FAMILY COURT OF AUSTRALIA

Jia & Khajeh [2020] FamCA 1068

File number(s):	PAC 4745 of 2018
Judgment of:	**FOSTER J**
Date of judgment:	16 December 2020
Catchwords:	**FAMILY LAW** – PROPERTY – De facto Property Adjustment – Where discussion of applicable principles – Where short marriage – Where contributions overwhelmingly favour the husband – Where no relevant s 90SF(3) factors – Order for cash payment to the wife.
Legislation:	*Family Law Act 1975* (Cth) ss 79, 90SF, 90SM
Cases cited:	*Bevan & Bevan* (2014) FLC 93-572 *CCD & AGMD* (2006) FLC 93-300 *Chapman & Chapman* (2014) FLC 93-592 *Dickons & Dickons* (2012) 50 Fam LR 244 *Horrigan & Horrigan* [2020] FamCAFC 25 *Russell & Russell* (1999) FLC 92-877 *Scott & Danton* [2014] FamCAFC 203 *Stanford v Stanford* [2012] HCA 52 *Teal & Teal* [2010] FamCAFC 120
Number of paragraphs:	106
Date of hearing:	4 and 5 November 2020
Place:	Parramatta
Counsel for the Applicant:	Mr Campton SC
Solicitor for the Applicant:	Selvaggio Lawyers
Counsel for the Respondent:	Mr Givney
Solicitor for the Respondent:	McGrath Dicembre & Company

ORDERS

PAC 4745 of 2018

BETWEEN: **MS JIA**
Applicant

AND: **MR KHAJEH**
Respondent

ORDER MADE BY: **FOSTER J**

DATE OF ORDER: **16 DECEMBER 2020**

THE COURT ORDERS THAT:

1. That within one month from this date the husband pay to the wife or as she may, otherwise, direct in writing the sum of **$264,514**.
2. Leave to apply as to implementation or enforcement on short notice.

Note: The form of the order is subject to the entry in the Court's records.

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to 17.02 Family Law Rules 2004 (Cth).

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

REASONS FOR JUDGMENT

FOSTER J

1 The application for determination is an application for property settlement orders by the applicant de facto wife ("the wife") as against the respondent de facto husband ("the husband").

2 The parties commenced their de facto relationship in about June 2013 and separated in early November 2017. Thus a relationship of about four and a half years.

3 In her Amended Initiating Application filed in January 2020 the wife sought property orders that, in summary, provided:

(a) that the husband transfer to the wife his interest in the real estate property at C Street, Suburb A ("the Suburb A property") and that concurrently with such transfer the husband discharge the mortgage encumbrance secured over the said property;

(b) that within 14 days of orders the husband vacate the Suburb A property; and

(c) that within 35 days from the date of orders the husband pay to the wife a further sum of $1,170,000.

4 Otherwise, the wife sought in the event of the husband's default, various sale orders as against other properties owned by the husband so as to realise her entitlement.

5 At trial the wife sought an order for a cash payment to her of $1.6 million and in default various enforcement orders.

6 At trial the wife relied upon the following documents:

(a) her Amended Financial Statement filed 30 September 2020;

(b) her primary trial affidavit filed 27 February 2020; and

(c) the affidavit of Mr B Jia, the applicant's father, filed 27 February 2020.

7 The respondent husband for his part relied upon his Amended Response filed 24 January 2020 that, in summary, sought the following notations and orders:

(a) that the Court note that the husband has paid to the wife sums totalling $71,000 between June and August 2018 and the sum of $140,000 pursuant to orders made 21 January 2019;

(b) that the husband pay to the wife the sum of $285,000 within 60 days from the date of orders;

(c) that, otherwise, the husband be declared solely entitled to all other assets both personalty and realty in his present possession or entitlement; and

(d) that, otherwise, the wife's application be dismissed.

8 At trial the husband sought an order that he pay the wife a further sum of $285,000 in addition to funds already paid to her.

Context

9 These proceedings were commenced by the applicant wife in October 2018.

10 Various interlocutory applications and issues between the parties in relation to disclosure and discovery meant that proceedings were not listed for judicial case management until early December 2019.

11 On 5 December 2019 certain orders were made by consent in relation to the disposition of the proceeds of sale of a property at D Street, E Town, New South Wales. Otherwise on the same day, trial directions were made to facilitate the proceedings moving to a final hearing. The parties were directed to file their primary affidavit evidence by 28 February 2020 with proceedings listed for a compliance check before a registrar on 26 March 2020.

