FEDERAL CIRCUIT COURT OF AUSTRALIA

LABREC & BARDOW *[2020] FCCA 1994*

Catchwords:
FAMILY LAW – Property – final orders – de facto relationship – where de facto marital asset pool ascertained – where consideration of add-backs relating to legal fees and other funds – where Husband's annual leave entitlements asserted to be asset or financial resource of the Husband – where Court does not find such leave entitlements to form part of the de facto marital asset pool – where Court finds it is just and equitable to proceed with an order pursuant to section 90SF – where contributions found to be equal – where Court finds a 10 per cent adjustment in favour of Wife by reason of factors under section 90SF(3).

FAMILY LAW – Property – where Wife asserts Husband holds a legal and beneficial interest in real property as to 50 per cent – where Husband asserts he holds 50 per cent legal interest and 16 per cent beneficial interest in real property – where Wife asserts that presumption of advancement applies and has not been rebutted – where Husband asserts he aided his parents in purchasing real property and that presumption of advancement has been rebutted by his parent's intention – where Court finds presumption of advance has been rebutted.

Legislation:
Annual Holidays Act 1994 (NSW), s. 3
Family Law Act 1975 (Cth), ss.75, 79, 106A, 90SF, 90SL, 90SM, 117
Federal Circuit Court Rules 2001 (Cth), r. 21.02
First Home Owner Grant Act 2000 (Cth)

Cases cited:
Grey v Grey [1677] EngR 86
Drever v Drever [1936] ALR 446
Briginshaw v Briginshaw (1938) 60 CLR 336
Shepherd v Cartwright [1955] AC 431
Charles Marshall Pty Ltd v Grimsley [1956] 95 CLR 353
Elias & Elias [1977] FLC 90-267
Calverley & Green (1984) 155 CLR 242
Marriage of AM & EW Dawes [1990] FLC 92-108
In the Marriage of Harris (1991) 104 FLR 458
Nelson v Nelson (1994) 33 NSWLR 740
Nelson v Nelson (1995) 184 CLR 538
In the Marriage of Gould (1995) 128 FLR 401
In the Marriage of Tomasetti (2000) 156 FLR 130

Damberg & Damberg & Others [2001] NSWCA 87
Hickey & Hickey & Attorney-General for the Commonwealth of Australia [2003] FamCA 395
JPDJ & DADJ [2005] FMCAfam 86
Trustees of the property of Cummins (a bankrupt) & Cummins (2006) 227 CLR 278
Stanford & Stanford (2012) 247 CLR 108
Dickons & Dickons [2012] FamCAFC 154
Singerson & Joans [2014] FamCAFC 238
Fields & Smith [2015] FamCAFC 57
Tang & Vo [2016] FCCA 880
Grier & Malphas (2017) 55 Fam LR 107
Wallis & Manning [2017] FamCAFC 14
Fontana & Fontana [2018] FamCAFC 63
Hurst & Hurst [2018] FamCAFC 146
Trevi & Trevi [2018] FamCAFC 173
Sadasivam & Seshan [2019] FamCAFC 76
Jabour & Jabour [2019] FamCAFC 78
Whiton & Dagne [2019] FamCAFC 192
Mabb & Mabb & Anor [2020] FamCAFC 18

JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (Lexis Nexis Butterworths, 8th ed, 2016)
John McGhee, *Snell's Equity* (Sweet & Maxwell, 34th ed., 2019)

Applicant:	MS LABREC
Respondent:	MR BARDOW
File Number:	SYC 2516 of 2018
Judgment of:	Judge Morley
Hearing date:	24 September 2019
Date of Last Submission:	25 September 2019
Delivered at:	Sydney
Delivered on:	4 August 2020

REPRESENTATION

Counsel for the Applicant:	Dr Barnett
Solicitors for the Applicant:	Santo Family Lawyers
Counsel for the Respondent:	Mr Othen
Solicitors for the Respondent:	First Choice Family Lawyers

ORDERS

(1) THAT the court make an order under Section 90SM of the *Family Law Act 1975* (Cth) as follows:

(a) That within three calendar months from the date of this Order the Respondent do all such acts and things and sign all documents necessary to transfer to the Applicant the whole of his right title and interest in the property situate at B Street, Suburb C in the State of New South Wales ('the B Street, Suburb C property') being the whole of the land in certificate of title folio identifier ... and simultaneously with such transfer the Applicant shall be solely responsible as between the Applicant and the Respondent for all outgoings payable in relation to the B Street, Suburb C property and the Applicant shall indemnify and keep indemnified the Respondent in relation to all and any such payments, and further simultaneously with such transfer the Applicant shall do all things necessary to discharge the mortgage currently registered over the B Street, Suburb C property by Westpac Banking Corporation Limited ('the mortgage') so as to release the Respondent from all and any liability in relation to the mortgage.

(b) That in the event that the Applicant does comply with order 1(a) in relation to the mortgage within three months from the date of this order then the parties shall sign all documents and instruments and do all things necessary to list for sale the B Street, Suburb C property at a listing price agreed upon between them with a real estate agent agreed upon between them and shall

proceed to a sale of the B Street, Suburb C property at a sale price agreed upon between them and following such sale the proceeds of sale shall be applied as follows:

(i) In adjustment of rates on settlement;

(ii) In payment of agent's commission (if any) on sale;

(iii) In payment of legal and all other proper costs of sale;

(iv) In payment to the Westpac Banking Corporation Limited of a sum sufficient to discharge the mortgage;

(v) In payment of the balance to the Applicant.

(c) That in the event that order 1(b) operates and the B Street, Suburb C property does not sell by private sale within six months from the date of this order then the parties shall sign all documents and instruments and do all things necessary to list the B Street, Suburb C property for sale by public auction with an auction agent agreed upon between them at a reserve price agreed upon between them and shall proceed to a sale at a sale price agreed upon between them and the Applicant shall be solely responsible for all costs and expenses of the auction payable prior to the auction sale and following such sale the proceeds of sale shall be applied as provided in order 1(b) hereof.

(d) That in the event that order 1(c) operates and the B Street, Suburb C property does not sell by public auction in accordance with order 1(c) hereof then the B Street, Suburb C property shall be resubmitted for sale by private treaty in accordance with the provisions of order 1(b) hereof and the B Street, Suburb C property shall be resubmitted for sale by public auction at six (6) monthly intervals from the last public auction and be resubmitted for sale by private treaty between such auctions, until the B Street, Suburb C property shall be sold and upon such sale either by public auction or private treaty the proceeds of sale shall be applied as provided in order 1(b) hereof.

(e) That in the event that the parties are unable to reach agreement in relation to an auction agent, a real estate agent, a listing price, a reserve price or a sale price whether for a sale by public auction or by private treaty then the parties shall and do hereby appoint

the President for the time being of the Real Estate Institute of New South Wales or his nominee to determine such disputed matter or matters and the parties shall thereafter act in accordance with that determination and the parties shall be equally responsible for the costs and expenses of the President or his nominee in making such determination.

(f) That in accordance with section 90XT(1)(a) of the *Family Law Act 1975* (Cth) ('the Act'), whenever a splittable payment becomes payable in respect of the superannuation interest of the Respondent, Mr Bardow, in Super Fund D Account number ...49 ('the Fund'), the Applicant will be entitled to be paid an amount calculated in accordance with Part 6 of the *Family Law (Superannuation) Regulations 2001* (Cth) using the base amount of $171,846.00 and there will be a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for these Orders.

(g) That the Trustee of the Fund must comply with the obligations imposed upon trustees of eligible superannuation plans under the Act and *Family Law (Superannuation) Regulations 2001* (Cth).

(h) That Orders 1(f) and (g) bind the Trustee of the Fund and take effect from the operative time being the fourth business day after the date of service of these Orders on the Trustee.

(i) That, after service of the payment split notice pursuant to r.7A.03 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), the Applicant and Respondent shall do all such things and sign all such documents as may be necessary, including but not limited to, exercising a request pursuant to r.7A.06(1) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), for the rollover or transfer of the transferable benefits out of the Respondent's interest in the Super Fund D to a fund of the Applicant's choosing in accordance with r.7A.12 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

(j) That the Respondent is the sole owner in law and in equity as between himself and the Applicant of all items of real property, personal property and financial assets currently in his power,

possession or control other than as specifically dealt with elsewhere in this order, and including, but not limited to, the debt owing to the parties from Ms E in the sum of $75,000.00.

(k) That the Applicant is the sole owner in law and in equity as between herself and the Respondent of all items of real property, personal property and financial assets currently in her power, possession or control other than as specifically dealt with elsewhere in this order.

(2) That in the event that either party refuses or neglects to comply with any part of this order in relation to the execution of any deed, instrument or document the court appoints and authorises the Registrars of the Federal Circuit Court of Australia, Sydney Registry, to execute such deed, instrument or document in the name of the party who so refuses or neglects and further appoints those Registrars to do all acts and things necessary to give validity and operation to the deed, instrument or document.

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

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYC 2516 of 2018

MS LABREC
Applicant

And

MR BARDOW
Respondent

REASONS FOR JUDGMENT

Introduction

1. These are final property proceedings between the Applicant de facto Wife, Ms Labrec ('the Wife') and the Respondent de facto Husband, Mr Bardow ('the Husband'). The parties commenced cohabitation in 2006 and separated on either 1 November 2017 (on the Wife's evidence) or 30 January 2018 (on the Husband's evidence).

2. There are two children of the relationship, X, born in 2013, six years of age at the time of the hearing, and Y, born in 2014, five years of age at the time of the hearing.

3. On 24 April 2018, the Wife commenced proceedings for property settlement orders under section 90SM of the *Family Law Act 1975* (Cth) ('the Act'), and the Husband filed his Response on 4 July 2018.

4. On 13 September 2018, the parties attended a Conciliation Conference with a Registrar, but were not able to settle their matter.

5. On 6 March 2019, Judge Vasta conducted an interim hearing of the Wife's interim application for the Husband to pay to her spousal

maintenance for her support. His Honour made an interim order that the Husband pay to the Wife $300 per week as spousal maintenance.

6. The matter went to final hearing before me from 24 September 2019 until 25 September 2019. On hearing, the Wife was represented by Dr Barnett of Counsel. The Husband was represented by Mr Othen of Counsel.

7. At entirely my fault, these Reasons and final orders have been too long delayed and I apologise to the parties, their solicitors and counsels and, in the particular circumstances of this case, to the relevant members of the Husband's extended family for that delay.

Material relied upon

8. At final hearing, the Wife relied upon the following materials:

   a) A Case Outline document prepared by her counsel, Dr Barnett, and including the final orders sought by the Wife;

   b) Her Amended Initiating Application filed 18 December 2018;

   c) Her affidavit sworn or affirmed on 30 August 2019 and filed 2 September 2019;

   d) Her Financial Statement sworn or affirmed on 30 August 2019 and filed 2 September 2019; and

   e) A Balance Sheet prepared on behalf of the Wife in support of her submissions.

9. The Wife also relied upon the following exhibits admitted into evidence during the hearing:

   a) Exhibit A1 – Costs Advice Notice, dated 19 September 2019, from the Wife's solicitors to her;

   b) Exhibit A2 – Statement number 41 dated 9 June 2016 for the Westpac Rocket Statement relating to a home loan account ending #...88 and a Deposit Offset account ending #...38 in the joint names of the parties;

c) Exhibit A3 – mortgage application form with F Bank relating to a loan application by the Husband and Ms E (his sister), dated 13 March 2007;

d) Exhibit A4 – an 'Application for First Home Owner Grant' document under the *First Home Owner Grant Act 2000* (NSW) (as the Act was then known) in relation to an application by the Husband and Ms E, dated 9 March 2007;

e) Exhibit A5 – A Change to Home Loan Request form with F Bank, in relation to a refinance proposed by the Husband and Ms E, dated 27 March 2012;

f) Exhibit A6 – a Loan Application form with Westpac Banking Corporation ('Westpac') in relation to a loan application by the Husband and the Wife, dated 7 December 2010;

g) Exhibit A7 – a Loan Application form with Westpac in relation to a loan application by the Husband and the Wife, dated 14 February 2011;

h) Exhibit A8 – from the documents produced on subpoena by Dr W:

    i) A two-page report dated 1 June 2018 on the letterhead of Z Clinic relating to X;

    ii) A one-page report dated 7 August 2019 on the letterhead of Z Clinic relating to X; and

    iii) A tax invoice dated 1 June 2018 from Z Clinic Pty Ltd to the Wife in relation to X;

i) Exhibit A9 – a one-page print headed "*Leave – Balances*" in relation to the annual leave entitlements of the Husband with his current employer as at 11 August 2019;

j) Exhibit A10 – a subpoena to produce documents issued by the Court at the request of the Wife to Ms H (the Husband's mother) on 14 January 2019;

k) Exhibit A11 – an affidavit of service sworn by Mr AA, licensed process server, on 18 January 2019, filed with the Court on 12

February 2019, in relation to service of the subpoena in exhibit A10 on Ms H on 18 January 2019;

l) Exhibit A12 – a letter received in the Sydney Registry on 30 January 2019 in relation to this matter from Ms H and Mr T (the Husband's father) relating to exhibit A10;

m) Exhibit A13 – a letter dated 10 September 2019 from the Husband's lawyers to the Wife's lawyers;

n) Exhibit A14 – a letter dated 5 September 2019 from the Wife's lawyers to the Husband's lawyers;

o) Exhibit A15 – a letter dated 9 September 2019 from the Husband's lawyers to the Wife's lawyers;

p) Exhibit A16 – a letter dated 6 August 2019 from the Wife's lawyers to the trustee of Super Fund D (the trustees of the Husband's superannuation fund) and a letter dated 9 August 2019 from a "*Family Law Officer*" of Super Fund D Management Limited to the Wife, care of her solicitors, advising that the trustee had no objection to the superannuation splitting order proposed by the Wife, as notified in the former mentioned letter; and

q) Exhibit A17 – six pages of bank statements of various dates for a F Bank account in the name of Ms E ending #...38, and six pages of bank statements of various dates for a F Bank account ending #...34 in the joint names of the Husband and Ms E.

