to the matrimonial asset pool before division by the wife on the basis of conduct amounting to waste on the part of the husband is \$141,494.
98. I find in this matter that it is not appropriate to add back to the matrimonial asset pool before division, sums of money that have been

³⁷*In the Marriage of Kowaliw, J.I. and Kowaliw, A.G.* [1981] FLC 91-092.

lost to the parties – interest charged on outstanding rates and outstanding water rates – or for a failure to obtain tenants for a property or for deterioration in the value of a property by neglect, but I find that it is appropriate to take those matters into account when assessing any adjustment to be made between the parties under section 79(4)(e), which refers to section 75(2) of the Act.

99. I will address any appropriate adjustment when considering any such adjustment in step 3 of the four-step process in the event that I find that it is just and equitable to proceed with a property settlement under section 79 of the Act.

Superannuation interests

100. The parties are both trustees of and members of the Labella Family Superannuation Fund. I do not have any evidence as to the value of the parties' individual member's accounts. I do have evidence in relation to the value of one asset within the superannuation fund, being the self-managed super fund's bank account with Bank CC, being account number ...4 in the joint names of the parties (as appropriate for trustees), which had a credit balance as at 11 September 2019 of \$189,744.42, as revealed in exhibit A2, the documents produced on subpoena by Bank CC.
101. There is no evidence that there are any assets in the Labella Family Superannuation Fund other than that Bank CC account. It is the wife's case that she has not had full and frank disclosure from the husband of all of the detail of the Labella Family Superannuation Fund, which the husband has controlled from the time of its inception up to the present time. As a trustee for the fund and as a member, the wife would be entitled to demand and receive all relevant detail and documents, however in line with the husband's track record in failing to file his tax returns, it may well be that the fund is severely non-compliant in that it has not been audited or submitted appropriate returns from any years, if ever.
102. Accordingly, I am left with no other option on the available evidence than to find that the value of the Labella Family Superannuation Fund is the value as at 11 September 2019 of the Bank CC account, being \$189,744.42.

103. However, I cannot currently make a finding in relation to the value of each of the parties' individual member's accounts in that fund. There is a real possibility that one member account may be greater in value than, even considerably greater than, the other member account after a cohabitation of 19 years between the parties and that fund representing their accumulated superannuation benefits from its establishment in September 2001 until being abandoned by the wife in June 2018. Such circumstance would have a bearing on my consideration of whether or not it is just and equitable to proceed with a property settlement between the parties under section 79 of the Act.
104. On the evidence it is plain that the husband has been making some contributions, whether voluntary or by way of directing his employer compulsory entitlements there, to the Labella Family Superannuation Fund post-separation. It is also plain that the husband, through his current employment with Employer R, has his employer compulsory contributions paid by that employer to a fund for the husband's benefit with Super Fund OO.
105. The evidence presented in exhibit A8, the documents produced on subpoena by Employer R, indicate that an item in the husband's pay advice slips, produced under that subpoena, is payment by the employer of the husband's nine and a half per cent employer compulsory superannuation contribution to Super Fund OO and that as at 27 June 2019, the year to date contributions (for the financial year 2018-2019) were \$12,851.14 and that the contributions for the year to date as at 3 October 2019 (financial year 2019-2020) were \$4739.79, being at that stage a definite contribution total of \$17,590.93.
106. The wife ceased making contributions or directing her employee compulsory entitlement contributions to the Labella Family Superannuation Fund at the time of separation in June 2018. The wife in her Financial Statement relied upon by her in the final hearing indicated an estimated superannuation entitlement combined amongst the Labella Family Superannuation Fund, Super Fund PP and Super Fund QQ of \$90,000.
107. In the case outline document prepared by the wife's counsel and relied upon by the wife in hearing, the draft balance sheet asserts that the wife has entitlement through Super Fund PP of \$1,227. Accordingly, in the

absence of any more specific evidence, I find that the wife has a superannuation entitlement outside of the Labella Family Superannuation Fund and with the Super Fund PP fund of \$1,227.

