

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 1)

Hansen & Peel [2023] FedCFamC1F 400

File number(s): NCC 3777 of 2019

Judgment of: **SMITH J**

Date of judgment: 23 May 2023

Catchwords: **FAMILY LAW** – Property – estate substituted for deceased wife – mature age relationship – husband’s greater initial financial contributions – equal non-financial contributions - contributions favour husband 57.5% to 42.5% – wife’s right to dispose of her contribution entitlement to child of prior relationship through will – wife’s beneficiaries financial position not a relevant factor – s 75(2) - paid legal fees “added-back” not to be treated as of lesser value than other assets when assessing s 75(2) factors - wife has no future needs – credit issues with husband’s evidence of new relationship and possible financial resource – husband’s undertaking not to challenge will – husband’s age and needs and mid-sized property pool justify an additional 7.5% adjustment to husband: Adjust property 65% to 35% in favour of husband

Legislation: *Evidence Act 1995* (Cth) s 50
Family Law Act 1975 (Cth) ss 72, 75, 79, 90K, 106A, 117
Succession Act 2006 (NSW)

Cases cited: *DJM v JLM* (1998) FLC 92-816
Grace v Grace [2012] NSWSC 976
Jabour & Jabour (2019) FLC 93-898
Mallet & Mallet (1984) 156 CLR 605
Menzies v Evans and Another (1988) 12 Fam LR 519
Miklic v Miklic [2010] FamCA 741
Parrott v Public Trustee of NSW (1994) 17 Fam LR 785
Pierce v Pierce (1999) (1998) 24 FamLR 377
Tasmanian Trustees Ltd and Gleeson (1990) FCL 92-156
Tomasetti and Tomasetti (2000) FLC 93-023
Trask & Westlake (2015) FLC 93-662
Trevi v Trevi [2018] FamCAFC 173
Weir & Weir (1992) 16 Fam LR 154

Division:	Division 1 First Instance
Number of paragraphs:	245
Date of hearing:	26-28 April 2023
Place:	Newcastle
Counsel for the Applicant:	Mr Bithrey
Solicitor for the Applicant:	Peter Hamilton and Associates
Counsel for the Respondent:	Mr Duane
Solicitor for the Respondent:	Boyd Olsen Lawyers

ORDERS

NCC 3777 of 2019

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

BETWEEN: **THE ESTATE OF THE LATE MS HANSEN**
Applicant

AND: **MR PEEL**
Respondent

ORDER MADE BY: SMITH J

DATE OF ORDER:

IN THESE ORDERS THE WORDS IN COLUMN TWO HAVE THE MEANING IN COLUMN ONE:

<i>Column one</i>	<i>Column two</i>
The Applicant Ms Clint in her capacity as the Executor of the Estate of the Late Ms Hansen	'the executor'
The Respondent Mr Peel	'the husband'
The executor and the husband jointly	'the parties'
\$542,426	'the settlement sum'
24 August 2023	'the settlement date'
The land and dwelling at B Street, Suburb C in the state of New South Wales, being the land in Folio Identifier ...	'the former matrimonial home'
The monies owed by the parties to D Pty Ltd secured by mortgage over the title of the former matrimonial home	'the mortgage'

THE COURT ORDERS THAT:

Set aside binding financial agreement

1. Pursuant to section 90K of the *Family Law Act 1975* (Cth) the Binding Financial Agreement entered into between Ms Hansen and Mr Peel on 9 July 2010 be set aside.

Payment of monies, discharge of mortgage and transfer of home

2. On or before the settlement date of 24 August 2023 the husband is to pay to the executor the settlement sum of \$542,426 in full.
3. If that settlement sum is paid then:

- (a) Simultaneously with payment of the settlement sum the parties are to do all acts and things, and sign all documents necessary, to transfer sole ownership of the former matrimonial home to the husband; and;
- (b) Simultaneously with payment of the settlement sum the parties are to do all acts and things, and sign all documents necessary, to either:
 - (i) Facilitate the husband paying out the mortgage in full; or
 - (ii) Facilitate the husband refinancing, or otherwise dealing with, the mortgage so that the estate has no liability for the mortgage.
- (c) Simultaneously with payment of the settlement sum the parties are to do all acts and things, and sign all documents necessary, to either:
 - (i) Facilitate the husband paying out any rates or other liabilities running with the former matrimonial home so as to relieve the estate from any such liability; and;
 - (ii) Facilitate the husband paying or acknowledging sole liability for any outgoings associated with the former matrimonial home incurred on or after his occupation of the former matrimonial home so as to relieve the estate from any liability for those outgoings.