10. The Husband relied upon the following material:

a) An Amended Case Outline prepared by his counsel and containing the Husband's proposed short minutes of order;

b) The Husband's aide-memoire in relation to the Suburb G property;

c) His Amended Response filed 14 June 2019;

d) His affidavit, sworn 2 September and filed 3 September 2019;

e) His Financial Statement, sworn or affirmed 2 September and filed 3 September 2019;

f) An affidavit of Ms E, the Husband's sister, sworn 4 September and filed 10 September 2019; and

g) An affidavit of Ms H, the Husband's mother, sworn 3 July and filed 4 July 2018.

11. The Husband also relied on the following documents entered into evidence during the hearing as exhibits:

a) Exhibit R1 – a letter dated 20 September 2019 from the Husband's solicitors to the Husband, being a Costs Advice Notice;

b) Exhibit R2 – pages 2, 3, and 4 of statement #...14 of the Westpac Rocket Statement for the home loan account ending #...88 and the Deposit Offset account ending #...38 in the joint names of the Husband and the Wife;

c) Exhibit R3 – the whole of statement #...46 for the Westpac Rocket Statement for the home loan account ending #...88 and Deposit Offset account ending #...38 in the joint names of the Husband and the Wife; and

d) Exhibit R4 – a proof of evidence document by the Husband, dated 23 September 2019, with the annexures referred to in the proof of evidence.

The orders sought

12. The Wife seeks final orders summarised as follows:

a) That within 42 days of orders, the Husband pay to the Wife $330,000 and do all things necessary to transfer to her the whole of his interest in the real property at B Street, Suburb C ('the B Street, Suburb C property');

b) That simultaneously with the transfer; the Wife do all things necessary to obtain a discharge of the mortgage secured on title to the B Street, Suburb C property;

c) That a superannuation splitting order be made providing for the Wife to receive a base amount of $89,554 out of the Husband's interest in his Super Fund D account, that the order bind the trustees of the fund, and that the order take effect four business days after service of the order on the trustee;

d) That the base amount provided to the Wife out of the Husband's Super Fund D account be rolled out by her to a fund of her choosing;

e) That the Wife be the sole owner in law and in equity of all items of personal and real property in her possession of which she is the registered proprietor at the date of orders, including but not limited to all or any moneys standing to her credit in any bank or building society accounts, her shareholdings, her Motor Vehicle 1 and any present or future expectation under a trust or estate; and

f) That the Husband be declared the sole owner in law and in equity or all items of personal and real property in his possession or of which he is the registered proprietor as at the date of orders, including but not limited to his interest in the real property at J Street, Suburb G, NSW, all or any moneys standing to his credit in any bank or building society accounts, his shareholdings, his Motor Vehicle 2 and Motor Vehicle 3 and any present or future expectation under a trust or estate.

g) That the Husband pay the Wife's costs.

13. The Husband seeks final orders summarised as follows:

a) A declaration that the Husband has a 16 per cent interest in the property at J Street, Suburb G ('the J Street, Suburb G property') in NSW;

b) That within 60 days of orders, the Wife pay to the Husband $84,678;

c) That simultaneously with the payment described in (b) herein, the Husband do all things necessary to transfer to the Wife the whole of his interest in the B Street, Suburb C property;

d) That simultaneously with the transfer in order (c) herein, the parties do all things necessary to discharge and refinance "*the two mortgages to Westpac Bank*" secured over the B Street, Suburb C property into the Wife's sole name;

e) In the event the Wife defaults in relation to payment to the Husband under order (b) reproduced herein, the parties sell the B Street, Suburb C property, and after payment out of all loans secured on the property so as to discharge the mortgage, adjustment of rates, payment of agent's commission and fees and legal costs and fees of sale, the Husband receive $84,678 and the Wife receive the balance then remaining;

f) That there be a superannuation splitting order in favour of the Wife in the base amount of $74,537 out of the Husband's interest in the Super Fund D , that the orders bind the trustee of the fund, and that they have effect from the operative time, being the fourth business day after the date of service of the orders on the trustee;

g) That the Wife's application for spousal maintenance made on 18 December 2018 be dismissed and that spousal maintenance be discharged as at the date on which it stands paid;

h) That the parties forthwith do all acts and things necessary to divide any bank accounts in their joint names equally between them and to close such accounts;

i) That other than as required to perform the orders, the Husband release the Wife from all debts, liabilities, demands or claims whatsoever that the Husband has or would have against the Wife;

j) Subject to performance of the orders, the Wife release the Husband from any debts, liabilities, demands or claims whatsoever that the Wife has or would have against the Husband;

k) That except as otherwise provided in the orders, the parties are each declared the sole owners in law and in equity to the exclusion of the other, of all items of property and financial resources, including furniture, jewellery, household items, choses-in-action, motor vehicles, money in bank accounts and

superannuation entitlements held in their respective names, possession or control as at the date of these orders;

l) That except as otherwise provided in the orders the parties are each to remain solely liable to the exclusion of the other for any debt or liability held in their respective names as at the date of the orders;

m) An order pursuant to section 106A of the Act appointing a Registrar or Judge of the Family Court of Australia at Sydney; and

n) That the Wife pay the Husband's costs of the proceedings.

14. I note at this point that there is some difficulty in the Court making a declaration, particularly a declaration pursuant to section 90SL of the Act (though the section is not referred to in the orders sought) that the Husband "*...has an interest equivalent to the value of 16 per cent of the property known as*" the J Street, Suburb G property. This is on the basis that the Husband and his sister, Ms E, are the registered proprietors as co-owners of that property, and it is not in evidence as to whether they hold their interests as joint tenants or tenants in common.

15. It is asserted by the Husband that both he and his sister hold part of their legal interests in the property upon a resulting trust for their parents. Neither the Husband's sister nor his parents were parties to the proceedings. This is not to say that a finding as to the extent of the Husband's beneficial interest, if any, cannot be made for the purpose of these proceedings.

16. The Wife's application for spousal maintenance made on 18 December 2018 was by way of an application for interim orders in her Amended Initiating Application filed that day. That issue was the subject of the interim hearing before his Honour Judge Vasta on 6 March 2019, at which time his Honour made an order that the Husband pay the sum of $300 per week spousal maintenance to the Wife.

17. The Wife did not seek a final order in relation to spousal maintenance in either her Amended Initiating Application filed 18 December 2018, nor as one of the orders set out in her Case Outline at the final hearing. Interim orders cannot survive the making of final orders disposing of

proceedings and, accordingly, the interim order in relation to spousal maintenance made on 6 March 2019 will end on the making of final orders without any specific order of dismissal.[1]

18. Both parties have sought an order that the other party pay their costs of and incidental to the proceedings, however I will not make any order for costs together with the final orders in the matter. The issue of costs is an issue inherently to be considered and decided following the making of final orders. To consider the issue of costs in this matter, I would need further submissions as to what circumstances justify the Court making an order as to costs, rather than applying section 117(1) of the Act for each party to bear his or her own costs.[2] Inherently, those submissions would need to consider the final orders.

19. As I will not decide the issue of costs, I note that pursuant to rule 21.02 of the *Federal Circuit Court Rules 2001* (Cth), an application for an order for costs may be made within 28 days after a final order has been made or within any further time allowed by the Court.[3]

The evidence

20. At the time of the hearing, the Husband was 36 years of age and the Wife was 35 years of age. The parties commenced cohabitation in a de facto relationship in 2006 and never married. The Wife says the parties separated in November 2017 and that at that time the Husband moved out of the matrimonial home, being the parties' home unit at B Street, Suburb C and moved in with his parents in the J Street, Suburb G property.[4] The Husband says that the parties separated on 30 January 2018, the Wife remained in B Street, Suburb C property, and the Husband moved into the J Street, Suburb G property.[5]

21. Following the separation, X and Y remained living with the Wife and from that time until the hearing they spent each alternate weekend with the Husband from Friday night until Sunday afternoon. In the main, the Husband has only spent those two nights per fortnight caring for the

[1] *Sadasivam & Seshan* [2019] FamCAFC 76, [27]-[29].
[2] *Family Law Act 1975* (Cth) s 117(1).
[3] *Federal Circuit Court Rules 2001* (Cth), r 21.02.
[4] Wife's affidavit filed 2 September 2020, [42].
[5] Husband's affidavit filed 3 September 2020, [6]-[7].

children between the parties' separation and the final hearing, without any more extensive time during school holidays.

22. The parties separated for a period of about two months during 2008.

23. At the commencement of cohabitation the Wife was studying for her degree and working part-time with an earned income of about $26,000 per year. The father was in full-time employment and contracted to Employer K on a salary of about $75,000 per year.

24. The Wife commenced full-time employment at sometime between 2006 and 2012. In 2012, she left paid employment in preparation for the birth of the parties' first child, X, who was born in 2013. The Wife returned to paid employment on a part-time basis three days per week in 2016 with Employer L on a salary of $40,000 per year.

25. In 2016, the Wife changed her employment to Employer M working at first four days a week, and later either four or five days per week on a salary of about $80,000 per year.

26. In 2010, the Husband changed employment to full-time work with Employer N on a salary of $105,000 per year. In about 2011, the Husband changed to his current employment with the Employer O.

27. Accordingly, the Husband was the sole income earner for a period of about four years from 2012 to 2016 and was in receipt of a higher income than the Wife in the years when they were both in paid employment.

28. At the commencement of cohabitation, the Wife had a shareholding in various public companies in her P Shares with a value of $48,500 and a sum of about $4,000 in cash. Accordingly, I find that her initial contribution was to the value of about $52,500.

29. At the commencement of cohabitation, the Husband had two savings accounts with F Bank with the sum of about $2,000 in one account and the sum of about $7,500 in the other account. Accordingly, I find that the Husband's initial contribution was savings to a value of about $9,500.

30. Since 2004, two years and nine months before the parties commenced cohabitation, the Husband's parents, who at that time, and up until 2016, were living in Country Q, began sending sums of money by funds transfer to the Husband's bank account in Australia and to their daughter Ms E's bank account in Australia. It was the Husband's practice when he received such sums of money from his parents to transfer those sums to his sister's account, as it paid better interest than his account, and it being his case that he regarded all of those sums of money received by his parents as *remaining* money belonging to his parents.

31. The amount received by the Husband from his parents and applied as described, prior to the parties commencing cohabitation, totalled $108,916.45.

32. The moneys so received by the Husband from his parents between the commencement of the parties' cohabitation and the purchase by the Husband and his sister of the J Street, Suburb G property totalled $78,536.77.

33. As I have said, it is the Husband's case that when these sums were in his account, he was holding the moneys upon trust for his parents and that when the moneys were transferred by him to his sister's account, she was holding the money upon trust for their parents. These moneys, together with moneys received by the Husband's sister direct from their parents, were eventually applied toward the purchase of the J Street, Suburb G property in May and June 2007.

34. It is the Wife's case that, whatever the intent of the Husband's parents in forwarding the moneys to the Husband and to the Husband's sister between 30 January 2004 and the purchase of the J Street, Suburb G property, when the funds were applied to the purchase of the J Street, Suburb G property, the presumption of advancement applied so as to vest in the Husband and his sister the beneficial interest in the J Street, Suburb G property represented by that part of the purchase funds composed of money received from their parents.

35. From the commencement of cohabitation in 2006 until August 2011, the parties lived in a unit at Suburb R owned by the Wife's mother. The Wife's evidence is that the parties paid $250 per week by way of rent to

the Wife's mother for two or three months after they took up occupation, and that the Wife's mother then said to them that she would prefer that they stopped paying her the rent and save the money toward purchasing a property of their own. The Husband's evidence is that he paid $800 per month by way of rent to the Wife's mother from October 2006 until January 2008.

36. The Wife, in support of her contention, puts in evidence copies of bank statements of an account held by her mother. In cross-examination, the Wife admitted that she did not, at the relevant time, manage her mother's financial affairs and that it is possible that her mother had other accounts into which payments of rent may have been made in accordance with the Husband's evidence.

37. The Husband annexes to his affidavit, as annexure D, a copy of bank statements for an account in his name with F Bank showing regular transfers in an amount of $800 at monthly intervals, commencing on 19 October 2006 through to 14 January 2008, some described as "*TFR other bank investment property*" and others described as "*TFR other bank investment property rent*". The Husband's explanation for the reference to 'investment property' is that he:

> *was under the impression, at this point in time, that the property was an investment property which [the Wife's mother] had purchased in [the Wife's] name. I later found out, however, that this was not the case and the Suburb R property had never once been in [the Wife's] name.*[6]

38. I find that I prefer the evidence of the Husband, that from October 2006 until January 2008, the Husband paid to the Wife's mother the sum of $800 per month by way of rent for occupation of her Suburb R property by the parties.