108. The draft balance sheet in the wife's Case Outline recites under the heading "*Husband's Post Separation Liabilities*" a debt for "*incurred, but unpaid legal fees and disbursements to Access Law Group*" in the sum of \$11,530.³⁸ The full sum, on the evidence, is \$11,530.84.
109. Access Law Group registered a caveat pursuant to what they assert is a caveatable interest, granted to them by contract between the husband and themselves through their legal fees agreement, over all property in which the husband has an interest. Accordingly, the caveats are registered on all four Queensland properties. They are also registered over the C Street, City D Property to the extent of the husband's one third interest.
110. The orders sought by the wife contemplate a sale of the A Street, Suburb B and J Street, Suburb K Properties in Queensland and a possible sale by way of enforcement of both of the F Street, Suburb G and H Street, Suburb G Properties. To deal with those properties, it will be necessary to have the said caveats withdrawn.
111. The Access Law Group are on notice of the orders sought by the wife through a course of correspondence between the wife's solicitors and Access Law Group. That course of correspondence is in evidence. Further, Ms Stringio, solicitor, appeared at the commencement of the undefended hearing, representing Mr Ellicott, solicitor, a principal in Access Law Group. Ms Stringio's appearance being made without objection by the wife.
112. The orders proposed by the wife would see Access Law Group recovering one half of their outstanding fees, in a sum of \$5,765.42, from the sales of the A Street, Suburb B Property and J Street, Suburb K Property. The wife then seeks orders that would provide a refund to her of that sum from the husband.
113. The husband's outstanding legal fees, as with the wife's outstanding legal fees, represents a debt that should be paid by the husband from

³⁸ Case Outline of the Wife filed 15 October 2019, p 18.

his share of the matrimonial asset pool, because to have the wife participate in any way in that payment would involve a form of ‘unspoken’ costs order under section 117 of the Act.³⁹ Accordingly, I will seek to deal with the debt owed by the husband to Access Law Group for unpaid legal fees in the final orders that I make by providing for its payment from that part of property settlement to be received by the husband.

114. Similarly, in relation to the estimated amount of \$73,000.00 stated to be outstanding for unpaid legal fees owed by the wife to her solicitors, final orders should provide that that sum is paid by the wife to her solicitors from her share of the net matrimonial asset pool.
115. The question as to whether or not an order is made that the husband pay the wife’s costs to any degree is an order for the compensation of the wife for her legal costs. It would be a matter for decision after the property settlement orders have been made and would have no bearing on the actual payment made or unmade between the wife and her solicitors.

Capital gains tax issues

116. There are capital gains tax issues affecting all six real properties forming part of the matrimonial asset pool. In relation to the four Queensland properties, each was purchased by the husband in his sole name after the capital gains tax commencement date – in 1985 – and each has been at some time a commercial property within the meaning of the relevant legislation, in that it has been tenanted, including H Street, Suburb G, which was tenanted for some period of time between purchase by the husband and it becoming vacant and beginning to fall into disrepair.
117. The executor or administrator of a deceased estate has 24 months to sell a non-capital gains tax-affected property (such as a deceased’s principal place of residence or property purchased by the deceased prior to the capital gains tax date in 1985) during which time the sale will not be a deemed disposal for the purposes of the capital gains tax legislation.⁴⁰ The C Street, City D Property has been distributed on

³⁹ *Family Law Act 1975* (Cth) s 117.

⁴⁰ *Income Tax Assessment Act 1997* (Cth) s 118-195.

administration of the husband's late mother's estate in equal one third shares to the husband and his two sisters.

118. The property is still retained by them and accordingly, as the property is a commercial property and is not the principal place of residence of any of the registered proprietors, it is now subject to capital gains tax. The acquisition date being the husband's late mother's date of death and the acquisition cost being the value as at her date of death (for ease of identification usually taken to be the value at which that particular rural property was listed in the relevant application for grant of probate or letters of administration).
119. The husband has not filed any tax returns for at least 12 years. On the sale of any of the capital gains tax-affected properties standing in his sole name, or as to his share of the C Street, City D property, capital gains tax would be payable by the husband calculated in accordance with the marginal income tax rates that apply to his income.
120. As a member of the Federal Judiciary I have an obligation to see that matters affecting the Commonwealth's revenue are done in accordance with the law. Accordingly, in framing final orders I will attempt to make provision for the setting aside from the sale of property any moneys due as capital gains tax once the husband has filed all of his outstanding income tax returns.
121. For the purpose of calculating a likely amount payable as to capital gains tax on the sale of property held in the husband's sole name, a starting point can be the husband's evidence as to his income from his employment with Employer R. Those details were set out in his Financial Statement sworn by him on 18 January 2019, being exhibit A9 at the hearing, and those details found on the payslips relating to the husband's employment with Employer R found in exhibit A8 in the proceedings.
122. In that regard I note in exhibit A8 the husband's pay advice slip dated 27 June 2018 showed a total payment year to date at \$135,275. This evidence will be of assistance in estimating the likely capital gains tax payable by the husband in relation to the sale of any of the real properties of which he is a registered proprietor.