Sale of former matrimonial home by auction

- 4. If the settlement sum is not paid in full by the settlement date the parties shall do all acts and things and sign all necessary documents to cause the sale of the former matrimonial home by public auction, as follows:
 - (a) Real estate agent selection:
 - (i) Within 14 days of the settlement date the estate shall nominate in writing to the husband the names of 3 qualified real estate agents who have consented to act.
 - (ii) If the estate does not nominate 3 agents within that time frame, the husband may nominate an agent in writing at their sole discretion and notify the estate within a further 7 days, and that will be the agent for the purposes of the sale.

- (iii) If the estate does nominate 3 agents within the time frame then within a further 7 days the husband shall nominate one of those agents and then that agent will be the agent for the purposes of the sale.
- (iv) If the husband does not select an agent within 7 days of notice of 3 agents, the estate may choose one of the 3 nominated agents at their sole discretion and that will be the agent for the purposes of the sale.
- (v) Within 14 days of the determination of the agent the parties shall sign all authorities and execute all documents necessary to instruct the agent to act on the sale of the former matrimonial home.
- (vi) The parties shall be responsible for giving joint instructions to the agent acting on the sale of the former matrimonial home;
- (vii) The costs of the agent shall be paid out of the sale proceeds.
- (b) Conveyancing solicitor selection:
 - (i) Within 14 days of the settlement date the estate shall nominate in writing to the husband the names of 3 qualified conveyancing solicitors who have consented to act.
 - (ii) If the estate does not nominate 3 conveyancing solicitors within 7 days, the husband may nominate a conveyancing solicitor at their sole discretion and that will be the conveyancing solicitor for the purposes of the sale.
 - (iii) If the estate does nominate 3 conveyancing solicitors then within a further 7 days the husband shall nominate one of those conveyancing solicitors and then that conveyancing solicitor will be the conveyancing solicitor for the purposes of the sale.
 - (iv) If the husband does not select 1 conveyancing solicitors within 7 days the estate may choose one of the 3 nominated agents at their sole discretion and that will be the conveyancing solicitor for the purposes of the sale.
 - (v) That within 14 days of the date of the determination of the conveyancing solicitor the parties shall sign all authorities and execute all documents necessary to instruct the conveyancing solicitor to act on the sale of the former matrimonial home.

- (vi) The costs of the conveyancing solicitor shall be paid out of the sale of the former matrimonial home.
 - (c) Auction and auctioneer:
 - (i) The former matrimonial home be placed on the market for sale by auction within 21 days of the appointment of an agent or as soon as possible after that date;
 - (ii) The auction is to take place at a date to be agreed by the parties, but absent agreement no more than ten weeks from the date of the appointment of the agent;
 - (iii) The parties may agree on an auctioneer, but failing agreement the auctioneer shall be determined by the agent;
 - (iv) Either party may lawfully bid at the auction.
 - (d) Reserve price:
 - (i) The parties may agree at any time to a reserve price, but failing agreement the reserve price shall be determined by the Agent.
 - (e) Re-auction until sale:
 - (i) In the event that the former matrimonial home fails to be sold at the auction referred to above the former matrimonial home shall be resubmitted for auction at a reserve price 5% lower than at the previous auction 4 weeks after the first auction, and shall continue to be resubmitted for auction every 4 weeks with a further 5% reduction in the reserve price until such time as the former matrimonial home is sold.
5. In the event a prospective purchaser makes an offer to purchase the former matrimonial home prior to the proposed date for auction, the parties may agree on a price and to sell the former matrimonial home to such a purchaser.
 6. Neither party will, without the prior written consent of the other, rent or let or tenant the former matrimonial home in any way.
 7. Neither party will, without the express written consent of the other, cause any other agency agreement to be effected or binding on the parties.
 8. Neither party will encumber or otherwise deal with the former matrimonial home without the prior written consent of the other party.