12 Regrettably, as a consequence of the community pandemic that manifested itself in the early months of 2020, proceedings were not listed for trial until 4 November 2020 allocating three days for final hearing. The final hearing commenced on 4 November 2020 with the hearing being completed on 5 November 2020 on which date judgment was reserved to a date to be fixed.

A word about the parties' evidence

13 The parties are in conflict as to the history of their relationship, particularly, in the context of this short cohabitation. The conflict focuses, understandably, on the nature and extent of the contributions by the wife during that period.

14 Both parties were cross-examined at some length thus providing to the Court the opportunity of hearing and considering their oral evidence as it contrasted with their evidence in chief as found in their primary trial affidavits.

15 The wife was anxious to focus on what she perceived to be important to the assessment of her contributions. During her oral evidence she made concessions and, otherwise, gave evidence that placed her efforts in perhaps better perspective than she at first represented. It is considered that she placed great emphasis on what she perceived to be her efforts but gave little, if any, evidence as to the contributions made by the husband not only to his accretion of assets but also to his contributions to her in terms of accommodation and financial support. Many of her assertions as to what "we did" were clearly actions of the husband.

16 In many respects her evidence was simply wrong and showed little understanding of the husband's financial dealings notwithstanding that the proceedings had been ongoing for some time.

17 There were complaints as to the husband's disclosure and discovery but ultimately the asset pool for consideration was the subject of mostly agreement. The husband, on the other hand, in oral evidence at trial made concessions where appropriate particularly as to the efforts of the wife. His evidence was succinct and clear. He did not seek to diminish the wife's contributions as conceded by him.

18 Overall, the evidence of the husband where it conflicts with that of the wife that is not supported by objective evidence is to be preferred.

Background

19 At final trial the wife was aged 29 and the husband 31.

20 The parties met in late 2012.

21 Subsequently, in March 2013 the wife commenced working at a hospitality business "F Business" owned and operated by the husband. She was employed in customer service. The wife worked at the business four evenings a week and some weekend work. She asserts that she was not paid a wage for her hours worked.

22 In June 2013 the parties commenced cohabitation in a home unit premises at Suburb G in Sydney. That property was owned by the husband's father. The husband paid no rent to his father but paid property outgoings being council rates, water rates and strata levies. The parties resided in those premises until mid-2014. The parties then moved to the self-contained mezzanine area of premises at H Street, Suburb J, a factory unit from which the business of K Company acquired by the husband operated.

23 In October 2015 the parties then moved to the mezzanine area of factory premises at L Street, Suburb M being the new factory premises acquired by the husband for the K Company business.

24 In June 2017 the parties separated and the wife moved to her parents' home at Suburb N.

25 The husband continued to live at Suburb M until June 2019 when he moved to a flat at the rear of the Suburb A property.

At cohabitation

26 At the commencement of the parties' cohabitation in 2013 the wife was a Masters candidate at O University. That year her studies were by course work on campus and the following year by way of research but requiring not less than three days on campus each week. She was on scholarship receiving about $16,000 net per annum. She asserts that these funds were used to purchase groceries and to pay for living expenses for herself and the husband. She further asserts that she undertook the primary household duties for the parties including cooking, shopping, cleaning and washing. Otherwise, at the commencement of cohabitation the wife had some savings but also an accumulated HECS debt related to her ongoing tertiary studies.

27 At the commencement of the parties' cohabitation the husband had the following assets:

(a) a one half interest in retail premises at 1 P Street, Suburb Q from which his "F Business" hospitality business operated;

(b) a car space being 2 P Street, Suburb Q;

(c) a car space being 3 P Street, Suburb Q. This property was sold in December 2017 with sale funds of $85,000 paid to the husband's company Khajeh International Pty Ltd;

(d) the "F Business" operated by him from the Suburb Q property;

(e) a motor vehicle; and

(f) jewellery.

28 Otherwise, the husband had a credit card liability of about $5,000 at the commencement of cohabitation.

Thereafter

29 In late 2013 the husband set up two corporate structures:

(a) In August 2013 the husband incorporated **Investments Khajeh Pty Ltd** ("Investments") and the **Khajeh Discretionary Trust** ("the Trust"). Investments is the corporate trustee of the trust and the husband is the sole director of that company and the sole shareholder.