123. The L Street, City D Property was used by the parties as an investment following its purchase in the wife's sole name and, as I understand the evidence, it continues as a commercial property. The wife seeks orders that provide that she retain the L Street, City D Property and continue to be solely liable for the loan account secured by the first registered mortgage on that property with Bank JJ.
124. I have not been provided with any estimate or calculation in any manner of the capital gains tax that would be payable by the wife on a disposal of that property as at the date of trial. That is not a criticism of the wife's case. It is implied by the wife that in retaining that property and liability for the loan account secured on the property, the wife will also 'carry on with that property' the capital gains tax liability that would attach to the wife on a disposal of the L Street, City D Property.

The value of motor vehicles

125. In the wife's case outline balance sheet the husband's motor vehicle, presumably the Motor Vehicle 2 registration ... referred to in his Financial Statement (exhibit 9), is valued by the wife at \$35,000. The husband in his Financial Statement (exhibit A9) values the vehicle at \$30,000. No evidence is provided by the wife in relation to the value of that vehicle and statements in the draft balance sheet in the case outline relied upon by the wife are not evidence, they are submissions. Accordingly, I will accept the evidence of the husband as to the vehicle of the vehicle at \$30,000.
126. In the wife's Case Outline her motor vehicle is asserted to be valued at \$10,000. In the wife's Financial Statement sworn or affirmed 27 September 2019 she refers to the Motor Vehicle 1 as having a value of \$8,000. Once again I will prefer the sworn evidence of the wife in her Financial Statement over her submission in her case outline, and I will take the value of the Motor Vehicle 1 as \$8,000.

Debt for unpaid school fees

127. The wife gives evidence that she is personally liable, as between herself and her husband, to E School and M School in the sum of \$4,601. The wife gives evidence that the husband is personally liable,

as between himself and the wife, to E School and M School in the sum of \$6,395. I will accept that evidence from the wife.

Outstanding rates

128. The wife presents evidence in her case that there are outstanding rates owed to City EE Regional Council by the husband on the H Street, Suburb G Property totalling \$8072.59. That amount made up of \$5,039 in principal and \$3,033 accrued in interest.
129. The wife gives evidence that the outstanding rates owed by the husband to the City EE Regional Council on the F Street, Suburb G Property, as at 27 September 2019, of \$11,691.85, that amount made up of \$8,485 in principal and \$3,135 accrued in interest, and a further sum owing to City EE Regional Council of \$984 for outstanding water usage fees for the F Street, Suburb G Property as at 27 September 2019.
130. The wife has sought an addback for the interest accrued on the unpaid council rates and the unpaid water usage rates on the F Street, Suburb G Property and I have dealt with that addback issue earlier in these reasons. In the wife's evidence is detail of action pending by City EE Regional Council to force the sale of both the H Street, Suburb G and F Street, Suburb G Properties pursuant to relevant legislation to recover the arrears of rates and interest accrued thereon. The council is staying their hand pending the outcome of these proceedings.
131. I will provide in the final orders for payment of the outstanding rates and water usage rates from any sale of those properties as part of the costs of sale before the net proceeds of sale are ascertained as forming part of the net matrimonial asset pool. The element of wastage involved in the interest accrued will be dealt with, as indicated earlier in these reasons in discussing addbacks, in considerations under section 75(2) of the Act.

Estimated realisation costs of the A Street, Suburb B and J Street, Suburb K Properties

132. In the wife's Case Outline, she makes submissions in the draft balance sheet as to likely realisation costs on the sale of the J Street, Suburb K and A Street, Suburb B Properties, by estimating two per cent sale commission (not indicating if same is inclusive or exclusive of GST)

\$5,000 for marketing costs and \$5,000 for legal fees. I have no evidence as to likely sales commission, amounts required by Queensland real estates for marketing fees or likely amount of legal costs by legal practitioners or conveyancers (if there are any) in the State of Queensland.

133. Further, the material is provided as a submission to the court and accordingly is not evidence. I do not find any evidence to ground those estimates in the case presented by the wife. In any orders for sale of the J Street, Suburb K and/or A Street, Suburb B Properties (and any of the other real estate real properties) I will attempt to deal with the costs of sale in such manner that they will not cause a diminishment of that part of the net matrimonial asset pool to be received by either party. Rather, those costs will be one of the deductions from the gross matrimonial asset pool before arriving at the net matrimonial asset pool to be divided between the parties.