39. On about 8 May 2007, the Husband and his sister settled their purchase of the property at J Street, Suburb G. The purchase price was $680,000. To part fund the purchase, the Husband and his sister obtained two loans with F Bank, both secured by way of a single registered mortgage on the J Street, Suburb G property. One loan was for $180,000 with a variable interest rate, and the other was for $220,000 with a fixed

[6] Husband's affidavit filed 3 September 2020, [27].

interest rate, both loans being in the joint names of the Husband and his sister.

40. Further costs of purchase were $26,094 for stamp duty and $10,000 paid to the vendor to purchase the furniture in the property, bringing the total cost of the purchase to approximately $716,094. The Husband's evidence is that the funds forwarded over the previous three and a half years to the Husband and his sister by their parents were utilised to fund the balance of the purchase price, stamp duty, purchase of the furniture, and the cost of the purchase. It is the Husband's evidence that these extra funds included a bank cheque for $68,015 paid as a deposit on purchase of the home from funds received from the parents, and that all of the balance of the purchase price and costs were also paid from those funds.

41. The Husband deposes that "*in or about late 2005*", he had a discussion with his father in which his father advised that it was the parents' intention to move to Australia when they retired, and that they would like their children to begin looking for a property for them to purchase. Both the Husband and his sister put into evidence a copy of a handwritten letter from their parents to them and a certified translation thereof, the text of which, in translation, reads:

> *To our beloved children!*
>
> *Dad and I really miss you but are happy that all is well with you. We've thought about it and have decided that in the future we would like to move to live in Australia, and specifically in Sydney. Before we lived right next to you, and it's hard not to see your children for a long time.*
>
> *Dad read that you can arrange a Parents Visa. I think that sounds like a long process, but we need to start arranging this and collating documents now.*
>
> *We have money so are thinking that it would be good if you, Mr Bardow and Ms E, could find us a place to live. Dad is dreaming of a house, but I'd be happy with an apartment too. Seeing as there are two of you and this is a financial question, let us parents prepare an agreement to be formalised with our signatures. This is really important for dad and for me!*

(1) You, Mr Bardow and Ms E, study the real estate market in Sydney and present to us information as to real estate prices, technical characteristics of the residence, land block sizes, location or other information that we parents would be interested in.

You can search in neighbouring suburbs to your Suburb S or in any other good location.

(2) We, parents, will transfer to you the funds that you will use for the purchase of the residence where we will be able to live upon arrival in Australia.

(3) All the funds that will be transferred into, Mr Bardow, your account and, Ms E, your account, will be used only for the purchase of the residence and loan repayments for the residence.

(4) Prior to purchasing the residence, all relevant conditions of the real estate purchase (price, size, location, layout…) are first to be agreed with us – the parents.

(5) In the event that the real estate is sold, all funds invested into it by the parents will be returned to us taking into account market value and the deposited share.

(6) In the event of the death of the parents, all funds invested in real estate will be divided equally between you – Mr Bardow and Ms E.

This is essentially everything, unless you suggest something which we can consider together. Could you please formalise everything with your signatures as evidence of your agreement!

All is well with us, we're working.

Parents:

Father: Mr T [signature]

Mother: Ms H [signature]

Son: Mr Bardow [signature]

Daughter: Ms E [signature]

I'm sending this letter by ordinary post, and ask my darlings to sign the letter and return to us.

With kisses and love to you!

Your parents

2006

42. The original handwritten document bears signatures purporting, from description, to be each of the parents, the Husband, and his sister

43. I first note that on the Husband's evidence the payments into his account from his parents began on 30 January 2004 and that there had been 10 payments prior to the date of the letter. All of those payments were into the Husband's account. Thereafter and until the property was purchased, the payments were into sometimes the Husband's account and sometimes into his sister's account.

44. Following the purchase, the J Street, Suburb G property was occupied by the Husband's sister and her Husband, Mr U.

45. The Husband annexes to his affidavit, as annexure A, a copy of a letter dated 14 August 2019 from his solicitors to the solicitors for the Wife. That letter encloses three schedules prepared by the Husband summarising the various bank transactions referred to above whereby the Husband and his sister received moneys into their accounts from their parents prior to the purchase of the J Street, Suburb G property.

46. Each schedule indicates the moneys paid towards the repayment of the loan accounts secured by the mortgage on the J Street, Suburb G property:

    a) The first schedule indicates the payments made by the parents into the Husband's account, his sister's account, or an offset account in the joint names of the Husband and his sister, set up at the time of the J Street, Suburb G property's purchase;

    b) The second schedule indicates the payments and withdrawals made by the Husband's sister into and out of the offset account; and

    c) The third schedule indicates the payments and withdrawals made by the Husband into and out of the offset account.

47. Enclosed also with the letter were "*copies of the various bank account statements which evidence the above-mentioned transactions set out in the summaries, together with indexes in support of the summaries*".[7]

48. On hearing, the summaries, forming part of annexure A to the Husband's affidavit, were relied upon by the Husband as summaries within section 50 of the *Evidence Act 1995* (Cth) ('the Evidence Act') and not objected to on behalf of the Wife.

49. Based upon the above-mentioned schedules, the Husband and the Husband's sister both assert in their evidence that their parents contributed the whole of the moneys for the purchase of the J Street, Suburb G property, payment of stamp duty on purchase, purchase of the furniture, and other costs of purchase, other than the sum of $400,000 borrowed on the F Bank loan accounts by the Husband and the Husband's sister in their joint names, secured by way of mortgage.

50. The schedule for the Husband's parents asserts that, following the purchase of the property, they contributed a further sum of $179,230.18 toward the purchase, making total contributed by them $504,089.79.

51. The schedule prepared in relation to contributions by the Husband's sister to the offset account asserts that she contributed a total sum of $237,531.01. The schedule prepared in relation to the Husband's contribution to the offset account asserts that he contributed a total of $137,737.50.

52. If the beneficial ownership of the J Street, Suburb G property is apportioned in accordance with the contributions to total purchase price, stamp duty, furniture, other costs of purchase, and inclusive of interest on the loan accounts, then the relative ownerships would be in the proportion 57.33 per cent by the parents, 27 per cent by the Husband's sister, and 15.67 per cent by the Husband.

53. For the purposes of the hearing, the competing contentions accepted by the parties on their competing arguments as to the extent of the Husband's beneficial interest in the J Street, Suburb G property were that he either had a beneficial interest in 50 per cent of the property (the Wife's position relying on the presumption of advancement) or

[7] Husband's affidavit filed 3 September 2020, annexure A.

that he had a 16 per cent interest (the Husband's position relying on a rebuttal of the presumption of advancement and resulting trust as to 57.33 per cent of the property held by the Husband and his sister for their parents). I will examine this issue and make findings later in these Reasons.

54. The offset account opened by the Husband and the Husband's sister with F Bank following the purchase of the J Street, Suburb G property was the account from which repayments of the two loan accounts were drawn by F Bank.

55. The Wife tendered into evidence documents that were marked as exhibits A3, A4, A5, A6, and A7. I will briefly reiterate the nature of those documents:

a) Applications for finance by the Husband and his sister with F Bank in relation to purchase of the J Street, Suburb G property (exhibit A3);

b) An application for the first home owner's benefit payment by the Husband and his sister in relation to their purchase of the J Street, Suburb G property (exhibit A4);

c) An application for finance to re-finance the loan accounts secured on the J Street, Suburb G property by the Husband and his sister (exhibit A5);

d) An application for finance by the Husband and Wife with Westpac Bank for the purchase of the B Street, Suburb C property (exhibit A6); and

e) An application for a loan with Westpac Banking Corporation by the Husband and the Wife also in relation to the purchase of the B Street, Suburb C property.

56. In each of those documents, it is plain that the Husband indicated to the relevant financial institution[8] and to the Office of State Revenue NSW (as it was then known) for the first home owner's grant that the Husband and his sister were the sole owners of the J Street, Suburb G

[8] F Bank for exhibits A3 and A5, and Westpac Banking Corporation for exhibits A6 and A7.

property,[9] and that he had a half interest in the J Street, Suburb G property.[10]

57. In cross-examination, the Husband's explanation was that, as he and his sister were the joint registered proprietors of that property, he considered that he was answering the information sought in each of those application documents correctly. He explained that he did not disclose that his parents held the largest share of that property by contribution to purchase price, because that information was not asked for in those documents.

58. In cross-examination, it was put to the Wife that she was aware that the Husband's co-purchase of the J Street, Suburb G property was not for the purpose of receiving an income stream from the property, and she agreed with that proposition. When it was put to the Wife in cross-examination that she had presented no evidence as to the reason why the Husband had purchased the J Street, Suburb G property, she answered that the Husband had told her that he had bought it for their children.

59. The Husband's counsel asserted in his submissions that this was a fabrication by the Wife during cross-examination, noting that the purchase was made in May 2007 and that the parties' first child, X, was not born until 2013. That disparity in dates does not of itself disprove the Wife's assertion – parents can purchase property intending it to be for the benefit of their children, whom they hope to have at some time in the future.

60. The Husband's sister and her Husband occupied the J Street, Suburb G property until April 2016 when they moved to reside in Country V for purposes associated with the Husband's sister's employment. During the whole of the period of their occupation, they paid no rent to the Husband in relation to their occupation of the J Street, Suburb G property.

61. The Wife annexes to her affidavit copies of the schedules prepared by the Husband of payments by the parents, the Husband, and his sister into the F Bank offset account associated with the J Street, Suburb G

[9] Exhibits A3, A4, and A5
[10] Exhibits A6 and A7.

property and, in paragraph 25 of her affidavit, she accepts that between 11 May 2007 and 26 February 2016, when the loan accounts were fully repaid, the Husband's sister and Mr U made a total contribution of $237,531.01 into the F Bank offset account in the joint names of the Husband and the Husband's sister.

62. In the Wife's affidavit, she accepts that the Husband made a contribution of $137,737.50 "*towards the loan repayments of the J Street, Suburb G property*".[11] However, she disputes that all financial transactions shown in the three schedules are "*financial contributions made to the property at J Street, Suburb G*".[12]

63. The Wife gives evidence that she cannot concede the amounts asserted to have been provided by the Husband's parents, as she has not been provided with documentation to establish the source of those funds. She does not concede that deposits into the Husband's account and into the Husband's sister's account prior to the purchase of the J Street, Suburb G property were from the Husband's parents and says "*I do not know the source of these funds*."[13] She further says, "*I also do not know how these funds were spent and do not believe they have any relevance to these proceedings*."[14]

64. The Wife does concede that at least the sum of $108,772.02 was transferred into the Husband's sister's account by the Husband and by the parents, and that a transfer was made by the Husband's sister from her account into the joint offset account, but asserts that a sum of $7,062 was retained by the Husband's sister in her account.[15] She also notes that sums were paid into the Husband's account – from what she asserts is an unknown source, asserted by the Husband to be his parents – and that transfers by the Husband out of his account "*into an unknown account*" were not in the same amounts.[16]

65. In early 2008, the parties purchased a Motor Vehicle 3 for about $11,500, that sum being withdrawn by the Husband from the F Bank offset account in the joint name of the Husband and his sister.

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[11] Wife's affidavit filed 2 September 2019, [26].
[12] Wife's affidavit filed 2 September 2019, [23].
[13] Wife's affidavit filed 2 September 2019, [24(a)].
[14] Wife's affidavit filed 2 September 2019, [24(b)].
[15] Wife's affidavit filed 2 September 2019, [24(d)-(e)].
[16] Wife's affidavit filed 2 September 2019, [24(f)].

66. In 2010, the Husband and the Husband's sister refinanced the two loan accounts secured on the J Street, Suburb G property and consolidated them into one loan account with a debit balance of approximately $300,000.

67. In about mid-2010, the Husband and Wife agreed to establish a joint share portfolio account. The Husband's evidence is that the Wife sold the share portfolio held by her at the start of cohabitation for approximately $50,000 and applied the funds to purchase BB Shares and CC Shares in her sole name for a sum of $25,000, and applied the remaining $25,000 toward purchase of shares in the parties' joint portfolio. The Husband says that he contributed the sum of approximately $20,000, presumably from his earnings, toward the purchase of shares in the parties' joint share portfolio.

68. In March/April of 2011, the parties purchased the B Street, Suburb C property for $585,000 in their joint names. The total purchase cost was about $615,000 including stamp duty and other costs. The parties obtained a loan from Westpac in the sum of $470,000, of which $468,000 was available for the purchase. The Wife sold shares in the share portfolio in her sole name, and the parties sold shares in their joint share portfolio and, between 21 February 2011 and 3 March 2011, deposited those funds into the Husband's Westpac Choice account ending #...65. On the evidence, $31,200 came from the sale of their joint share portfolio assets and $40,000 came from the sale of the Wife's share portfolio assets.

69. On 21 March 2011, a sum of $83,540 was withdrawn from the Husband's Westpac Choice account to apply toward the purchase. A sum of $57,052.50 was withdrawn on 17 February 2011 by the Husband from the F Bank offset account in the joint names of the Husband and his sister and applied toward payment of the deposit on exchange of contracts on the B Street, Suburb C property.