9. The husband has sole use and occupation of the former matrimonial home from the date of these orders until payment of the settlement sum or the sale of the property to a third party on the following conditions:
- (a) The husband shall pay the mortgage as to both interest and principal as it falls due and shall not seek a suspension or alteration of the payment schedule.
 - (b) The husband shall pay all rates and other outgoings that run with the land, and all outgoings associated with the occupation of the former matrimonial home.
 - (c) The husband shall maintain and pay for all usual insurances over the former matrimonial home.
 - (d) The husband shall provide access to the former matrimonial home at all reasonable times to prospective purchasers and the agent, or their representative.
 - (e) The husband shall maintain the former matrimonial home in reasonable condition and repair pending completion of sale.
10. In the event the former matrimonial home is sold, the proceeds of sale of the former matrimonial home shall be distributed in the following manner and priority:
- (a) Payment of agent's commission, auctioneers fees and advertising expenses payable on the sale;
 - (b) Payment of the legal costs and fees relating to the sale;
 - (c) Payment to discharge the mortgage;
 - (d) Payment of any council or water rates or other fees and charges running with the land required to transfer title, which sums shall be deemed to be payments to the husband in payment of his entitlements under these orders.
 - (e) The net sum after payment of these items at (a) to (d) above shall be the “net sale proceeds”.
 - (f) Payment of the net sale proceeds to the estate and the husband on the following basis:
 - (i) The estate is deemed to have a capital sum which equals \$294,421 (‘the estate’s capital sum’);
 - (ii) The husband is deemed to have a capital sum which equals the total of \$866,571 plus the sums in (A) and (B) immediately below (‘the husband’s capital sum’);

- A. Any payments required to discharge charges over the land under (d) above are deemed to be payments made to the husband and to be added to his deemed capital sum; and;
 - B. Any failure to pay the full interest and principal required on the mortgage from the date of these orders until settlement of the sale of the former matrimonial home, and which must be paid to discharge the mortgage in (c) above, are deemed to be payments made to the husband and to be added to his deemed capital sum.
- (g) The estate's capital sum plus the husband's capital sum plus the net sale proceeds shall equal "the net property pool".
- (h) The net sale proceeds are to be distributed to the parties so that:
 - (i) The estate's capital sum plus the portion of the net sale proceeds paid to the estate shall equal 35% of the net property pool; and
 - (ii) The husband's capital sum plus the portion of the net sale proceeds paid to the husband shall equal 65% of the net property pool; and
- 11. The parties have liberty to relist the matter on short notice if any issues arise in relation to implementation of these Orders.

Super splitting

- 12. Within 14 days of the date of orders, the Applicant and Respondent in their capacities as trustees for Super Fund 1 ("the trustees") do all such acts and things and sign all such documents as may be necessary to allocate amounts held by the trustees that have yet to be allocated to the member account of the deceased wife to the Respondent's member account.
- 13. Within twenty-one (21) days of the date of this Order, the Applicant and the Respondent in their respective capacities as directors of the trustee shall cause a meeting to be held in accordance with the Rules of the Superannuation Fund Trust Deed of the Fund and in that meeting shall:
 - 13.1. Calculate the amount of the transferable benefits;
 - 13.2. Authorise the transfer of the transferable benefits to the Respondent; and
 - 13.3. Authorise the consolidation of the wife's/husband's interest in the Fund.

14. Upon the trustees' compliance with the orders above, the Applicant and the Respondent in their respective capacities as directors of the trustee of the Super Fund 1 ("the Fund") do all acts and things to split to the deceased wife's member account in the fund to the Respondent and the Applicant shall resign as a director of the trustee and transfer any share in that company to the Respondent or as he may direct.