Husband's personal income tax refunds for the financial years since 2007

134. I find on the evidence that the husband has not lodged his income tax returns, as at the date of trial, for at least the years ended 30 June 2007 to 30 June 2019. He has been in receipt of income throughout that time and accordingly is in breach of Commonwealth Income Tax legislation and liable to prosecution.⁴¹
135. It is submitted by the wife that on lodgement of his outstanding income tax returns, the husband would be entitled to receive an income tax refund in relation to some or all of the default years. The submission behind that assertion is that throughout much of that time the husband was the sole registered proprietor of Queensland properties that were negatively geared, whilst being an income tax payer as an employee, with his income tax instalments being deducted by his employer and paid with group tax. I have no further evidence on the point and can make absolutely no estimate or finding of any nature in relation to any possible amounts to be received by the husband by way of income tax refund on the lodgement of his outstanding returns.

⁴¹ Income Tax Assessment Act 1997 (Cth) ss 4.1, 3.10. See also *Taxation Administration Act 1953* (Cth) s 8C.

136. It is relevant for two purposes. Firstly, because if the husband is entitled to tax refunds, then it is, at the very least, a resource available to the husband, obtainable by him by preparing and lodging the outstanding income tax returns. Accordingly, it would be a matter that can be taken into account when making assessment of any appropriate adjustment between the parties under section 75(2).
137. Secondly, orders are sought by the wife to the effect that the husband be required within 28 days of orders being made to do all things necessary to prepare and lodge with the ATO his personal income tax returns for the years ended 30 June 2007 to 2009 and inclusive, that the husband then authorise and direct the ATO to direct any refund payable to him to the trust account of the wife's solicitors, those monies then to be applied toward paying 50 per cent thereof to the wife as part of her share of the net matrimonial asset pool, and to apply the other 50 per cent toward payment of any costs order made against the husband for payment of the wife's costs, and to remit any surplus funds to the husband.
138. There is no evidence on which a calculation or even an estimate can be made of any amount likely to be received into the wife's solicitor's trust account as a result of any such order.
139. When considering what orders are just and equitable to be made as between the parties, after having made findings as to whether or not it is just and equitable to proceed with a property settlement under section 79 of the Act and, if so, having made findings in relation to the appropriate adjustment between the parties based on contributions and made findings in relation to any adjustment to be made between the parties on the assessment of the matters referred to in section 75(2) of the Act, I will decide how I should deal with the husband's possible income tax refunds – whether by orders as sought by the wife in result of possible increase of the net matrimonial asset pool and division of asset between the parties or by taking the matter into account as a resource available to the husband.

The matrimonial asset pool

140. Based upon the findings I have made in these reasons as to the composition of and value of the matrimonial asset pool, I find as follows.

141. The matrimonial assets and their values are:

Owner	Asset	Value
Husband	C Street, City D	\$258,333
Husband	A Street, Suburb B, QLD	\$320,000
Husband	J Street, Suburb K, QLD	\$360,000
Husband	H Street, Suburb G, QLD	\$185,000
Husband	F Street, Suburb G, QLD	\$295,000
Wife	L Street, City D, NSW	\$500,000
Husband	Savings	\$18,389
Wife	Savings	\$14,816
Husband	Motor Vehicle 2	\$30,000
Wife	Motor Vehicle 1	\$8,000
Husband	Contents	\$5,000
Wife	Contents	\$5,000

142. The total assets are \$1,999,538.

143. I find that the liabilities of the parties are:

Debtor	Liability	Amount
Husband	Westpac loan #...9 (secured on Brisbane properties)	\$314,562
Husband	CBA loan #...5 (secured on the City EE properties)	\$151,527
Husband	CBA loan #...3 (secured on the City EE properties)	\$183,005
Wife	Bank JJ bank loan #...3 (secured on the L Street, City D property)	\$20,199
Husband	Debt for outstanding school fees	\$6,395
Wife	Debt for outstanding school fees	\$4,601
Husband	Outstanding water usage fees on F Street, Suburb G	\$946.89
Husband	Outstanding rates on F Street, Suburb G	\$11,691.85
Husband	Outstanding rates on H Street, Suburb G	\$8072.59

144. The total liabilities of the parties are (without the odd cents) are \$701,000.
145. Accordingly, the net matrimonial asset pool, not including superannuation entitlements, available for division between the parties is \$1,298,538.
146. The husband is the owner in law and in equity as between himself and the wife of assets to the value of \$1,471,722, and is responsible for

liabilities, exclusive of liability by the wife, for \$676,200, giving him a net asset figure of \$795,522.