(i) Investments in January 2014 purchased a car space at **4 P Street, Suburb Q** for $47,000.

(ii) Investments as trustee of the Trust in December 2015 purchased a property at **E Town** for $250,000 that was used by the parties as a weekender on a regular basis. Some renovation work was done to the property by the parties with the help of family and friends. The property was sold at a loss in January 2020 for $238,000 by court order and $77,199 (being the balance with interest owing under interim property order dated 21 January 2019) was paid to the wife and the balance less agent's commission to the husband.

(iii) Investments in June 2017, a few months before the parties separated, as trustee of the Trust purchased a rural property at S Town Road, S Town for $1.1 million. The purchase was wholly funded by borrowings secured over the property and the other properties owned by the husband. The husband acquired some stock for the property and the parties did some cosmetic renovation work before separation.

(b) In early December 2013 the husband incorporated **Khajeh International Pty Ltd** ("International") for the purpose of acquiring the business "K Company". International later in December 2014 purchased factory premises at L Street, Suburb M as referred to below.

30 It is common ground that these entities are to be regarded as assets of the husband.

31 Later in August 2015 the husband incorporated **T Business Pty Ltd**. In October 2015 he incorporated **U Pty Ltd**. Thereafter he registered the business name **"V Business"** to sell product from his rural property at S Town. That business has not yet turned a profit.

The Hospitality business

32 Subsequent to the parties commencing cohabitation, the wife commenced to attend at the business premises. She did some casual work there until about August 2014 after the husband

acquired the K Company business in mid-2014. At that time the husband ceased work at the business and the parties had moved to live at Suburb J.

33 Whilst the wife asserts that she was not paid for her part-time work, there is evidence of funds deposited to her account and the husband asserts some cash payments to her and he concedes that some of her wages found their way into International. The wife's tax return for the year ended 30 June 2015 reveals income from the husband of about $9,000 and tutoring income of about $4,000. In circumstances where the parties dined at the business and obtained food, otherwise, through the business, not much turns on a resolution of the issue.

34 The parties continued to attend the business several nights per week to dine.

35 Otherwise, the wife was a full-time university student five days per week and some Saturdays, commuting from Suburb J to campus by train each day until the husband purchased a vehicle for her in 2015 at a cost of nearly $16,000. The husband paid registration, insurance, maintenance and some petrol for the running of the car.

36 In the 2016 tax year the wife's tax return evidences income from the husband of about $18,700. In 2017 the wife earned about $7,400 from university tutoring and in the 2018 year about $8,750.

37 The business was run by the husband's brother after the business closed in early 2017.

38 Later that year the parties were engaged and the husband purchased a ring at a cost of $17,000 for the wife. She retains the ring.

K Company

39 Prior to the purchase of the K Company business the husband's mother, Ms CC, in early August 2013 transferred to him the **Suburb A property** owned by her at the time at an expressed consideration of $400,000. No money changed hands but the husband and his mother agreed on an arrangement to repay her. The property has been renovated since acquisition including the construction of a granny flat now occupied by the husband. Renovation costs were funded by the husband's father. As at trial the husband lived there with his partner. There is no evidence as to the financial circumstances of their cohabitation.

40 A few weeks later the husband's father, Mr Khajeh Snr, transferred to him properties **1 and 2 X Street, Suburb Y** for a total expressed consideration of $400,000. No money changed hands.

41 On 20 December 2013 International contracted to purchase the K Company business for $500,000 plus stock to the value of $118,000.

42 The purchase was primarily funded by way of CBA bank loan and overdraft totalling $440,000 secured over the properties transferred to the husband by his parents and other funds borrowed by the husband including $50,000 borrowed from the wife's father and funds provided by the husband's father.

43 Funds borrowed from the wife's father were repaid within about two months.

44 The husband's mother has been repaid funds from time to time totalling about $100,000 in all. The husband does not expect that his mother will seek further repayment.

45 The wife's father, an accountant, was retained on a paid basis to set up accounting systems and prepare necessary financial and accounting statements. He worked in the business as a contractor for several days each week in the first three months and then one day each week and was available for telephone assistance until the parties separated. He initially mentored the in-house accountant who he recalls commenced in about April 2014 at which time he reduced his attendances at the business.