70. Following their purchase of the B Street, Suburb C property, the parties received a gift of $30,000 from the Wife's mother and applied that sum toward renovations of the property. The parties moved into the property in August 2011.

71. The Wife left her paid employment during 2012 while pregnant with X and did not return to paid employment until taking up part-time work in 2016 with Employer L three days a week. In August of that year, she commenced working for Employer M four days per week.

72. In 2015, the Husband withdrew a sum of $7,150 from the parties' bank account to pay as a bond in relation to his parents obtaining a visa for migration to Australia with the Husband as their sponsor/guarantor. The Wife's evidence is that the bond was for a period of two years and should have been refunded to the parties in June 2017.

73. On 13 April 2016, the Husband withdrew $75,000 from the parties' loan account with Westpac that was secured on the B Street, Suburb C property and provided those moneys to the Husband's sister. There was some confusion at the time of the loan as to the purpose, the Wife giving evidence that she believed at the time of the loan that the moneys were to be used by the Husband's sister in paying out her share of the loan account in the Husband and his sister's name secured on the J Street, Suburb G property, but the Wife accepted at the hearing that the sum had been provided to the Husband's sister and applied by her to various purposes connected with her relocation with her Husband to Country V in 2016.

74. The parties agreed that the sum of $75,000 remains owing by the Husband's sister to the parties. In cross-examination, the Husband referred to the loan as "*an interest free loan*" on the basis that "*we are family*".

75. In 2016, the Husband's parents migrated to Australia and commenced living in the J Street, Suburb G property. At no time after the Husband's parents took up occupation of the J Street, Suburb G property have they paid any moneys to the Husband in relation to their occupation.

76. In 2017, the parties purchased a new Motor Vehicle 2 for $34,500, applying funds for the purchase from their joint offset account.

77. The parties separated in either November 2017 (on the Wife's evidence) or 30 January 2018 (on the Husband's evidence). In either case it is agreed that the Husband vacated the B Street, Suburb C property and

began living at the J Street, Suburb G property with his parents, while the Wife and the children remained living in the B Street, Suburb C property.

78. From the parties' separation until 22 August 2018, the Husband paid half of the required repayments on the loan account secured on the B Street, Suburb C property, in the sum of $305 per week, but made no contribution to strata levies, council rates, or other outgoings. The Husband ceased making any payments toward that loan account on 22 August 2018.

79. The Wife gives evidence that following the parties' separation she was in financial difficulties, and that she began receiving amounts of money from her mother by way of loans to assist her in payment of the loan account secured by a mortgage on the B Street, Suburb C property. The Wife and her mother entered into a loan agreement on 1 October 2018 whereby it was agreed between them that the Wife's mother would lend to her a sum of $7,800 for the purpose of payment of the mortgage loan account repayments. Between 1 October 2018 and 20 February 2019, the Wife's mother lent the Wife $6,500 of the $7,800 facility. That loan is still owed by the Wife to her mother.

80. On 24 April 2018, the Wife commenced these proceedings, and, on 6 March 2019, the interim order was made for the Husband to pay the Wife the sum of $300 per week by way of spousal maintenance.

81. Following the separation, the Wife sold shares in her name and received about $20,000, $10,000 of which she applied toward payment of her legal fees for these proceedings and $10,000 of which she applied toward living expenses for herself and the children.

82. On 16 January 2018, the Husband withdrew $55,000 from the parties' joint offset account and deposited that sum into his Westpac Choice account ending #...65 in his sole name, that sum thereafter intermingling with the Husband's income from his employment. The Husband then applied a total of $20,950 for the benefit of his parents, $28,720 in payment of legal fees for these proceedings, and the balance toward living expenses.

83. On 30 January 2018, the Wife withdrew $50,000 from the parties' joint offset account with Westpac Bank and, on 31 January 2018, withdrew a further $2,000 from that account. In effect, therefore, the amount withdrawn by the Wife was about $52,150. In the course of cross-examination, the Wife conceded that any moneys withdrawn from that account after the Husband's withdrawal on 16 January 2018 of $55,000, other than direct debits for child care costs and payment of the loan account with Westpac secured on the B Street, Suburb C property, were withdrawals by her. The Wife applied $23,000 toward the purchase of a Motor Vehicle 4 (later traded in by her on a Motor Vehicle 1) and $24,780.28 toward her legal fees for these proceedings, the balance of about $4,200 being expended by the Wife on living expenses for herself and the children.

84. In August 2018, the Wife traded in the Motor Vehicle 4 on a Motor Vehicle 1. The Motor Vehicle 1 cost $35,500. The Wife received $17,500 trade-in on the Motor Vehicle 4, paid $2,000 for the purchase on her credit card and obtained a loan with DD Finance for $16,000.

85. In February 2018, the Wife sought payment of child support by the Husband by assessment through the Child Support Agency. The first assessment was for the Husband to pay $330 per week to the Wife, and she received the first payment on 6 April 2018. In March 2018, the assessment amount was raised to $430 per week, and, in March 2019, it was lowered to $342.67.

86. The Husband says in his affidavit that at the time of the hearing, he was paying $464 per week by way of assessed child support.[17] This contrasts somewhat with item 31 of his Financial Statement filed 3 September 2020, where the Husband indicates that he pays $643 for the "*benefit of X and Y and Spousal Maintenance for Mortgage*". The spousal maintenance alluded to in this item is in the amount of $300 per week, pursuant to the orders of Judge Vasta on 6 March 2019, which would leave $343 paid by him pursuant to an assessment of child support.

87. The Wife gives evidence that she has on several occasions asked the Husband for further financial assistance with the expenses incurred by

[17] Husband's affidavit filed 2 September 2020, [82].

her for the children for school fees, medical costs and the cost of extracurricular activities, but that the Husband has refused to provide extra financial assistance over and above the amount he pays for child support as assessed.

88. The Wife asserts that she undertook most of the homemaker role from 2006 until 2012 when they were both in employment, though the Husband asserts that the parties shared the homemaker role during this time. The Wife says that once she ceased work between 2012 and 2016 for the birth of the children, she undertook the whole of the homemaker role and the principal day-to-day care of the children. In cross-examination, the Husband conceded that the Wife was the primary carer for the children. The Wife's mother assisted with the care of the children after the Wife returned to work four days a week in 2016, and, on occasions, the parties were also assisted by the Husband's mother.

89. Since the parties' separation, the Wife has been solely responsible for the parenting of the children except for two nights per fortnight when they are in the care of the Husband. The Husband does not spend any extra time with the children during school holiday periods.

90. The child, X, has been diagnosed with ADHD and learning difficulties. This has led to the Wife incurring some medical expenses for X without any extra financial assistance from the Husband over and above his assessed child support payments.

91. The Husband concedes that, since his parents migrated to Australia in 2016, he has provided them with money to assist them with their living and that he is responsible for their financial support as their sponsor/guarantor of their visas until they become eligible for Centrelink assistance. In paragraph 79 of his affidavit, he says:

> *I am my parents' sponsor/guarantor of for [sic] the next eight years whereby I am financially responsible for meeting their living expenses, as they are not entitled to Centrelink benefits or the Australian pension … My parents do not have any savings or significant assets in Australia, other than their interest in the J Street, Suburb G property.*[18]

92. Both the parties are in good health.

[18] Husband's affidavit filed 3 September 2019, [79].

93. The Wife is now in full-time employment with a yearly salary of about $85,200 plus bonuses. The Husband is in full-time employment with a salary of $150,000 per year plus bonuses. In the financial year ending 2018, he had a taxable income of $166,829.

94. X's ADHD diagnosis was by a paediatrician on 1 January 2018. His Mother paid $100 per session for speech therapy for him between April and June 2019, and then ceased the therapy as should could no longer afford it.

95. The Wife was cross-examined by the Husband's counsel in relation to her ability to borrow moneys to refinance the joint loan in the name of the parties secured on the B Street, Suburb C property and to pay out any sum that may be ordered by the Court to be paid by her to the Husband by way of property settlement order. She gave evidence that she had made inquiries and been told she had a borrowing capacity of "*up to $400,000*". She indicated that she could not obtain assistance in relation to funds for payment out of the loan account and payment to the Husband, if any, from any other person, including her mother, as she now had a poor relationship with her mother.

The evidence of Ms H

96. The Husband's mother, Ms H, gave evidence by affidavit and was cross-examined. She is from Country EE and was aged 59 years at the time of the hearing, and her Husband is from Country Q and was aged 59 years at the time of the hearing. They lived in Country Q prior to their migration to Australia.

97. In 2004, the Husband's parents decided they wished to live in Australia where their son and daughter were living. They commenced transferring amounts of about $10,000 to the Husband and to the Husband's sister into their relevant accounts, and it was Ms H's belief at that time that the purpose of the transfers was to accumulate funds for the purchase of real property for the Husband's parents to occupy when they migrated to Australia.

98. In 2006, Ms H and her husband became worried that their children may spend some of the funds that they were receiving from their parents, and so Ms H sent the handwritten letter referred to earlier to the

Husband and his sister to document that the funds were being transferred for the purpose of purchasing a property, and that the funds were not a loan. She and her Husband both signed the letter and, in the text of the letter as set out above, requested that their children also sign the letter to indicate that they accepted the terms set out in the letter.

99. In 2007, when the Husband and his sister identified the J Street, Suburb G property, they purchased that property in their joint names and applied $310,000 from an account in the Husband's sister's name that was composed entirely of funds accumulated from transfers by the parents to the Husband and his sister for that purpose. She deposes that a further $26,000 was also paid from those funds for the purchase.

100. Ms H and her Husband applied for a visa to live in Australia in 2007 and were told there was an eight-year waiting list.

101. Following the purchase of the J Street, Suburb G property by the Husband and his sister, the parents transferred to their children further sums to a total of $161,249. In 2016, the parents commenced residing in Australia and living in the J Street, Suburb G property.

102. A subpoena was issued by the Court at the request of the Wife to Ms H on 14 January 2019, being a subpoena for production.[19] That document was served on Ms H on 18 January 2019 at 12:50PM and $30 conduct money was tendered and accepted. On 30 January 2019, a letter was received in the Sydney Registry from Ms H and her Husband indicating that on 19 January 2019 they had left Australia for pre-planned travel, that they did not understand what the subpoena required of them, that they had difficulty with understanding the subpoena due to their lack of skills in the English language, that they had researched obtaining legal advice and had found out that such legal advice would cost between $2,500 and $5,000 dollars "*per person*", and that they could not afford that expense.

103. They indicated they would attend to the subpoena on their arrival back in Australia. However, by the time of the final hearing, there had been no production of documents in answer to the subpoena. Ms H was cross-examined about her failure to produce documents in answer to

[19] Exhibit A10.

the subpoena, and that evidence was covered by a certificate under section 128 of the Evidence Act. When challenged with the assertion that Ms H chose not to get legal advice, she responded "*I can't spend the money*."

104. In the course of being cross-examined on behalf of the Wife, Ms H was referred to the handwritten letter of 2006 referred to above, and she accepted that she sent the letter to her children. She accepted that, prior to 2006, she and her Husband had been sending money to the Husband and his sister. When asked if she accepted that the property at J Street, Suburb G was not purchased until 2007, she responded, "*Yes, for me and my Husband*." She was challenged that the Husband was currently living with his parents in the J Street, Suburb G property and that he did not pay rent for staying there, to which she responded, "*No, it's not our custom to do that*."

The evidence of Ms E

105. The Husband's sister, Ms E, provided evidence by way of affidavit and was cross-examined. She deposed that, in 2005, her brother said to, her words to the effect of:

> *Mum and dad want us to start looking for a property here in Australia to buy on their behalf. They will transfer us the money to be able to put a deposit down for the property.*

106. The Husband's sister annexes a copy of the handwritten letter of 2006 from her parents and the certified translation thereof to her affidavit, and says that she and her brother received the letter in 2006 when they were residing together.

107. She gives her evidence in relation to the moneys forwarded to her bank account and to the Husband's bank account by their parents:

> *... which were to be held in our respective bank accounts until such time that we had purchased the property on their behalf, and, upon purchasing a property, we would utilise these funds for payment of property.*[20]

108. She gives detail of the amounts transferred by her parents to her account and deposes that her parents also gave her lump sums:

[20] Affidavit of Ms E filed 10 September 2019, [12].

which equate with an approximate sum of $68,000 by way of cash deposits which are subsequently deposited into my bank accounts on their behalf.[21]

109. She gives evidence in relation to the purchase and funding of the purchase of the J Street, Suburb G property that equates with the evidence of the Husband. The Husband's sister attaches to her affidavit a schedule that sets out all the payments made by her and her Husband toward repayment and outgoings of the property for the period 11 May 2007 to 26 February 2016. The schedule prepared by the Husband's sister and annexed to her affidavit, and the schedule prepared by the Husband and annexed to his affidavit, with a copy annexed to the Wife's affidavit, differ only in that the Husband's schedule asserts that they contributed $237,531.01, and the Husband's sister's schedule asserts that she and her Husband contributed $236,846.01. This is a difference of $685.

110. The Husband's schedule contains 405 items, and his sister's schedule contains 406 items. The Husband's sister deposes that her Husband transferred into her account a further sum of $98,772 by various transfers between 15 May 2007 and 4 June 2010, the whole of which she applied toward repayment of the loan account secured by a mortgage on the J Street, Suburb G property.

111. The Husband's sister acknowledges that she received a loan from the Husband in the sum of $75,000 to assist her with the cost of relocating to Country V and that the loan remains outstanding.