147. The wife is the owner in law and in equity as between herself and the husband of assets to the value of \$527,816, and is solely liable as between herself and the husband for liabilities to a total of \$24,800, giving her a net asset value of \$503,016.

Is it just and equitable to make a property settlement order under section 79 of the Act?

148. I have found that the gross matrimonial asset pool has a value of \$1,999,538, exclusive of superannuation entitlements and that the total liabilities are \$701,000, giving a net matrimonial asset pool, not including the superannuation assets, of \$1,298,538.
149. The husband currently has ownership of \$795,522 worth of net matrimonial assets and the wife currently has ownership of \$503,016 net matrimonial assets. There is no conduct presented in the evidence by either party that would lead to a finding that it is not just and equitable in all the circumstances to make a property settlement order.
150. Unless property is adjusted between the parties under section 79 of the Act, the husband will retain 61.25 per cent of the net matrimonial assets and the wife retain 38.75 per cent, a result that on any consideration of the justice and equity of final property position between these parties on the breakdown of their marriage would not be just or equitable. Accordingly, I find that it is just and equitable in all the circumstances to make an order under section 79 of the Act, effecting a property settlement between these parties.

Findings in relation to contributions

151. It is unclear on the evidence what initial contributions were made by either of the parties. The parties commenced their cohabitation at marriage in 1999. At that time, the wife was a student studying for her second degree, and working part-time in her father's shop. The husband was working full-time as a professional for a firm called Employer GG and was conducting a business called HH Pty Ltd with his brother-in-law and a third person. The husband had been working

full-time as a professional “*for a few years prior to our marriage and had some savings.*”⁴²

152. Prior to marriage, the parties purchased the L Street, City D Property for \$135,000 as an investment, funding the purchase “*by savings of about \$70,000 and a loan from the Bank JJ of \$66,000.*”⁴³ The property was placed in the wife’s sole name as registered proprietor, but the mortgage was in the joint names of the parties.
153. There is no evidence as to where the savings of \$70,000 were held prior to their application for the purchase. Nor is there any evidence as to who had contributed to the accumulation of \$70,000 savings. Without evidence as to an unequal contribution made to the savings I cannot simply follow an assumption that savings were the greater part by the husband in consequence of his working full-time as a professional as against the wife working part-time and being a student. Accordingly, I find that the parties made an equal contribution at the start of their cohabitation.
154. I have outlined above the employment history of each of the parties and I find that the husband was in either full-time employment or engaged full-time in operating his own business, N Pty Ltd, and in the second business, except for a period between June 2015 or 2016 (there is evidence of both) and June 2018, when he was unemployed.
155. The wife was a student and in part-time employment from the time of marriage until late 2002 when she took up employment full-time as a health care worker until 2003. The wife was then on maternity leave until mid-2004 and then engaged in part-time work from time to time, including the conduct of her business LL Pty Ltd, later renamed O Pty Ltd, until 2006, when she again took up maternity leave. From 2007, the wife engaged in part-time consultancy work, including from 2015 for Employer NN as a professional, and she conducted her business, O Pty Ltd, which was her continuing source of income at the time of trial in addition to continuing in engaging in part-time work in the field of health care.

⁴² Wife’s affidavit of 27 September 2019, [10].

⁴³ Wife’s affidavit of 27 September 2019, [12].

156. In relation to the period of two or three years (depending on which version of the evidence is correct), during which the husband was out of employment, he had received a redundancy payment of \$70,000 which was applied by the parties toward the living expenses of the family unit ⁴⁴
157. In 2016, the husband's mother passed away and he inherited, amongst other things not detailed in the evidence, a one-third interest in the encumbered C Street, City D Property. Some liquid funds were inherited by the husband and the other beneficiaries of the estate, his two sisters, and it seems those funds were applied to a renovation of the C Street, City D Property. At hearing, the value of the husband's one-third interest in the inherited property at C Street, City D Property was \$258,333.
158. The wife was the primary carer for the parties' children, X and Y, throughout the time of the parties' cohabitation. The wife's evidence is that although the husband was engaged in full-time work for most of the time, during the period of his unemployment from 2015 or 2016 through to 2018, when he was available on a day-to-day basis to assist with the parenting of the children, he nevertheless regularly slept in until midday and gave some, though minimal, assistance with the parenting of the children.
159. The wife was mainly responsible for the homemaker role in the family unit – cooking, cleaning, washing, ironing, shopping and so forth. The husband assisted during his period of unemployment. He did begin making an increased contribution to the homemaker role by cleaning the kitchen before the wife came home from work and begin preparation of the evening meal for the family.
160. The redundancy payment of \$70,000 received by the husband related to a period of employment with Employer KK that occurred wholly within the period of the parties' cohabitation. Those funds were applied toward the family's living expenses during the period of time when the husband was not in receipt of any other earned income. As such, the \$70,000 redundancy payment was not a sole contribution by the husband over and above the financial contribution being made by the