46 The vendors of the business remained engaged for three months after purchase, attending at the premises each day to tutor the husband in the conduct of the business that manufactured and supplied products. The manufacture process was arduous physical work, notwithstanding the purchase of a semi-automated production line for particular products in October 2015, undertaken by the husband who was assisted by his father five to six days a week, mostly on an unpaid basis. The wife had no role in the production process.

47 Subsequent to the purchase of the K Company business, the wife assisted the husband by preparing invoices on a part-time basis for about three months whilst she was on university holidays. The wife was tutored by one of the vendors over the first three months. After about three months the business employed a full time accountant and a receptionist.

48 The wife resumed her university studies in March 2014 recommencing her Masters of Research at O University. Thereafter the wife assisted the husband with business emails and some invoicing on weekends and in the morning before university attendances and on occasions in the evening.

49 In December 2014 International purchased the Suburb M premises for $1.653 million. Total borrowing was $2.097 million that also refinanced the remainder of the CBA loan. Mortgage security was taken over the existing security properties and the new Suburb M factory. The factory, an old steel fabrication plant, was after purchase renovated for the purpose of the business over a period of 18 months at a cost of about $220,000 funded by the husband's father with the cost offset by the sale of two overhead cranes for $50,000.

50 In 2015 the wife commenced her PhD studies that required full time attendance at University from March 2015 through to completion of her thesis in late 2019. She was on a research grant and on staff at the university and entitled to four weeks annual leave.

51 The parties were living at the business premises with the husband working long hours and being assisted by his father who had extensive experience in the product industry.

52 The wife was continuing her university studies full time but assisted the husband in the business including some marketing for a period, undertaking on one occasion a measuring test at her university and assisting him with the complete revision of safety data sheets for the business product. The husband conceded that the safety data sheets involved a complex process to prepare. He requested the wife to assist in some minor updating even after separation for which she was paid.

53 The husband, otherwise, used the services of qualified consultants including his father to obtain and maintain certification and compliance with government standards for the business's products. The wife asserts she "helped" in this regard but exactly how she does not say.

54 The husband has travelled overseas extensively to source materials and machinery for the K Company business. On occasion he was accompanied by the wife.

55 Over the years the husband has paid rental income from his various properties and paid funds from his father that funded renovations to the Suburb M property and the purchase of stock at the time of acquisition into International. As a consequence, the company is indebted to him by way of his loan account.

56 The general tenor of the wife's evidence seems to underlie her assertion that the husband's business was a joint venture by both of them.

57 The husband acknowledged that the turnover of the business had significantly increased from the time of purchase to separation and that as at June 2020 gross turnover was about $5.5 million. Staff had increased by the end of the relationship to 10 employees with staff as at June 2020 of about 15 including part time, casuals and trainees. It was not suggested to him that such was a consequence of any efforts by the wife and he rejected any suggestion that the business was a "partnership effort".

Household, domestic and other issues

58 The wife asserts that she was the primary homemaker and attended to the bulk of domestic tasks. The husband, for his part, asserts that such duties were primarily shared.

59 Otherwise, the husband funded overseas travel for the parties to various countries during cohabitation at a cost of about $70,000.

60 As referred to above, the husband purchased for the wife a European car, her engagement ring, jewellery at a total cost of $15,000 and CBA shares at a cost of $19,000. These were all retained by the wife on separation.

The property at 1 P Street, Suburb Q

61 The "F Business" business closed in August 2017. The husband thereafter borrowed through his company T Business Pty Ltd $86,000 from his father. The property was renovated to open another hospitality business. The business has now closed.

U Pty Ltd

62 In 2016 the husband's father closed his business "U Pty Ltd". The husband acquired through the company his father's customer base of clients who had purchased products from the husband's business. The husband continues to sell to those customers.

The wife after separation

63 Subsequent to separation, the parties had some discussions as to resolution.

64 The husband later in the period from April 2018 to January 2020 has paid to the wife sums totalling $211,000 excluding interest and costs. Some of the funds were used by the wife for overseas travel, about $115,000 for legal expenses and some she asserts for living expenses.

65 The wife submitted her initial PhD thesis in April 2019 and then spent five months backpacking in Africa and Europe before seeking to obtain full time employment. She submitted her final thesis in November 2019. Her PhD was conferred in December 2019.

66 The wife obtained full time research position in April 2020 at a salary of $70,000 per annum plus superannuation.

67 She resides with her present partner in his father's home. She has not disclosed the financial circumstances of that cohabitation.