Household items and furniture

15. The property identified column 2 and 3 of the table contained in the Judgment in these proceedings shall be the chattel of the husband.
16. The husband is deemed to already be in possession of the items in column 3 of the table contained in the Judgment in these proceedings, and the estate has no liability to the husband in relation to those items.
17. The property identified in column 1 of the table contained in the Judgment in these proceedings shall be the chattels of the estate.
18. The parties shall do all things reasonably necessary to facilitate the husband collecting the following items from the commercial storage unit where they are stored, at his own expense, within 90 days of these orders.
- (a) 1 x Refrigerator with freezer drawer
 - (b) 1 x Refrigerator with top mounted freezer
 - (c) 2 x black urns
 - (d) 1 x clock
 - (e) 2 x ceramic urns
 - (f) 1 x outdoor dining table and chairs
 - (g) 1 x sofa table
 - (h) 2 x outdoor candle holders
 - (i) 1 x wall feature
 - (j) 1 x rug
 - (k) Multiple garage shelving
 - (l) 2 x candle holders
 - (m) 2 x Waste bins
 - (n) 1x Dining table

- (o) 8 x Dining chairs
- (p) 1 x Credenza

106A order

19. In the event that either party refuses or neglects to execute any deed or instrument necessary to give effect to orders above, the Registrar of the Court be appointed pursuant to s 106A of the Family Law Act 1975, to execute such deed or instrument in the name of such party and to do all acts and things necessary to give validity to the operation to the deed or instrument.

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 10.14(b) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

Section 121 of the *Family Law Act 1975* (Cth) makes it an offence, except in very limited circumstances, to publish proceedings that identify persons, associated persons, or witnesses involved in family law proceedings.

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

REASONS FOR JUDGMENT

Smith J:

INTRODUCTION

- 1 These are property proceedings pursuant to section 79 of the *Family Law Act 1975* (Cth) (the Act) between the Applicant Ms Clint in her capacity as the Executor of the Estate of the Late Ms Hansen (“the executor” and “the estate” and “the wife”) and the Respondent Mr Peel (“the husband”).
- 2 The wife was born in 1948 and passed away in 2021 at age 73. The husband was born in 1953 and is now 69.
- 3 The parties met in 1996. They commenced a relationship in 1997. In about mid-2004, the parties jointly purchased E Street, Suburb F, NSW (“E Street”). It is common ground that mid-2004 is the relevant date from which to assess contributions.
- 4 The parties married in 2008. The wife had one child from a prior relationship, Ms Clint, the executor, born 1982 and now aged 41. The husband also had one child from a previous relationship, Ms G, born 1989 and now aged 34. There were no children of this marriage.
- 5 The parties entered a Binding Financial Agreement (“BFA”) on 9 July 2010, which they both agree should be set aside. It was relied upon as evidence in respect of certain recitals.
- 6 There was a dispute about a period of separation during the relationship. However, no submissions were ultimately made that any temporary separation relevantly impacted on the assessment of contributions. Accordingly, it is unnecessary to decide that factual issue.
- 7 In early 2012, the parties sold E Street and purchased a block of land at B Street, Suburb C, NSW in the wife’s sole name. They then built a 5 bedroom house, (“the former matrimonial home”) which is the major asset in the property pool and subject to a mortgage, which is the major liability.
- 8 In early 2019, the wife was diagnosed with a terminal illness. The wife ended the marital relationship and the parties finally separated on 15 May 2019. They continued to live separately under the one roof. The wife commenced palliative treatment in mid-2019. In late 2019, the wife was advised by her doctor her life expectancy was 12 months.