⁴⁴ Wife's affidavit of 27 September 2019, [59] and [60].

wife during that period of time from her income-generating employment.

161. The wife's father paid \$10,000 in 2014 to discharge the wife's HECS debt relating to her degree.
162. Since the parties' separation in June 2018 and, most particularly, since the husband vacated the matrimonial home on 21 August 2018, the wife has continued to be principally responsible for the day-to-day care of Y in that Y spends two nights per fortnight in his father's care and the balance of the time in his mother's care. The husband pays no child support and so the greater part of the financial cost of maintaining Y is borne by the wife. X is spending about equal time between her parents and, therefore, her financial support is divided equally between her parents.
163. I find that on a holistic basis the husband has made a greater contribution than the wife, principally due to the effect of his contribution represented by his inheritance of his interest in the C Street, City D property from his late-mother's estate, which, when taken into account together with all of the other contributions of any nature made by or on behalf of the parties during the relevant period of their relationship up to the date of trial. I find contributions to be 57 per cent by the husband and 43 per cent by the wife.

Assessment of matters under section 75(2) of the Act

164. The wife is 47 years of age and there is no evidence that she enjoys anything other than good health. The husband is 51 years of age and there is no evidence that he enjoys anything other than good health.
165. Both parties have a career and are capable in engaging in appropriate gainful employment in consequence of both their educational attainments and their employment and work histories. The husband's income, as stated in his Financial Statement sworn by him on 18 January 2019, is \$2,800 per week by way of wages or salary from his employment, \$1,122 per week rent received from such of his investment properties as are tenanted and \$168 per week received as an

ongoing consequence of the business N Pty Ltd conducted by him. In total the husband has a total weekly income of \$4,090.⁴⁵

166. The pay advice slips for the husband found in the material produced on subpoena by his employer, Employer R, and entered into evidence as exhibit A8 indicate an income from his employment in the financial year to 30 June 2019 that, in effect, confirms the statement of his income from employment given in his Financial Statement – \$135,275 up to 23 June 2019 in that financial year. In the event that final orders made in this matter cause the sale of some of the husband's Queensland investment properties, it will have an effect upon his income from rent, but it will also have an effect upon his expenses relating to payment of loan accounts secured on those properties.
167. The wife deposes in her Financial Statement that she receives the sum of \$1,122 per week by way of wages or salary from her employment, receives a rental income of \$371 a week, being from the L Street, City D Property, and receives an income of \$775 a week from her conduct of the consulting business trading as O Pty Ltd. The Wife therefor has a total weekly income of \$2,268.
168. That is a difference in weekly income between the parties of \$1,822 and even allowing for some diminution in the husband's income through loss of investment properties as a consequence of orders, there is still sufficient disparity in the parties' income to justify some adjustment in favour of the wife.
169. On the evidence, there is the prospect that the husband can receive tax refunds relating to some or all of the 12 years he has failed to submit his income tax return. Such tax refunds, if received as a consequence of those outstanding tax returns being submitted as a group, would represent a capital sum in his hands. There is no evidence that would enable me to make any finding whatsoever as to what that capital sum may be or even to make even the vaguest estimate.
170. Nevertheless, it is, on the evidence, certainly a likely resource to fall to the husband once he complies with the law and submits his returns and it is a resource that might, in that event, justify some further adjustment

⁴⁵ Exhibit A9, p 3.

in favour of the wife. However, as foreshadowed earlier in these reasons, it is at this point that I make a finding as to the best way to deal with such possible tax return fund. Should it be treated as a resource with consequent adjustment in favour of the wife, or should orders be made as sought by the wife compelling the husband to lodge his returns and deal with any moneys received by way of tax refund by division between the parties as part of the net matrimonial asset pool and then application of part or all of the husband's share to payment of any costs order made against him and in favour of the wife?