The approach to de facto property adjustment

68 The parties agree that they lived in a de facto relationship to which the Act applies.

69 Part VIIIAB of the *Family Law Act 1975* (Cth) ("the Act") provides for alteration of property interests between parties formerly in a de facto relationship.

70 The legislative process and course of consideration is similar to that under Part VIII of the Act in respect of married persons.

71 Section 90SM of the Act defines the Court's powers in determining applications for property settlement between de facto couples. Sub-section 90SM(3) of the Act provides that:

> The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

72 Section 90SM(4) of the Act sets out the matters the Court must take into account when considering what orders should be made for the alteration of the interest of the parties in property. Those matters are:

> (a) The financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
>
> (i) to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
>
> (ii) otherwise in relation to any of that last-mentioned property;
>
> whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and
>
> (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
>
> (i) to the acquisition, conservation or improvement of any of the

property of the parties to the de facto relationship or either of them; or

(ii) otherwise in relation to any of that last-mentioned property;

whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them; and

(c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent; and

(d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship; and

(e) the matters referred to in subsection 90SF(3) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship; and

(g) any child support under the Child Support (Assessment) Act 1989 (Cth) that a party to the de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the de facto relationship.

73 Section 90SF(3) of the Act sets out the relevant further considerations which are as follows:

(a) the age and state of health of each of the parties to the de facto relationship (the subject de facto relationship); and

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(c) whether either party has the care or control of a child of the de facto relationship who has not attained the age of 18 years; and

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (4), the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

(g) a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(i) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the de facto relationship and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person—the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under s 90SM in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(o) the terms of any order or declaration made, or proposed to be made, under this Part in relation to:

(i) a party to the subject de facto relationship (in relation to another de facto relationship); or

(ii) a person who is a party to another de facto relationship with a party to the subject de facto relationship; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(p) the terms of any order or declaration made, or proposed to be made, under Part VIII in relation to:

(i) a party to the subject de facto relationship; or

(ii) a person who is a party to a marriage with a party to the subject de facto relationship; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(q) any child support under the Child Support (Assessment) Act 1989 (Cth) that

a party to the subject de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the subject de facto relationship; and

(r) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(s) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship; and

(t) the terms of any financial agreement that is binding on a party to the subject de facto relationship.

74 The approach to the determination of an application under s 79 of the Act is set out in *Stanford v Stanford* [2012] HCA 52 and further considered by the Full Court in *Bevan & Bevan* (2014) FLC 93-572, *Chapman & Chapman* (2014) FLC 93-592 and *Scott & Danton* [2014] FamCAFC 203. The approach is similar in de facto matters.

75 The High Court in *Stanford v Stanford* (supra) said the following in relation to s 79 of the Act:

> 35. It will be recalled that s 79(2) provides that "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. The requirements of the two sub sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the Court that, in all the circumstances, it is just and equitable to make the order.
>
> …
>
> 37. First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to "*altering* the interests of the parties to the marriage in the property" (emphasis added). The question posed by s 79(2) is thus whether, having regard to those *existing* interests, the court is satisfied that it is just and equitable to make a property settlement order.
>
> …
>
> 39. Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that "[c]ommunity of ownership arising from marriage has no place in the common law". Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses". The question presented by s 79 is whether those rights and

interests should be altered.

> 40. Thirdly, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down". To conclude that making an order is "just and equitable" *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.

76 There is no doubt that the above principles established by *Stanford* equally apply to the de facto property settlement provisions in the Act (s 90SM).

77 The process ordinarily involves a staged process.

78 The Court must identify the existing legal and equitable interests of the parties in the property, the liabilities and financial resources of the parties at the time of the hearing and then whether it is just and equitable to make a property settlement order.

79 Such a consideration should not be guided by an assumption that the parties' rights to or interests in property are or should be different from those that then exist. The question is whether those rights and interests should be altered.

80 There is no presumption that one or other party has the right to have the property of the parties divided between them or a right to an interest in marital property that is fixed by reference to the various matters in s 90SM(4).

81 The Court needs to conclude that it would be unjust or unfair to leave property rights intact.

82 In many cases this requirement is readily satisfied where the parties are no longer in a marital or de facto relationship and, thus, for example, the common ownership or use of property by husband and wife will no longer be possible or the express or implicit assumptions that underpinned existing property arrangements such as the accumulation of assets or financial resources by one for the benefit of both have been brought to an end with the relationship.