112. The Husband's sister was cross-examined by the Wife's counsel in relation to her part in completing the applications for finance and the application for the first home owner's grant in exhibits A3, A4, and A5. In relation to the application for the first home owner's grant, when asked if she had made any enquiries as to whether or not her parents would be regarded as persons with a relevant interest in the J Street, Suburb G property and therefore disclosable on the document, she responded that she and her brother had had the help of a solicitor in completing the first home owner's grant application, that the solicitor knew they were buying the house for their parents, and that they were not advised to disclose that information on the documents.

[21] Affidavit of Ms E filed 10 September 2019, [13].

113. When asked if she had asked any questions of the relevant financial institutions about her parents having an interest in the property, she responded "*we asked the bank and the solicitor if we should put our parents down and they told me no, the loan is for yourself and your brother.*"

114. When shown exhibit A5 in relation to the refinance by the Husband and herself with F Bank in relation to the J Street, Suburb G property, and asked if she agreed that nowhere in the document did it indicate that anyone else besides herself and her brother had ownership of the J Street, Suburb G property, she responded "*The document does not ask for anyone who had an interest in the house. The document doesn't ask me to do that.*"

115. When challenged that she did not pay rent to her parents for the period of time she occupied the property from its purchase in 2007 until she vacated the property to move to Country V in 2016, she responded "*Why would I pay rent at my parents, no I didn't.*"

116. The Wife relied on her Financial Statement sworn or affirmed by her on 30 August 2019 and filed on 2 September 2019 setting out her financial circumstances at the time of the hearing. The Husband relied on his Financial Statement sworn or affirmed on 2 September and filed 3 September 2019 to the same effect.

The issues

117. Before I commence the task of identifying the matrimonial asset pool and ownerships as between the parties and proceeding with the legislative pathway under section 90SM, the issues to be resolved are as follows:

a) The extent of the Husband's interest in the J Street, Suburb G property. The Wife contends that he has a 50 per cent beneficial interest, whereas the Husband contends that he has a 16 per cent beneficial interest;

b) How the Court should treat the sums asserted by the parties to be add-backs to the matrimonial asset pool. Those add-backs funds are moneys withdrawn by each of the parties from their joint

Westpac Bank Rocket Statement account. In each party's case, the funds were paid in part towards their legal fees;

c) Whether the debt owed by the Wife to her mother in the sum of $6,500 should be included in the global matrimonial asset pool, calculated as if a joint liability, or dealt with on its own and left as a liability of the Wife outside a global matrimonial asset pool calculation; and

d) Whether the value of the Husband's accrued annual leave of 86 and a half days with the Wife's contended value of $24,993 should form an asset in the calculation of the matrimonial asset pool.

The Husband's interest in the J Street, Suburb G property

118. The Husband asserts that up to the time of purchase of the J Street, Suburb G property in May and June 2017, his parents provided a sum of $324,859.61. Given the sum of $400,000 was applied to the purchase (being moneys borrowed by the Husband and his sister from F Bank on the two loan accounts, a total from two loans of $180,000 and $220,000), this provided $716,000. The purchase price of the property was $680,000 with an additional $10,000 to purchase the furniture contained in the home, and $26,094 for stamp duty and costs.

119. The Wife does not admit that all of the moneys that the Husband asserts were received by him were from his parents, but she does not and cannot give any other source for that money.

120. The J Street, Suburb G property was purchased in May and June 2007, seven and eight months after the parties commenced a cohabitation. The Wife does not assert that she contributed to any of the moneys applied by the Husband and the Husband's sister for the purchase of the J Street, Suburb G property outside of the loan account moneys, other than that if any of those moneys were savings accumulated by the Husband between October 2006 and May 2007, then there may have been some contribution on her part in consequence of the cohabitation for that period of time.[22]

[22] See, eg, Wife's affidavit filed 2 September 2019, [20], [27].

121. However, the Husband relies on his own evidence, the evidence of his sister, and the evidence of his mother that the sum of $316,000 applied for the purchase was composed entirely of money transferred to himself and to his sister by his parents, and not being the whole of that sum to that time.

122. The Wife contends that even if the Husband's parents provided the funds applied to a purchase of the J Street, Suburb G property other than any loan account moneys, there is a presumption that they provided those funds for the benefit of the Husband and his sister, to advance their children in their lives, and *not* themselves.

123. The Wife contends that the presumption of advancement also applies to the funds paid by the Husband's parents to repayment of the loan accounts, such that when taken together with the financial contribution to repayment of the loan accounts by the Husband and his sister – on the Husband's evidence, $137,737 and $237,431.01 respectively – the beneficial interest in the property rests in equal shares with the Husband and the Husband's sister, and that the Husband's parents have no beneficial interest in the property. This does not take into account any disparity in the contributions made by the Husband and the Husband's sister during repayment of the loan accounts that is inherent in the evidence given by each of them.

124. The Husband, for his part, contends that the moneys provided to himself and his sister for the purpose of the purchase of the J Street, Suburb G property gives rise to the presumption of advancement, but that the presumption is rebutted by the evidence of the Husband, his sister, and their mother.

125. A neat summary of the law relating to the presumption of advancement is contained in the judgment of Heydon JA, Spigelman CJ and Sheller JA agreeing, in *Damberg & Damberg & Others*:[23]

> *There is a presumption that where one or more parents convey property to a child, the parent or parents intended to give the child the beneficial interest in the property, not merely the legal title. That presumption can be rebutted by showing, on the balance of probabilities, that the parent or parents did not have*

[23] *Damberg & Damberg & Others* [2001] NSWCA 87.

that intention. In the present circumstances, where the husband alone transferred the property, it is his actual intention alone which is to be ascertained: Calverley v Green [1984] HCA 81; (1984) 155 CLR 242 at 246-251 per Gibbs CJ.[24]

126. In *Nelson v Nelson*[25] in the New South Wales Court of Appeal, and then later the High Court of Australia, the respective appellate courts confirmed that the presumption applies between parent or parents and an adult child.

127. In *Calverley & Green*,[26] Deane J preferred to state the rule as not strictly a presumption, but as a principle that in certain relationships, such as parent/child, equity infers that in a transfer of property, from parent to the child, the beneficial interest in the property follows the legal title.

128. Their Honours in *Damberg* further clarified their broad summary in two key areas. First, they clarified that whilst the standard of proof for rebuttal of the presumption was on the balance of probabilities, the presumption does "*not…give way to slight circmstances…*"[27], nor is the presumption to be "*…frittered away by nice refinements*".[28]

129. Their Honours make reference to several authorities that suggest that the standard of proof for rebutting the presumption is "*higher than the normal civil standard*".[29] However, the Court was not satisfied that this was an instance that required the principle in *Briginshaw v Briginshaw*.[30] The Court deemed that a rebuttal of the presumption needed proof of "*definite intention to retain beneficial title*"[31] not a "*nebulous intention to rely upon the… relationship as a source of control over the property*".[32]

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[24] *Damberg & Damberg & Others* [2001] NSWCA 87, [42].
[25] *Nelson v Nelson* (1994) 33 NSWLR 740; *Nelson & Nelson* (1995) 184 CLR 538.
[26] *Calverley & Green* (1984) 155 CLR 242.
[27] *Damberg & Damberg & Others* [2001] NSWCA 87, [43]; *Shepherd v Cartwright* [1955] AC 431.
[28] *Damberg & Damberg & Others* [2001] NSWCA 87, [43].
[29] *Damberg & Damberg & Others* [2001] NSWCA 87, [43], citing *Grey v Grey* [1677] EngR 86, [598].
[30] The proposition of the principle is that more convincing evidence is necessary to meet the standard of proof in civil matters where an allegation is particularly serious, or unlikely to have occurred; *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[31] *Damberg & Damberg & Others* [2001] NSWCA 87, [44].
[32] *Damberg & Damberg & Others* [2001] NSWCA 87, [44], citing *Drever v Drever* [1936] ALR 446, [450] (Dixon J).

130. Second, and flowing on in consequence of the first clarification, the Court delineated what evidence was appropriate and admissible for the purposes of a rebuttal. With regard to what would constitute admissible evidence for this purpose, their Honours cited with approval the following passage from *Snell's Equity*, cited in *Shepherd & Cartwright*:[33]

> *The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration ... But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.*[34]

131. The Court pertinently explained that the reference to declarations in that passage was to 'out of Court' declarations. The parties to a case may give testimonial evidence in Court of their past intentions. However, their Honours emphasised that where:

> *...a person whose intention at an earlier time is in issue may give evidence of it, and the position is the same here, even though the weight of the evidence, coming as it does from an interested witness, must be scrutinised with care.*[35]

132. Ultimately on this point, their Honours held that there were no rules for admissibility of evidence tendered to rebut the presumption of advancement that were peculiar to this area of law, but rather the rules were simply "*those of the general law that any modifications effected by the Evidence Act 1995 (Cth) are applicable*."[36]

133. It follows then that in order to ascertain the true intention of the person who has paid the purchase money, the Court can receive testimony from the parent who provided the purchase funds, from the child, and evidence, written or oral, of the circumstances surrounding the transfer, such as statements made by the parties. However, that evidence is confined to acts and declarations of the relevant parties befor or at the time of purchase or so immediately after it as to constitute a part of the transaction, and not statements and declarations made after the fact of

[33] *Shepherd v Cartwright* [1955] AC 431
[34] Edmund Henry Turner Snell and RE Megarry, *Snell's Equity* (Sweet & Maxwell, 24th ed., 1954) 153, cited in *Shepherd v Cartwright* [1955] AC 431.
[35] *Damberg & Damberg & Others* [2001] NSWCA 87, [45].
[36] *Damberg & Damberg & Others* [2001] NSWCA 87, [45].

the transfer other than anything in the nature of admissions, which would be in effect, statements against interest.[37]

134. **The relevant intention is the intention of the parents in providing the purchase moneys**. Therefore, in order for a party to successfully rebut the presumption that the transfer of property from a parent to a child was an advancement of the beneficial interest in the property, that party would need to provide sufficient evidence that the parent had a definite intention at the time of the transfer to retain that beneficial interest. The evidence must do more than create a tenuous link between the purported intention of the parent to retain the beneficial interest in the property and their actions in transferring of the property.

135. An example of when the presumption may be rebutted is in a case where the transfer of property purchased with a parent's money to the child can be shown to be intended to establish a situation where the child is a nominee of the real purchaser, the parent, who intended to obtain and retain the beneficial interest upon purchase. The law endeavours to always to give effect to the intentions of the parties, but if there is an absence of any evidence of such intention except the bare fact of the transfer to a child of property purchased with the funds of the parent, then it is presumed until the contrary is proved, that the parent intended the beneficial interest to be taken by the child.

136. In the event that the presumption of advancement is rebutted, then the finding would be that the Husband holds an equal share of the legal title with his sister, but holds 34 per cent of the beneficial interest in the property upon trust for his parents and 16 per cent of the beneficial interest in the property for himself. In general, upon rebuttal of the presumption of advancement, the trust would be presumed to be a resulting trust – a presumption of law – consequent upon the legal title to the J Street, Suburb G property being vested wholly in the Husband and the Husband's sister in equal shares.

137. I acknowledge my extensive referencing in the foregoing from *Jacobs' Law of Trusts in Australia*.[38]

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[37] See generally C*alverley & Green* (1994) 155 CLR 242; *Trustees of the property of Cummins (a bankrupt) & Cummins* (2006) 227 CLR 278

[38] JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (Lexis Nexis Butterworths, 8th ed, 2016) [12-10] to [12-15].

138. Accordingly, the Court must first consider whether the presumption of advancement arises in this case. Clearly, the presumption *does* arise, and same is accepted by the Husband in his counsel's submissions. Then, the Court must consider whether a presumption so arising has been rebutted.

Has the presumption been rebutted?

139. The Wife's counsel submitted that the Wife accepted that the shortfall between the purchase price, including stamp duty, and presumably the furniture contained in the home, and the amount borrowed from F Bank, in the joint name of the Husband and his sister, was provided by the Husband's parents. The Wife also submitted that the further sums of money deposited by the Husband's parents into his account and his sister's account after the purchase of the J Street, Suburb G property, which were applied toward repayment of the loan accounts, were also provided by the parents by way of advancement, and that, accordingly, the presumption of advancement had not been rebutted.

140. She submitted that where the presumption of advancement arises, an onus rests on the transferor – the Husband's parents – to rebut the presumption that they transferred the property as a gift, if they seek to show that they had not intended a gift for the Husband and his sister. She referred the Court to *Shepherd & Cartwright*[39] and *Charles Marshall Pty Ltd & Grimsley*.[40]

141. Counsel for the Wife further submitted that it was relevant that the Husband's parents had not sought to be joined in the proceedings, and had not been joined by the Husband so as to enable them to seek a declaration of trust. She submitted that even if the Husband's parents *did* intend that their funds be applied so that they could take the beneficial interest in the property represented by their funds, and not provide advancement to their son and daughter, the presumption would only be rebutted if there was admissible evidence that the parents did not intend the advancement.