171. I prefer to deal with the matter by way of adjustment in favour of the wife for the likely resource in the hands of the husband. If there is any objection to making such an adjustment on the basis of a 'likely' resource as opposed to a 'certain' resource, then I find that it is appropriate to consider such adjustment on the basis of a likely resource because it is at the fault of the husband, and no one else, that his tax returns have not been submitted for at least the past 12 years.
172. There is good argument in the submission made on behalf of the wife that, on those returns being submitted, and subject to penalties and so forth that may or may not be imposed, there is a good basis to believe that there would be a refund if consequent only upon the negative gearing of the investment properties being in the husband's sole name.
173. As for an application of the fund by way of orders to division between the parties and in payment toward the costs order, I find that there is an artificiality in that as any consideration of the question of costs should follow after the making of final property orders, whereas the orders as sought by the wife would incorporate the application of funds in satisfaction of costs orders into the property settlement orders, which precede the costs order. I prefer to deal with the matter by way of a likely resource in the hands of the husband and a finding that it grounds further adjustment in favour of the wife.
174. X was 16-years of age at trial and Y was 13-years of age at trial. The parties each have care and control of X for about equal time, whereas the wife has care and control of Y for 12 nights per fortnight, Y being with his husband for two nights per fortnight. No child support is paid by the husband to the wife. I find that the wife's greater share of the day-to-day care and control of Y and a consequent position as his

principal financial supporter justify a further adjustment in favour of the wife.

175. Neither party's Financial Statement contained the detail of their commitments to be found in Part N of that document, neither party being required to complete Part N as the proceedings did not contain any of the financial issues that so require its completion. The husband in his Financial Statement deposed that his weekly personal expenditure, including 'total of all other expenditure' as set out in part G is \$3,860, giving him an excess of income over expenses. The wife deposes that her total personal expenditure per week is \$2,270, giving her an excess of expenditure over income of \$2 per week.
176. I have already indicated in the adjustment in favour of the wife based on her far greater financial support for Y and, accordingly, I find that there is no adjustment to be made between the parties based on the commitments of each necessary to enable them to support themselves or either of the children.
177. On the evidence, neither party is responsible to support any person other than the children of the marriage. On the evidence, neither party has entered into a cohabitation following separation.

Contribution to the income and earning capacity of the other party

178. The husband contributed to the wife's income and earning capacity as it currently stands and for her future by his financial support of the wife through the early years of their marriage when she was completing her degree.
179. The wife contributed to the husband's income and earning capacity as it stands now and for his future by her being principally responsible for the parenting and homemaker roles within the family unit, freeing the husband to engage in full time employment and so continued to develop his skills of value in the employment marketplace.
180. There is no adjustment to be made to either party for this factor.

Other considerations

181. In relation to any other facts or circumstances which the justice of the case requires to be taken into account, I have been directed in submissions on behalf of the wife to the husband's failure of disclosure, despite the order made on 14 December 2018 by Judge Altobelli that the husband provide full and frank disclosure, and the circumstances surrounding the wastage argument advanced by the wife.
182. I find that there has been a failure on the part of the husband to provide full and frank disclosure of his financial circumstances as required.
183. The wastage argument was termed, in submissions on behalf of the wife, as addbacks relating to the diminution of the matrimonial asset pool in consequence of the interest charged and to be paid on the arrears of rates owing on the H Street, Suburb G Properties and the interest charged on the arrears of water rates owing and to be paid on the F Street, Suburb G Property. This argument also including the loss of any rental income from the H Street, Suburb G Property in consequence of that property being left untenanted, and falling into dereliction for a period of years, at least since 2015. This was submitted by the wife to represent a loss of \$94,380, that figure being based on submissions made on behalf of the wife as contained in exhibit A5 – a document containing rental losses submission and calculations.
184. Then there is the further wastage, as submitted by the wife, in the difference in value of the H Street, Suburb G Property between the current value assigned by the expert witness of \$185,000 and its value if it had been maintained in a state of appropriate repair as stated in the indicative assessment of the expert witness at \$225,000, being a difference of \$40,000. The total of these wastage addbacks asserted by the wife is \$141,494. I find that there has been wastage by the husband and that the same should be dealt with by way of an adjustment under section 75(2)(o) in favour of the wife.
185. The disclosure made by the husband in his Financial Statement entered as exhibit A9 and by way of provision and disclosure of documents as detailed in the wife's evidence is patently not full and frank disclosure in line with what is required of him under the authorities of *Black &*

*Kellner*⁴⁶ and *Weir & Weir*⁴⁷. I find that this failure justifies an adjustment in favour of the wife.