83 In particular, such a circumstance arises where both parties seek property adjusting orders but are unable to agree as to same. Here both parties seek different orders as to the division of their property and it is conceded by counsel for both parties that it is appropriate for the Court to make orders altering their present property interests. It is appropriate to do so.

84 If it is appropriate to make orders adjusting property, the Court then considers the contributions made by the parties as defined in s 90SM(4).

85 The Court must then consider the matters in s 90SF(3).

86 The Court can then consider the "justice and equity" of the actual orders to be made: *Russell & Russell* (1999) FLC 92-877; *Teal & Teal* [2010] FamCAFC 120, in the context of the Court's obligation to make "appropriate orders" as provided for in s 90SM(3) of the Act.

The Asset Pool

87 The parties provided a draft trial balance sheet at the commencement of the trial: Exh "D".

88 During submissions the present pool for consideration was refined and agreed as follows:

Assets

Husband	Interest in T Business Pty Ltd	Nil
Husband	Interest in Khajeh International Pty Ltd	$ 512,043
Husband	Interest in Investments Khajeh Pty Ltd	Nil
Husband	Interest in Khajeh Trust	Nil
Husband	Property C Street, Suburb A	$ 830,000
Husband	Property 1 X Street, Suburb Y	$ 345,000
Husband	Property 2 X Street, Suburb Y	$ 345,000
Husband	Car space 4 P Street Suburb Q	$ 36,500
Husband	Car space 2 P Street Suburb Q	$ 75,000
Husband	Premises 1 P Street Suburb Q	$ 500,000
Husband	Gold coins and chains, jewellery	$ 30,000
Husband	Loan accounts owed to him	$ 1,342,563
Husband	Household contents	$ 2,000
Husband	Z Account 11309	$ 6,600
Husband	Public Company Shares	$ 25,000

Husband	Bitcoins	$ 7,000
Husband	Paid legal fees	$ 126,507
Wife	European car	$ 7,000
Wife	Jewellery	$ 5,000
Wife	Funds in Solicitors Trust Account	$ 71,767
Wife	Paid legal fees	$ 112,949
Wife	Superannuation	$ 823
		$ 4,380,752
Liabilities:		
Wife	HECS debt	$ 26,643
		$ 4,354,109

89 The wife sought to assert that a property at BB Street, Suburb G was an asset of the husband and that it was held in trust for him by his father who is the registered proprietor. The husband rejects that contention. The wife sought to adduce into evidence representations purportedly made by the husband's father in other proceedings in this Court in an affidavit filed by the father. Such an out of court representation is precluded under the hearsay rule if it is sought to rely on such representation as fact. No notice was given as to the intention of the wife to seek to adduce such hearsay evidence as required under ss 64 and 67 of the *Evidence Act 1995* (Cth). The tender of the affidavit was accordingly rejected. There is no evidence supporting the wife's contention.

Contributions

90 As the Full Court recently said in *Horrigan & Horrigan* [2020] FamCAFC 25:

> [35] It is well established that an assessment of contributions is not a mathematical exercise, but rather involves the identification and assessment of all of the parties' respective contributions, in a holistic way across the course of the relationship and in the post separation period to the point of assessment. (*Pierce v Pierce* (1999) FLC 92-844; *Singerson & Joans* [2014] FamCAFC 238; *Dickons v Dickons* (2012) 50 Fam LR 244 and *Marsh & Marsh* (2014) FLC 93-576; *Lovine & Connor and Anor* (2012) FLC 93-515 at [39]-[42]).

91 In *Dickons & Dickons* (2012) 50 Fam LR 244 the Full Court said:

> 24. There can be little doubt that the classification of contributions by reference to terms such as "initial contributions", "contributions during the relationship", and "post-separation contributions", can be helpful as a convenient means of giving coherent expression to the evidence in a s 79 case and to giving coherence to the nature, form and extent of the parties' respective contributions. However, the task of assessing contributions is holistic and but part of a yet further holistic determination of what orders, if any, represent justice and equity in the particular circumstances of this particular relationship. So much is clear from the terms of s 79 itself and, in particular, s 79(2). The essential task is to assess the nature, form and extent of the contributions of all types made by each of the parties within the context of an analysis of their particular relationship.
>
> 25. Doing so is also consistent with the demands of authority that the ultimate assessment of contributions should be made without "…giving over-zealous attention to the ascertainment of the parties' contributions…" (*Norbis v Norbis* (1986) 161 CLR 513 at 524) and the well-established recognition in the authorities (acknowledged specifically by her Honour in this case) that the process required of the Court by s 79 is the exercise of a wide discretion, not the performance of a mathematical or accounting exercise.
>
> 26. The necessarily imprecise "wide discretion" inherent in what is required by the section is made no more precise or coherent by attributing percentage figures to arbitrary time frames or categorisations of contributions within the relationship. Indeed, we consider that doing so is contrary to the holistic analysis required by the section and, in the usual course of events, should be avoided.