142. Counsel referred the Court to *Calverley & Green* in asserting that the correct time to determine the beneficial interest in the property was the

[39] *Shepherd v Cartwright* [1955] AC 431.
[40] *Charles Marshall Pty Ltd v Grimsley* [1956] 95 CLR 353.

time of acquisition of the property, to be ascertained by drawing upon evidence of the acts and declarations before and at the time of purchase or so immediately after it as to constitute a part of the transaction. Subsequent declarations could be received in evidence only if against interest.[41]

143. It was submitted on the Wife's behalf that the Husband's conduct, and that of the Husband's sister, was consistent with the presumption of advancement in that:

a) There is evidence of funds being advanced by the parents to the Husband and his sister prior to the asserted discussion regarding the purchase of property (there was advancement of funds in 2004, the Husband asserts the conversation with his parents was in or about late 2005, and the letter discussing the matter in 2006);

b) The Husband's sister did not transfer the entirety of the funds provided to her by the Husband's parents toward purchase of the house;

c) The Husband's parents did not seek that rent be paid by the Husband when he resided in the property;

d) The Husband made repayments to the loan accounts secured on the J Street, Suburb G property from his own funds to an agreed value of $137,737 after purchase; and

e) The Husband made declarations to F Bank, Westpac, and to the New South Wales Office of State Revenue that he owned 50 per cent of the J Street, Suburb G property.

144. Taking the last point first, I note that there was no indication in the various application forms for F Bank, Westpac, and the NSW Office of State Revenue to differentiate between legal title to the property and the beneficial or equitable interest in the property.

145. The argument advanced by Dr Barnett on behalf of the Wife is that the position held out to the two banks and the governmental body in the documents, being exhibits A3 to A7 inclusive, by the Husband and his

[41] *Calverley & Green* (1984) 155 CLR 242, 262.

sister that they were the sole owners of the property, is good evidence of the reality of their position as entitled to the beneficial interest to the exclusion of their parents at law and in equity.

146. In the past, such actions and resulting arguments have given rise to what was once known as the 'Elias principle'. That principle is that when a party has made representations of fact to third parties and has gained advantage from so doing, it is open to the Court in subsequent proceedings under section 90SM of the Act to decline to accept from that party evidence which contradicts those representations.[42]

147. The same sort of 'principle' can also be found in the Full Court decision of *In the Marriage of AM & EW Dawes*[43] where it was held that if during the course of a marriage the party represents to the Commissioner of Taxation that his or her spouse is a partner or employee in a business operated by that party and is paid a salary as such, that party cannot be heard to say, in subsequent proceedings, that his or her spouse was not in fact the partner or employee. The focal word there used by the Court is 'cannot'.

148. However, the High Court's decision in *Nelson & Nelson* [44] authoritatively established that it would be wrong to regard the 'Elias principle' as forming an absolute rule giving rise to some form of estoppels, whereby a party who asserts a legal position to a third party for advantage cannot thereafter deny that assertion in proceedings under the *Family Law Act 1975* (Cth). Rather, the truth of the situation must be decided on the basis of all of the evidence. Of course, that finding by the Court, that the circumstances of beneficial ownership are other than as held out, intentionally or otherwise, by a party to a third party for advantage, may have consequences outside of the proceedings.

149. I note and acknowledge the assistance of the decision of Riley J in *Tang & Vo*[45] at paragraphs 62 to 65, in which her Honour refers to *JPDJ & DADJ*[46] per Ryan FM, as her Honour then was.

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[42] *Elias & Elias* [1977] FLC 90-267.
[43] *Marriage of AM & EW Dawes* [1990] FLC 92-108.
[44] *Nelson & Nelson* (1995) 184 CLR 538.
[45] *Tang & Vo* [2016] FCCA 880 (Riley J).
[46] *JPDJ & DADJ* [2005] FMCAfam 86 (Ryan FM).

150. Accordingly, the statements by the Husband and his sister to F Bank, Westpac, and the Office of State Revenue in the applications are in no way determinative, but simply form part of the evidence on the issues. I note that none of those applications call for a distinction to be drawn by the applicant between the legal title to property and the beneficial interest in the property.

151. In any case, it is not the intention of the Husband and his sister, in receiving the moneys from the parents and applying them to purchase of the J Street, Suburb G property, that would give rise to the presumption of advancement or establish a rebuttal of that presumption, but the intention of their *parents*.

152. The case presented for the Wife does not contain any evidence casting doubt on the authenticity of the handwritten letter in 2006 from the Husband's mother, on behalf of herself and her husband, to the Husband and his sister. I set the text of the translation of that letter out in full earlier in these Reasons because of its importance.

153. The text of the letter clearly and unmistakeably evinces an intention on the part of the parents that the moneys forwarded by them to their son and their daughter in Australia were to be applied for the purchase of a home in the Sydney area, not only to be occupied by those parents when they migrate to Australia, but to be owned by those parents. In this regard, I note particularly numbered paragraph 5:

> *(5) In the event that the real estate is sold, all funds invested into it by the parents will be returned to us taking into account market value and the deposited share.*

154. The fifth numbered paragraph gives rise to a strong interpretation that it was the intention of the parents that the funds would be applied by their son and daughter to a purchase of a property in their (the son and daughter's) names. On the unshaken evidence, it was not open to the parents to purchase and own property registered on title in their names and held by them in their own right while still residing in the Country Q, but that the beneficial ownership of a property legally registered in their children's names could be held by them.

155. I refer again to the wording of numbered paragraph 2:

(2) We, parents, will transfer to you the funds that you will use for the purchase of the residence where we will be able to live upon arrival in Australia.

156. The text of this wording could give rise to an interpretation that the parents would be entitled to live in the property, but not necessarily be beneficial owners thereof, as could the third paragraph of the letter immediately preceding the numbered paragraphs:

> *We have money so are thinking that it would be good if you, Mr Bardow and Ms E, could find us a place to live. Dad is dreaming of a house, but I'd be happy with an apartment too. Seeing as there are two of you and this is a financial question, let us parents prepare an agreement to be formalised with our signatures. This is really important for dad and for me!*

157. The fourth numbered paragraph indicates the requirement of the parents that their wishes be consulted in relation to the purchase:

> *Prior to purchasing the residence, all relevant conditions of the real estate purchase (price, size, location, layout…) must first be agreed with us – the parents.*

158. Neither the Husband, his sister, nor his mother were cross-examined in relation to the authenticity of the letter, nor the correctness of the translation. Accordingly, I find that the letter is authentic, and that it is expressive of the intention that the parents were to take the beneficial interest in the J Street, Suburb G property to the extent of their contribution to purchase price, including to a repayment of the loan accounts.

159. The evidence of the Husband's mother as to the intention that the J Street, Suburb G property be purchased with moneys provided by the Husband's parents for their benefit, and not as an advancement to their children, was not impeached in cross-examination of the Husband's mother. The evidence given by the Husband and his sister going to the expression of that intention to them by the Husband's parents was similarly not impeached in their cross-examination.

160. Accordingly, I find that though the Husband either has a legal interest with his sister of an equal share as joint tenants or a one half interest in the property as a tenant in common, there being no evidence of the manner of their joint holding, he holds 16 per cent of the beneficial

interest in the property as his own entitlement, and holds 34 per cent of the beneficial interest upon trust for his parents.

The add-backs

161. The Wife's position is that the legal fees actually paid by each party up to the time of hearing should be added back to the matrimonial asset pool. Those fees are $35,500 paid by the Wife and $28,720 paid by the Husband.

162. The Husband agrees with the submission of the Wife that the legal fees should be added back in the amounts stated.

163. The Full Court of the Family Court of Australia has provided useful guidelines for adding back to the property available at trial in paragraphs 27 to 42 of *Trevi & Trevi*,[47] where the Court found "*propositions emerging from authority that paid legal fees as a category of add-back is imbued with considerations specific to that expenditure*."[48]

164. While confirming that the matter is still a matter for the discretion of the trial judge, the Court pointed out that if the funds used to pay legal fees prior to trial have come from capital as opposed to post-separation income or post-separation borrowings, the Court notes in paragraph 36 that:

> *Paid legal fees occupy a particular position in the consideration of add-backs by reason of section 117(1) of the Act: a matter not relevant to any other form of expenditure or dissipation of property the subject of an add-back claim.*[49]

165. In paragraph 37:

> *An order failing to add back a legal cost is a pre-emptive decision about one party paying the other's legal costs. The statutorily prescribed default position is that neither party pays all or some of the other party's costs. Any awarding of costs is to be based upon a finding of justifying circumstances, and dependent to a large extent on the result of the proceedings.*[50]

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[47] *Trevi & Trevi* [2018] FamCAFC 173.
[48] *Trevi & Trevi* [2018] FamCAFC 173, [31].
[49] *Trevi & Trevi* [2018] FamCAFC 173, [36].
[50] *Trevi & Trevi* [2018] FamCAFC 173, [37].

166. I find in this matter, and in accordance with the position accepted by the parties, that the sum of $35,500 paid prior to trial by the Wife for legal fees and the sum of $28,720 paid by the Husband prior to trial for legal fees should both be added back to the matrimonial asset pool.

167. The Wife further submitted that of the balance of the moneys withdrawn by the Husband from the parties' joint Westpac Bank Rocket Statement account on 16 January 2018 in the sum of $55,000, at least the $20,950 expended by the Husband for the benefit of his parents should also be added back.

168. The Husband, for his part, contends that if the funds withdrawn from the joint account and expended by him on matters other than his legal fees are to be added back then both the $10,000 spent by the Wife on living expenses from the $20,000 she received from sale of shares after separation and that part of the $52,150 (as I have found) withdrawn by the Wife from that account post-separation between 16 January 2018 and 7 February 2018 should be added back, with the exception of the expenditure therefrom by the Wife on a motor vehicle ($23,000) and legal fees ($24,780.28).

169. It was submitted by the Husband's counsel that in keeping with the trend of the authorities, the better approach for the Court would be to not add back the amounts specifically, but rather to deal with any matters of justice and equity between the parties arising from the moneys withdrawn and dispersed by each of the parties prior to trial, other than in relation to legal fees, or as represented in existing assets purchased, under section 90SF(3)(r), when dealing with any appropriate adjustment between the parties at step three of the four-step process, if the Court finds that it is just and equitable to proceed with the making of a property settlement order under section 90SM.

170. I accept that submission. Accordingly, the only amounts I will add back to the matrimonial asset pool are $35,500 expended by the Wife on legal fees prior to trial, and $28,720 expended by the Husband on legal fees prior to trial.

The debt owed by the Wife to her mother for $6,500

171. The Wife was not challenged in relation to her assertion that she owes a sum of $6,500 to her mother pursuant to the loan agreement they entered into on 1 October 2018. I find that the Wife does owe the sum of $6,500 to her mother.

172. The Husband's counsel submitted that the loan is a post-separation arrangement between the Wife and her mother so as to enable the Wife to stay in the former matrimonial home, and that it is a matter for the Wife to assume sole liability for payment of that debt without it being taken into account in calculating the net matrimonial asset pool available for distribution between the parties.

173. I accept the evidence of the Wife in relation to the debt. I find that the moneys were applied by the Wife toward repayments required on the loan account with Westpac secured on the B Street, Suburb C property. I will include the debt in the calculation of the net matrimonial asset pool.

174. The fact that the Wife had occupation of the former matrimonial home property whilst the Husband resided elsewhere is a matter to be taken into account in relation to the question of contributions generally, if I find that it is just and equitable to proceed with the making of property settlement orders under section 90SN.

The Husband's annual leave entitlements

175. Exhibit A9, being a print of the Husband's annual leave entitlements to his employment with the Employer O as at 11 August 2019 indicates that at that date, he had an entitlement to 86.5 days (rounded up from 86.4754) annual leave. No evidence was presented by the Husband to dispute a finding that the record is accurate.

176. The Wife asserts that the value to be placed on the Husband's accrued annual leave is $24,993. I have not been provided with evidence as to how that calculation has been made.

177. The Husband continues in his employment with the Employer O and there is no evidence to indicate any present intention on the part of the Husband to terminate that employment or to receive a 'pay out' for his

annual leave, or as to whether such a 'pay out' could be obtained by the Husband, despite the terms of section 3(5) of the *Annual Holidays Act 1994* (NSW).

178. Accrued long service leave may on occasions be treated in a different manner, but the entitlement being dealt with in this matter is strictly accrued annual leave.[51]

179. In the absence of any evidence that the Husband will, or even may, convert his accrued annual holidays into a capital sum other than by taking those annual holidays whilst continuing his employment and being paid his normal rate of pay during his leave on annual holidays, I find that the accrued annual leave neither forms an asset nor a financial resource.

The law

180. The law relating to the alteration of property interests between two parties to a de facto relationship is governed by section 90SM.[52] Relevant in this case, section 90SM(1) vests the Court with power to alter the interests of the parties in property,[53] and the power to make orders providing for the settlement or transfer of property, as determined by the Court.[54]

181. However, the Court must not make an order under section 90SM unless the Court is satisfied that, in all of the circumstances, it is just and equitable to do so.[55] The legislative process relating to the alteration to property interests of parties to a marriage was considered by the High Court in *Stanford & Stanford*,[56] however the Court's decision in that case bears identical relevance to parties to a de facto relationship.