186. I find that the appropriate adjustment under section 75(2) is an adjustment in favour of the wife of 20 per cent.
187. Accordingly, I find that it is appropriate to make orders dividing the net matrimonial assets of the parties on a basis of 63 per cent to the wife and 37 per cent to the husband.

Superannuation assets

188. I have found that for the purposes of the value at trial, the value of the Labella Family Superannuation Fund was \$184,810.30. It is a self-managed superannuation fund of which the husband and wife are both trustees and of which the husband and wife are the only members. I do not have any evidence as to the value of each of the parties' member accounts within that fund.
189. There is no basis to believe that the member accounts are equal, such a circumstance is extremely rare in self-managed superannuation funds. The parties were each making contributions or having contributions made on their behalf to the fund from their employment, particularly by way of employer contributions under the employer compulsory superannuation legislation up to the time of separation.
190. At the time of separation, the wife redirected her employer compulsory superannuation contributions from her employment to another or other funds. The evidence shows that contributions continued to flow to the Labella Family Superannuation Fund from the husband's employer on his behalf. These factors alone mitigate against the parties' member accounts being equal and raise a likelihood that the husband's member account has the greater value.
191. Each of the parties has their own superannuation entitlements, the wife disclosing in her Financial Statement that she has entitlements also with Super Fund PP and with Super Fund QQ, though not particularising those entitlements in the Financial Statement but, rather,

⁴⁶ *Black & Kellner* (1992) 15 Fam LR 343.

⁴⁷ *Weir & Weir* (1992) 16 Fam LR 154.

and unhelpfully, setting out a composite amount for each of those funds and the Labella Family Superannuation Fund.

192. The husband has superannuation with Super Fund OO and on the evidence, I find that the value as at trial is \$17,590.93.
193. The parties have made equal contribution to the accumulation of their superannuation funds up to the time of separation. The wife has made contribution following separation by the application of her employer compulsory entitlements to her own funds and by her contribution as homemaker and parent for the children following separation. The husband has made post separation contribution to the Labella Family Superannuation Fund following separation by way of contributions from his employer and has made contributions to his Super Fund OO fund by way of employer compulsory contributions from his employer.
194. I find that the factors that led to an adjustment of 20 per cent in favour of the wife for consideration of the ‘future needs factors’ under section 75(2) of the Act do not apply in relation to the parties’ superannuation interest pool. With the wife at 47 years of age and the husband at 51 years of age, they each have a significant period of time remaining to engage in appropriate gainful employment and contribute, either themselves if they wish or through the employer compulsory superannuation legislation, to the accumulation of further superannuation entitlements and at the time that each comes to take their superannuation at their minimum vesting age under the legislation, the factors as to disparity of income and care of and support of children considered under the available asset pool above will not apply.
195. I find that the adjustment made in favour of the wife in consequence of the husband’s wastage and the husband’s failure of full and frank disclosure is adequately dealt with in relation to the adjustment affecting the available assets pool. I do not find that it is just and equitable to make an order that involves an adjustment under section 75(2) between the parties relating to the superannuation pool. Accordingly, I find that the superannuation pool should be divided equally between the parties.
196. Whilst I have made a finding that the husband’s superannuation entitlements outside the Labella Family Superannuation Fund are

valued at \$17,590.93, I cannot make any finding as to the value of the wife's superannuation entitlements in Super Fund PP and with Super Fund QQ. Accordingly, I do not intend to make any adjustment between the parties in relation to those funds by way of any splitting orders.

197. I will make a splitting order affecting the husband's member account in the Labella Family Superannuation Fund such that the effect of the splitting order is to provide that each of the parties' member accounts are equal, with the wife to roll her member account out of that fund and into another complying fund and then do all things necessary to resign as a trustee fund.

Conclusion

198. I find that the net matrimonial assets in the available asset pool should be divided between the parties as to 63 per cent thereof to the wife and as to 37 per cent thereof to the husband.
199. I find that each of the parties should retain their own superannuation entitlements in complying funds outside their self-managed superannuation fund. I find that there should be a splitting order affecting the husband's member account in the Labella Superannuation Fund so that the values of each of the parties' member accounts are made equal, with the wife to then roll her superannuation entitlements in her member account out to another complying fund and to resign as a trustee of the self-managed super fund.

I certify that the preceding one hundred and ninety-nine (199) paragraphs are a true copy of the reasons for judgment of Judge Morley

Associate:

Date: 3 June 2020