92 Counsel for the wife argues that the Court should adopt a one pool approach. Where the accretion of the asset pool is such as it is in the context discussed above and overwhelmingly attributable to the husband (and on his behalf members of his family) it is considered that such approach is just and equitable in all the circumstances.

93 The wife's contributions are mostly tenuous in terms of assets accretion if at all. Indeed, her case mostly relies on assertion that by inference her physical contributions and other contributions must have led to asset accrual. There is no evidence to support such inferences. Certainly, she did things to assist the husband. Yet whilst mostly supported and accommodated by the husband she pursued her full time tertiary studies over a period of years. The assessment of contributions is not to be seen in isolation but an assessment of contributions on balance by both parties.

94 It can be ascertained that the wife seems to contend that perhaps the relationship with the husband is indicative of some joint venture arrangement between them that has been frustrated by the end of their relationship. Such can be the only rational explanation for her contention for an assessment of her contributions in the range of 35 to 40 per cent of the overall pool of assets.

95 Such an approach would lead the Court into error. The Full Court in *CCD & AGMD* (2006) FLC 93-300 said:

> 43. As to those opinions, whatever the justifications for the power to adjust property interests, I doubt that, at least without heavy qualification, intention and compensation are factors which ought influence alteration of property interests. In particular, I consider that the concept of compensation for income lost during a marriage (of itself) and compensation for a loss of living standard (of itself) are not factors which ought influence the outcome of a property settlement. In *Beck and Beck (No 2)* (1983) FLC 91-318 the Full Court said:
>
> > "With respect to maintenance there is, we agree, no concept of compensation for loss of expectations in the Family Law Act. The underlying concepts in sec. 72, 73, 75 and 76 are first the appropriate needs and financial circumstances of the party or child whose claim for maintenance is under consideration and, secondly, the capacity of the respondent to the application.
> >
> > …
> >
> > In determining a maintenance claim, a Court having determined the needs of the person or persons on whose behalf the application has been made then looks at the capacity of the respondent to pay. There are no other relevant issues and certainly the question of compensation for past loss is not relevant to the determination.
> >
> > Past conduct may be an issue in determining the mechanics of an order, how it is to be implemented, or whether or not there should be security but it is not an issue in determining quantum. Section 75(2) is directed to the factors to be considered in making an appropriate assessment under sec. 72 for the party whose maintenance is under consideration, an assessment just to both parties and to children, it is not in any way at all directed to compensation.
> >
> > In considering a claim under sec. 79 of the Act, the Court is enjoined to look at contribution as therein defined. The Court is then directed to take into account such parts of sec. 75(2) as are relevant. Conduct, except for financial conduct, is not an issue and even as to financial conduct there is no element of compensation. The question is still the assessment of an appropriate amount which would result in financial justice between the parties taking into account all of the facts relevant to the particular case." (at 78,166-78,167)
>
> 44. In paragraph 48, Carmody J said:
>
> > "48. The basic rationale for the power to alter private property interests on separation or divorce in Australia, however, lies in the binding nature of the marital relationship and its hallmark features of "give and take". Marriage in this country is "an institution" … It is, first and foremost, a sacred covenant.…"
>
> 45. While I may or may not agree with his Honour's opinion about the rationale for the power expressed in s 79, on its own the expression of his Honour's opinion may not constitute the application of any wrong principle in altering

the property interests of the parties. However, concern arises in the light of later statements, for example, paragraph 52:

> "52. The alteration exercise…compensates them for unmet expectations or lost opportunities and misplaced reliance on the strength of assurances of the permanence and stability of the relationship…"

and:

> "106. I readily infer the wife here would probably have had much the same expectation as the wife in Miller. It is unlikely that when entering into the marriage, although the parties were aware of the possibility of divorce (having regard to their matrimonial history), they expected not to remain married for life. Indeed, they promised to do so. Surely, anyone with that state of mind who marries a person with financial means late in the game, will have a legitimate expectation that once married his or her standard of living will increase permanently. The disappointment of that reasonable expectation is a relevant consideration under paragraph 75(2)(o) even though it is not expressly mentioned in section 79(4)."