182. In that decision, the High Court held that section 79(2) (or section 90SM(3) for de facto relationships) requires that at the outset of the Court's decision-making process, the Court must consider whether or not, in all the circumstances, it is just and equitable to make an order

[51] *In the Marriage of Gould* (1995) 128 FLR 401; *In the Marriage of Tomasetti* (2000) 156 FLR 130.
[52] *Family Law Act 1975* (Cth) s 90SM.
[53] *Family Law Act 1975* (Cth) s 90SM(1)(a).
[54] *Family Law Act 1975* (Cth) s 90SM(1)(d).
[55] *Family Law Act 1975* (Cth) s 90SM(3).
[56] *Stanford & Stanford* (2012) 247 CLR 108.

under section 79(1) altering the interests of the parties to the marriage in property (or section 90SM(1) for de facto relationships).

183. In considering the proposition posed by this first step, a Court should start by identifying items under the following categories:

a) The existing legal and equitable interests of the parties in property, according to ordinary common law and equitable principles;

b) The existing liabilities of the parties, according to ordinary common law and equitable principles and under legislation; and

c) The rights of the parties, if any, according to ordinary common law and equitable principles and under legislation, in relation to any asserted resources of the parties that may, if it is considered just and equitable to proceed with the property settlement, be taken into account in the Court's consideration of the matters referred to in section 90SF of the Act, to which section 90SM(4)(e) directs the Court's attention.[57]

184. That the interests as described above are 'existing' is of importance, as the Court noted, because the text of section 90SM(1)(a) gives reference to 'altering' the interests.[58]

185. I further note the comments of the High Court in *Stanford* at paragraph 42 which I reproduce in full here:

> *In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were*

[57] The case cites section 75(2) and 79(4)(e) respectively; *Stanford & Stanford* (2012) 247 CLR 108; see especially [37].
[58] *Stanford & Stanford* (2012) 247 CLR 108, [37].

sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).[59]

186. I will examine the de facto marital asset pool and the existing interests of the parties, before determining whether it is just and equitable to make a property adjustment order.

187. If the Court determines that it is just and equitable to make an order under section 90SM, the Court must then consider what orders are appropriate to be made. In doing so, I will follow the four-step process set out in *Hickey & Hickey & Attorney-General for the Commonwealth of Australia.*[60]

188. In *Hickey*, the Full Court of the Family Court set out a process of four inter-related steps that must be taken by a court when determining a property application:

a) First, "*the Court should make findings as to the identity and value of the property, liabilities, and financial resources of the parties at the date of the hearing*";[61]

b) Second, "*the Court should identify and assess the contributions of the parties within the meaning of section 79(4)(a), (b), and (c), and determine the contribution-based entitlements of the parties expressed as a percentage of the net value of the property of the parties*". As this matter concerns parties to a de facto relationship, I will give consideration to the matters set out in section 90SM(4)(a), (b), and (c); [62]

c) Third, "*the Court should identify and assess the relevant matters … ("the other factors") including…the matters referred to in section 75(2) so far as they are relevant…*" As with the

[59] *Stanford & Stanford* (2012) 247 CLR 108, [42].
[60] *Hickey & Hickey & Attorney-General for the Commonwealth of Australia ('Hickey')* [2003] FamCA 395, [39].
[61] *Hickey* [2003] FamCA 395, [39].
[62] *Hickey* [2003] FamCA 395, [39]. See also *Family Law Act 1975* (Cth) s 90SM(4)(a)-(c).

second step, I will give consideration to the matters set out in section 90SF(3) so far as they are relevant;[63]

d) Fourth, "*the Court should ... resolve what order is just and equitable in all the circumstances of the case*".[64]

189. The Full Court pointed out in *Hickey* that pursuant to the wording of section 79, there can only be one property settlement order at any one time, and that the one property settlement order is final, subject only to anything that may be properly done pursuant to section 79A of the Act. The wording of section 90SM(1) gives rise to the same requirement, subject only to section 90SN.[65]

190. The Full Court held in *Fontana*:[66]

> *... Indeed, the authorities are consistent in finding that assessing contributions is not an accounting exercise but a holistic one (Brandt & Brandt (1997) FLC 92-758; Norbis & Norbis (1986) 161 CLR 513).*[67]

191. The Court is required to consider the parties' contributions made on and from the commencement of their relationship, during their relationship, and following separation.[68]

192. The approach to determining the appropriate percentage of the net value of property in relation to the contributions of the parties, at step two of the four-step process, requires an assessment of contributions by, or on behalf of, each of the parties in a holistic manner, rather than attaching specific contributions to a specific item of property and making a determination upon that basis. To do the latter would be to disregard the whole of the contributions made during the whole of the relevant period of the relationship by or on behalf of each of the parties.

193. As the Full Court said in *Dickons & Dickons*[69] at paragraphs 14 to 16:

> *[14] As is plain from earlier decisions of this Court, regard must be had to the use made of contributions of various types so as to*

[63] *Hickey* [2003] FamCA 395, [39].
[64] *Hickey* [2003] FamCA 395, [39].
[65] *Hickey* [2003] FamCA 395, [47].
[66] *Fontana & Fontana* [2018] FamCAFC 63.
[67] *Fontana & Fontana* [2018] FamCAFC 63, [27].
[68] See, eg, *Jabour & Jabour* [2019] FamCAFC 78.
[69] *Dickons & Dickons* [2012] FamCAFC 154.

compare the contributions made by each of the parties during the course of, and over the length of, their relationship (see, for example, In the Marriage of Pierce (1998) FLC 92-844) But that is an entirely different proposition to, as it were, causally linking contributions with their asserted financial "product" or "value". The former recognises that the nature, form and extent of contributions made by each of the parties might differ; the latter suggests that the absence of a causal link counts as no contribution at all.

[15] The search for a causal link might be seen to come instinctively to the necessary inquiry and all the more so when regard is had to s 79(4)(a) which refers to financial contributions made "...directly or indirectly..." "...to the acquisition, conservation or improvement of any of the property ..." and goes on to also refer to the financial contribution made "...otherwise in relation to any of that last-mentioned property..." The terms of that sub-paragraph might, naturally enough, be seen to suggest a causal link between those contributions and the "financial product" which those contributions of that type are said to have produced. That same requirement might also be seen to suggest that relevant contributions of that type can be seen to be quantifiable – or, at least, conceptualised – in monetary terms, in contradistinction to contributions made pursuant to s 79(4)(c).

[16] While that apparent "causal connection" might be seen in s 79(4)(a) (and (b)), no such connection is apparent from the terms of s 79(4)(c); contributions of that latter type are not linked by the words of the sub-paragraph to the "...acquisition, conservation or improvement of any of the property..." or, indeed, to "property" at all. This is not a legislative oversight; the 1983 amendments to the Act which inserted the current s 79(4)(c) were specifically intended, relevantly, to remove any suggestion that there needed to be a causal link between contributions of that type and any particular asset or property. The Explanatory Memorandum to the Family Law Act Amendment Bill 1983 provides, at Clause 36, that a specific purpose of the re-casting of s 79(4) was, relevantly, to:

> *... revise sub-section 79(4) to remove the possibility of an interpretation of the sub-section requiring that there be a nexus between a spouse's contribution and a specific item of property in section 79 proceedings ...*[70]

[70] *Dickons & Dickons* [2012] FamCAFC 154, [14]-[16].

194. The Court is required to make a holistic value judgment in the exercise of a discretionary power of a very general kind.[71] The principle was expressed succinctly by the Full Court in the joint judgment of Bryant CJ and Ainslie-Wallace J in *Fields & Smith*[72] at paragraph 168:

> *...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.*[73]

195. The Full Court has been repeatedly clear that the approach to property settlement under section 79 of the Act (or, for present purposes, section 90SM of the Act) is not an accounting exercise. Here, I note the comments of the Full Court in *Grier & Malphas*[74] at paragraph 129, where Murphy and Kent JJ said:

> *As the Chief Justice points out, with those principles in mind, the trial judge adopted a broad-brush approach to the parties' respective expenditure. Nowhere error is established by reason alone of that approach; authority eschews "overly pernickety analysis" and section 79 demands neither an audit nor an exercise in accounting. However, when significant sums of money are said by one party or the other to have been "wasted" or to amount to a unilateral "premature distribution of property" and the evidence is suggestive of either or both, an analysis of the relevant sums and their use is needed.*[75]

What are the existing legal and equitable interests of the parties in property?

196. As stated by the High Court in *Stanford*, it is necessary to begin by considering whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property.

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[71] *In the Marriage of Harris* (1991) 104 FLR 458, 464.
[72] *Fields & Smith* [2015] FamCAFC 57.
[73] *Fields & Smith* [2015] FamCAFC 57, [168].
[74] *Grier & Malphas* (2017) 55 Fam LR 107.
[75] *Grier & Malphas* (2017) 55 Fam LR 107, [129].

197. My resolution of the matters in issue in relation to the composition of the matrimonial asset pool as set out above and the agreed position of the parties reflected in the balance sheet referred to in submissions by the parties enables me to make the following findings in relation to the matrimonial asset pool and ownerships:

Assets

No.	Ownership	Description	Value
1	Joint	B Street, Suburb C	$790,000
2	Husband	Beneficial interest in J Street, Suburb G – 16 per cent	$216,000
3	Wife	Westpac account ending #...23	$97
4	Wife	Westpac online investment portfolio	$2,191
5	Wife	Motor Vehicle 1	$28,000
6	Husband	Westpac account ending #...65	$893
7	Husband	FF Shares	$5,178
8	Husband	Motor Vehicle 2	$20,000
9	Husband	Motor Vehicle 3	$2,425
10	Joint	Debt owed to the parties by Ms E	$75,000
11	Husband	Add-back of legal fees paid by the Husband	$28,720
12	Wife	Add-back of legal fees paid by the Wife	$35,500
		TOTAL	$1,204,004.00

Liabilities

No.	Ownership	Description	Value
13	Joint	Westpac loan account #...88	$173,636
14	Joint	Westpac loan account #...02	$272,610
15	Wife	Debt owed to Ms GG (the Wife's mother)	$6,500
16	Wife	Finance debt with DD Finance	$13,669
		TOTAL	$466,415.00

Superannuation

198. The Husband's current superannuation entitlement is through his membership of Super Fund D and has a value of $235,194. It is an accumulation find. The Wife's current superannuation entitlements are also through a membership of the Super Fund D, an accumulation fund, with a value of $56,127. Accordingly, the parties' total superannuation entitlements are valued at $291,321.

199. Neither the Husband nor the Wife give any evidence of having accumulated superannuation entitlements prior to the commencement of their cohabitation. Accordingly, I find the parties' superannuation interests are as follows:

No.	Ownership	Description	Value
17	Wife	Super Fund D – accumulation fund	$56,127
18	Husband	Super Fund D – accumulation fund	$235,194
		TOTAL	$291,321.00

200. Accordingly, the net matrimonial asset pool without including superannuation is $737,589. The net matrimonial asset pool including superannuation is $1,028,910.

Is it just and equitable to make a property settlement order between the parties pursuant to section 90SM(3)?

201. The parties consider that it is just and equitable for the Court to proceed to make a property settlement order between them as they have presented competing claims for an adjustment of their property arising from the breakdown of their relationship.

202. I refer to the observations of the High Court in *Stanford* in paragraph 42, which, adapted semantically for present purposes, provides that:

> *... the just and equitable requirement is readily satisfied by observing that ... the Husband and Wife are no longer living in a [de facto] relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of the property by the Husband and Wife. No less importantly, the express and implicit assumptions that underpin the existing property arrangements*

> *have been brought to an end by the voluntary severance of the mutuality of the [de facto] relationship. That is, any express or implicit assumption that the parties may have had to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their [de facto] relationship is brought to an end with the ending of the [de facto] relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court makes a property settlement order. What order, if any, should then be made is determined by applying section [90SM(4)].*[76]

203. I find that it is just and equitable in this matter to proceed to make a property settlement order.

Contributions

204. The Wife made an initial contribution by bringing with her to the relationship her share portfolio with the value of about $48,500 and cash of about $4,000, a total of $52,500. The Wife's share portfolio was sold in the course of the cohabitive relationship and the proceeds were applied toward the purchase by the parties of other, joint shareholding and toward the purchase of the B Street, Suburb C property, with the joint shareholding also being sold and proceeds applied toward purchase of the B Street, Suburb C property.

205. The Wife was in employment, variously part-time and fulltime, from the commencement of cohabitation in 2006 until she left employment as a result of a miscarriage and then pregnancy with the parties' first child, X, in 2012.

206. The Wife resumed paid employment on a part-time basis three days a week in 2016 and then increased when she changed employers in August 2016 to four days a week part-time. She continued employment up until the parties' separation, and has remained employed since separation.

207. There is nothing in the evidence to indicate other than that the Wife has contributed the whole of her income from paid employment during cohabitation following separation toward the acquisition, conservation

[76] *Stanford & Stanford* (2012) 247 CLR 108, [42].

and improvement of the property of the parties to the marriage and toward the welfare of the family unit by contribution to payment of living expenses.

208. The Wife's mother provided a gift of $30,000 which enabled the parties to pay for renovations to the B Street, Suburb C property following its purchase. There is nothing in the evidence going to the intention of the Wife's mother in providing that sum and, as a matter of discretion, I will refer to an intention that she meant to advance and assist her daughter. Accordingly, I treat that gift as a contribution made on behalf of the Wife.[77]

209. At the commencement of cohabitation, the Husband had about $2,000 in savings in one account and $7,500 in savings in another account, a total of $9,500. There is nothing to show that he did anything other than contribute this to the relationship.

210. On purchase of the J Street, Suburb G property, the Husband and the Husband's sister established a joint loan account with F Bank as an offset account relating to their loan accounts secured by a mortgage on the J Street, Suburb G property. At the time of purchase of the B Street, Suburb C property by the Husband and the Wife, the Husband drew a sum of $57,052.50 from that F Bank offset account in the joint names of the Husband and his sister. However, there is no evidence to show the composition of that sum, other than the schedule prepared by the Husband and annexed to both his affidavit and the Wife's affidavit of the contributions made by him toward the repayment of the loan accounts on the J Street, Suburb G property following its purchase.

211. That schedule is a summary of his deposits to that offset account and his withdrawals from that offset account, and shows the $57,052.50 withdrawal on 17 February 2011 for the deposit on an exchange of contracts on the B Street, Suburb C property.

212. I find that the said sum of $57,052.50 is money accrued by the Husband in the F Bank offset account held jointly with his sister from moneys earnt by the Husband in the period from 18 May 2007 through to 17 February 2011. Accordingly, it is an accumulation of savings

[77] *Mabb & Mabb & Anor* [2020] FamCAFC 18.

from the Husband's income during the period when the parties were in cohabitation. The Husband had the benefit during the time of homemaker contribution made by the Wife. I note that at the time of the purchase of the B Street, Suburb C property, the parties' first child, X, had not been born.

213. It was submitted by counsel for the Husband that I should regard the Husband's interest in the J Street, Suburb G property, at 16 per cent of the value of the property, as a sole contribution by the Husband, the funds contributed by him to the relevant offset account from which the repayments of the loan accounts were taken coming from his income.

214. However, that submission ignores the line of authority in the Full Court of the Family Court that the Court, when deciding a property settlement matter, should take a holistic approach to consideration of the contributions of each of the parties, and not concentrate upon a specific and isolated contribution by one party to a specific and isolated item of property.[78]

215. To treat the Husband's direct financial contribution to the purchase of the J Street, Suburb G property, by providing moneys from his income for payment out of part of the loan accounts, without taking into account the whole of the contributions of each of the parties during the period from the commencement of the relationship to the present time, would be a misapplication of the Court's discretion.

216. I find on the evidence that the Husband made a considerably greater contribution to the financial income received by the parties from gainful employment than that contributed by the Wife.

217. I find that the Wife was the primary carer for the children of the relationship from the time of each child's birth until the time of separation, and that she has been their sole carer since separation except for two days per fortnight when they are in the father's care.

218. I find that the Wife was primarily responsible for the homemaker role during the period of the parties' cohabitation, particularly by reason of her being not in paid employment from 2012 to 2016 – four years of

[78] See especially, *Jabour & Jabour* [2019] FamCAFC 78; *Whiton & Dagne* [2019] FamCAFC 192; see, eg, *Dickons & Dickons* [2012] FamCAFC 154; *Singerson & Joans* [2014] FamCAFC 238; *Wallis & Manning* [2017] FamCAFC 14; *Hurst & Hurst* [2018] FamCAFC 146.

their 11 year cohabitation – and by reason of her being engaged in part-time employment three days a week for four months and then four days a week thereafter between 2016 and the parties' separation in either November 2017 or January 2018.

219. In relation to the direct contribution made by the Husband from his own funds – being funds earnt by him in the course of his employment – to the purchase price of the J Street, Suburb G property by contributions toward repayment of the loan accounts, being in the sum of $137,737, so as to give him a 16 per cent beneficial interest in that property, standing with his legal title held equally with his sister, I find, as I found in relation to the money redrawn therefrom for contribution to a purchase of the B Street, Suburb C property, that the direct financial contribution cannot be considered simply on its own, but must be considered in conjunction with all of the contributions of each of the parties through the period from commencement of their cohabitation to the date of hearing.

220. The whole of the Husband's financial contribution toward the J Street, Suburb G property came from funds earnt by him during the period of the parties' cohabitation, whilst the Wife was making substantial contributions in relation to being the homemaker and giving financial support to the family unit constituted by herself and the Husband from the income she earnt from her employment between 2007 and 2011

221. The Husband stopped making direct financial contributions to the repayments for the J Street, Suburb G property, except for a few minor contributions thereafter in 2011, following the purchase by the parties of the B Street, Suburb C property and their taking up responsibility for the loan accounts secured on that property.

222. I find that the contributions of the parties are equal. Had the Husband received a 50 per cent beneficial interest in the J Street, Suburb G property consequent upon the presumption of advancement not being rebutted, then contributions would have significantly favoured the Husband.

Should there be any adjustment between the parties pursuant to section 90SM(4)(e) in relation to relevant matters in subsection 90SF(3)?

223. On hearing, the Husband was 36 years of age and the Wife was 35 years of age. Both are physically and mentally capable of engaging in appropriate gainful employment and continue to do so.[79]

224. In 2018 the Husband had a taxable income of $166,829.[80] The Wife has an income of about $85,000 per year from her employment. Therefore, there is a significant disparity in the income of each of the parties.[81]

225. Each of the parties is achieving an income commensurate with their current earning capacity, and there is no evidence that their relative positions in relation to income and earning capacity will alter in the foreseeable future. Accordingly, this is a factor which favours an adjustment to the Wife.

226. The Wife has care and control of the children of the relationship who at hearing were six years and five years of age. The Husband spends time with the children for two nights per fortnight and has not been taking any extra time with the children during holiday periods. Responsibility for the children throughout the working week during the whole of the year is an inhibiter on the Wife's ability to compete with those without that responsibility in the employment marketplace. The Husband is not subject to such a limiting responsibility.[82]

227. I treat this aspect of the Wife's ongoing principal responsibility for care and control of the children as part and parcel of the disparity in the parties' income and, pursuant to section 90SF(3)(r), her earning capacity.

228. The commitments of each of the parties necessary to enable them to support themselves and the children of the relationship are set out in their respective Financial Statements.[83] The Husband asserts in his Financial Statement sworn or affirmed on 2 September 2019 that he

[79] See generally *Family Law Act 1975* (Cth) s 90SF(3)(a).
[80] Husband's affidavit filed 2 September 2019, annexure I.
[81] *Family Law Act 1975* (Cth) s 90SF(3)(b).
[82] See generally *Family Law Act 1975* (Cth) s 90SF(3)(c).
[83] See generally *Family Law Act 1975* (Cth) s 90SF(3)(d)(ii).

pays the sum of $343 per week by way of child support for the children (after deducting from this sum $300 which he states he pays to the Wife pursuant to the order for spousal maintenance). As stated earlier, this is in some contrast to paragraph 82 of the Husband's affidavit. The Wife, in effect, confirms this by indicating in her Financial Statement that she receives $337 per week from the Husband by way of child support for the children.

229. Neither party put into evidence a copy of the latest notification of assessment from the Child Support Agency as at the time of the hearing.

230. I find on the evidence that the greater part of the burden for the financial support of the children is met by the Wife. I would be minded to make this finding even if the Court was satisfied that the Husband was in fact paying $464 per week by way of assessed child support for the children, noting the contrasts in relation to his evidence on that matter.[84]

231. Neither party is responsible for the support of any person other than the children.[85] Neither party is responsible for the support of a child or another person that the party has a duty to maintain.[86]

232. Both parties indicate that they are not receiving any pension, allowance or benefit under the law of the Commonwealth or of a State or Territory or of another country. Neither party is currently receiving any pension, allowance or benefit under any superannuation fund or scheme.[87]

233. It is not possible on the basis of the evidence before the Court to assess a standard of living that in all the circumstances is reasonable for the parties.[88] However, I do find that the standard of living of the Wife is below that enjoyed by her during the relationship, by reason of there being less income available to her for the expenses of the family unit constituted of herself and the children, whilst she is still occupying the former matrimonial home at the B Street, Suburb C property and paying the loan accounts secured on that property.

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[84] Husband's affidavit filed 3 September 2019, [82].
[85] See generally *Family Law Act 1975* (Cth) s 90SF(3)(e).
[86] See generally *Family Law Act 1975* (Cth) s 90SF(3)(d)(ii).
[87] See generally *Family Law Act 1975* (Cth) s 90SF(3)(f).
[88] See generally *Family Law Act 1975* (Cth) s 90SF(3)(g).

234. The Wife contributed to the income and earning capacity of the Husband by being fulltime homemaker and parent from when she ceased work coinciding with her pregnancy with the parties' first child X in 2012, until 2016, enabling the Husband to continue in his fulltime employments through that time, and so develop his value in the employment marketplace.[89] In that regard, the duration of the parties' relationship did affect the Wife's earning capacity in that she was out of the employment marketplace for four years and thereafter engaged in part-time work through the balance of their cohabitation.[90]

235. The Wife continues her role as fulltime carer for the children.[91]

236. The Husband withdrew $55,000 from the parties' joint Westpac account and spent $20,950 of those funds (along with his regular income from his employment) on the financial support of his parents. Of the approximately $52,150 withdrawn from the parties' joint Westpac account by the Wife at about the same time, she spent $23,000 on the purchase of a Motor Vehicle 4, which eventually found its way into a trade-in at a value of $17,500 on the Motor Vehicle 1 at a purchase cost of $35,500. The Motor Vehicle 1 forms part of the matrimonial asset pool at a value of $28,000.

237. There is no benefit to the Wife in the money expended by the Husband for the benefit of his parents from what had been joint funds. There is benefit to the Husband in the expenditure by the Wife of $23,000 from what had been joint funds on the Motor Vehicle 4, which finds its way into part of the value of the Motor Vehicle 1 at $28,000, and being an asset available for distribution between the parties. Accordingly, I find that on the basis of the justice and equity of the case, there is consideration of adjustment in favour of the Wife on that basis.[92]

238. I find that it is appropriate to make an adjustment in favour of the Wife in relation to the matters referred to section 90SF(3) of 10 per cent.

239. Accordingly, I find that it is appropriate that orders be made reflecting a division of the asset pool between the parties by altering the interest

[89] See generally *Family Law Act 1975* (Cth) s 90SF(3)(j).
[90] See generally *Family Law Act 1975* (Cth) s 90SF(3)(k).
[91] See generally *Family Law Act 1975* (Cth) s 90SF(3)(l).
[92] See generally *Family Law Act 1975* (Cth) s 90SF(3)(r).

of the parties so that the Wife receives 60 per cent thereof and the Husband receives 40 per cent thereof.

What orders are just and equitable to be made between the by parties by way of proper settlement?

240. I approach this matter on the basis of a single pool encompassing the available assets of the parties, the current superannuation entitlements of the parties, and taking into account the liabilities that I have found should be considered in establishing the net asset pool for distribution between the parties.

241. The gross value of the assets available for distribution between the parties is $1,204,004. The addition of the parties' superannuation entitlements gives a gross asset pool for distribution of $1,495,325. When the relevant liabilities to a total of $466,415 are deducted, there is a net asset pool for distribution between the parties (including superannuation entitlements) of $1,028,910.

242. I have found that it is just and equitable to make orders adjusting the property between the parties so that the Wife receives 60 per cent of the net asset pool and the Husband receives 40 per cent of the net asset pool.

243. I find it is just and equitable that, pursuant to an order, the Husband receive the following:

a) His beneficial interest in the J Street, Suburb G property, $216,000;

b) His savings in Westpac account #...65, $893;

c) His FF Shares, $5,178;

d) The Motor Vehicle 2, $20,000;

e) The Motor Vehicle 3 , $2,425;

f) The debt owing to the parties from Ms E, $75,000;

g) The add-back of his paid legal fees, $28,720; and

h) His superannuation entitlements with Super Fund D remaining after a splitting order in favour of the Wife, $63,348,

a total of $411,564.

244. I find that it is just and equitable that an order be made adjusting the property between the parties so that the Wife receives the following:

a) The whole of the legal and beneficial interest in the B Street, Suburb C property, $790,000;

b) The Westpac savings account #...28, $97;

c) The Westpac online investment portfolio, $2,191;

d) The Motor Vehicle 1, $28,000;

e) The add-back of her paid legal fees, $35,500;

f) Her entitlements in her Super Fund D, $56,127;

g) A superannuation split in her favour from the Husband's Super Fund D, $171,846;

h) Less the Westpac loan account #...88 secured on B Street, Suburb C, $173,636;

i) Less the Westpac loan #...02 secured on B Street, Suburb C, $272,610;

j) Less the debt owed by the Wife to her mother, $6,500; and

k) Less the debt owed by the Wife to DD Finance, $13,669,

a net total of $617,346.

245. Inherent in the above proposed order is the necessity to make an adjustment between the Husband and the Wife by way of a superannuation splitting order so as to achieve the result that I have found to be just and equitable between the parties. As indicated, that splitting order will be a splitting order affecting the Husband's entitlement in his Super Fund D with a base amount of $171,846.

246. I note that exhibit A16 is a copy of a letter of 6 August 2019 from the solicitors for the Wife to the trustees of Super Fund D providing procedural fairness as required under section 90XZD of the Act, and a copy of a letter dated 9 August 2019 from the family law officer at Super Fund D Management Limited to the solicitors for the Wife indicating that were such orders to be served on the trustee the trustee would have no objection or would act on them accordingly.

247. Accordingly I make the orders set out at the start of these Reasons.

I certify that the preceding two hundred and forty-seven (247) paragraphs are a true copy of the reasons for judgment of Judge Morley

Associate:

Date: 4 August 2020