46. In my view, there is a real possibility that his Honour imported into his consideration of the extent to which property interests ought be altered, concepts of compensation for loss of the marriage and all it offered.

47. It has been said often enough that the Family Court is a creature of statute. Jurisdiction and powers are, save for such inherent powers as might be possessed by a superior court of record, contained within the statute. In particular, as to the exercise of power contained in s 79, the following observations are pertinent

48. In *Mallet v Mallet* (1984) 156 CLR 605, Gibbs CJ said (at 610):

> "Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorized by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered by the application of supposed rules for which the Family Law Act provides no warrant."

49. Deane J said (at 639-641):

> "It is clear that the function of the Family Court in determining what order should be made under s. 79 of the [Family Law Act 1975 (Cth)] involves the exercise of a judicial discretion. The exercise of that discretion is neither controlled nor fettered by any general rule or presumption of law that an appropriate order under s. 79 will effect an equal division between husband and wife of assets acquired during the life of the marriage. In each case, the Family Court must pay regard to the matters specified in s. 79(4) and determine whether it is just and equitable that any order be made and, if it is, what represents the appropriate order in the particular circumstances of the

> case before it.
>
> …
>
> It is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" or a "codeless myriad of precedent" and a "wilderness of single instances" of which Lord Tennyson wrote in his poem "Aylmer's Field". It is inevitable and desirable that the need for such consistency should lead the judges of the Family Court to look to what has been said and decided in prior cases for assistance and guidance in determining what is just and appropriate in the differing circumstances of subsequent cases and that shared experience and accumulated expertize should lead to the emergence of generally accepted concepts of what is prima facie just and appropriate in particular types of cases."

50. In *Norbis v Norbis* (1986) 161 CLR 513, Mason and Deane JJ said (at 521):

> "Section 79(1) of the Act provides that the Court may make such order as it thinks fit altering the interests of the parties to a marriage in the property of the parties or either of them. In so providing, the Act confers a very wide discretion on the Court. But that discretion is not unlimited. Its exercise is conditioned by the requirement that it is just and equitable to make the order (s 79(2)), and that the Court take into account the matters specified in s 79(4) and the general principles embodied in ss 43 and 81, so far as they are applicable."

51. In *W and W* (1980) FLC 90-872, referring to the decision of Asche J in McDougall and McDougall (1976) FLC 90-076, Nygh J said (at 75,528):

> "It must be stressed however that sec. 79(2) does not give this court an independent power to effect "palm tree justice". What is "just and equitable" depends on a proper consideration of the factors set out in sec. 79(4)…"

96 The wife's contributions as detailed above are modest and limited with little apparent relevance to asset accrual. The husband contends more realistically that the wife's contributions such as they are should be assessed at no more than 10 per cent.

97 Doing the best that can be done on the evidence and by reason of the husband's overwhelming preponderance of contributions in this short relationship, contributions on balance should be assessed as to 90 per cent to the husband and 10 per cent to the wife.

98 By reason of the asset pool set out above such an assessment would require a payment to the wife of a sum of about $435,000.

99 The wife has as follows:

European car	$	7,000

Jewellery	$ 5,000
Funds in Solicitors Trust Account	$ 71,767
Paid legal fees	$ 112,949
Superannuation	$ 823
	$ 197,539
Less HECS Debt	$ 26,643
Balance:	$ 170,896

100 The wife would thus be entitled to as further payment of 264,514.

Section 90SF(3) relevant considerations

101 Both parties are young. Neither asserts ill health.

102 The income and property of the parties is set out above. The wife is now in full time employment by reason of the completion of her studies undertaken during the relationship that she chose to undertake and, indeed, continued after separation. The husband is in a superior financial position.

103 Both parties are now cohabitating with another person but there is no evidence as to financial circumstances of such cohabitation.

104 Neither party argues for any further adjustment to contribution based findings. In the circumstances there will be no further adjustment.

105 It is just and equitable that the husband pay to the wife the further sum of $264,514 within one month from the date of orders.

106 Orders will be made accordingly.

I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Foster.

Associate:

Dated: 16 December 2020