- 9 The wife commenced these proceedings on 21 November 2019. On 4 February 2020, interim orders were entered for the wife to have sole use and occupation of the former matrimonial home. The husband vacated the former matrimonial home on 18 February 2020. The parties divorced on 19 September 2020. On 15 December 2020, the wife sought expedition. On 18 January 2021, the matter was listed for Final Hearing commencing on 7 April 2021. The wife swore her trial affidavit and financial statement on 11 March 2021. Her evidence was filed on 18 March 2021. She passed away during this period in early 2021.
- 10 On 25 March 2021, the wife's daughter acting in her capacity as the executor of the wife's estate was substituted for the wife in these proceedings.
- 11 The husband filed an application on 1 April 2021 seeking sole use and occupation of the former matrimonial home. By consent, Orders were entered on 26 July 2021 for the husband to have sole use and occupation on terms that he pay the estate \$200,000 by way of interim property settlement and be liable for all outgoings associated with the former matrimonial home. The husband still resides in the former matrimonial home, which he seeks to retain.
- 12 The husband was cross examined about a Ms H, who lives with him and who has attended a family wedding and to whom he has lent a substantial sum of money without security, but who he says is just a friend paying rent and otherwise not relevant.

SUBSTITUTION OF THE ESATE

- 13 The estate was substituted for the wife pursuant to section 79(8) of the Act. It was not contested that this was appropriate. I am satisfied that an order for adjustment would have been made had the wife not died, noting in particular the wife's sole ownership of the former matrimonial home but that the parties shared liability for the mortgage over it. I am further satisfied that it is still appropriate to make an order. Neither party submitted to the contrary.
- 14 The parties proposed competing orders to alter the interests of the estate and the husband. There is no issue that it is just and equitable, and appropriate, that final adjustment orders should be made. The orders I make are intended to determine and end the financial relationships between the estate and the husband, and I note my comments elsewhere concerning the husband's evidence and concession that he will not pursue any claim under the *Succession Act 2006* (NSW).
- 15 The husband seeks the opportunity to retain the former matrimonial home, with mortgage, if he is able to afford to do so. The husband led minimal evidence as to his capacity to obtain

finance by way of a reverse mortgage. Nevertheless, the estate agrees the husband should be afforded the opportunity to retain the former matrimonial home. There was disagreement as to terms on which he should have that opportunity.

16 The case was conducted with admirable efficiency, by experienced counsel, and ultimately the major facts as to contributions were not substantially in dispute.

17 It was agreed that contributions to the welfare of the family including homemaking were equal, as were non-financial contributions to the acquisition, conservation or improvement of property. The major issues were the appropriate weight to give to the respective financial contributions, the overall holistic assessment of all contributions, and the impact of the wife's passing on the appropriate application of s 75(2) of the Act on the facts of this case.

18 The estate submitted that over the course of the 15 year relationship, and taking into account post relationship contributions, contributions would be assessed as equal. The estate also submitted that although the wife's passing was a relevant factor, on the facts of this case no further adjustment would be made for s 75(2) factors, resulting in a final alteration of property interests as to 50% to the estate and 50% to the husband.

19 The husband submitted that contributions favoured him 60-65% with a submission of 62.5% to him and 37.5% by the wife. The husband further submitted that the impact of the wife's passing meant that the application of s 72(5) factors would result in a further significant alteration of property interests of 12.5% to him, with a final alteration of property as to 75% to the husband and 25% to the estate.

20 For reasons set out below, I find that contributions favour the husband 57.5% to 42.5% and that the wife's passing, and consequently the absence of s75(2) factors on her account and the weighing of the relevant s 75(2) factors applying to the husband, mean that there should be a further adjustment of 7.5% in the husband's favour.

21 On that basis, I find that the property of the parties should be adjusted as to 65% of net assets to the husband and 35% to the estate. There are also orders around the distribution of certain items of personalty, and in particular, items of household furniture.

THE PROCEEDINGS

22 This matter was listed for final hearing and heard over three days from 26 to 28 April 2023. Both parties were legally represented, including by Counsel.

23 The estate submitted a Court Book (MFI 1) and the husband a Court Book in two parts (MFI 2 and MFI 3).

24 The estate read or relied upon the following material at Trial:

- (1) Amended Application filed 15 December 2020;
- (2) Affidavit of Ms Clint filed 3 August 2022;
- (3) Affidavit of Ms Hansen filed 18 March 2021, including exhibits;
- (4) Financial Statement of Ms Hansen filed 18 March 2021;
- (5) Case Outline filed 25 April 2023, which was marked for identification (MFI 4);
- (6) Proposed minute of order at Trial (MFI 10);
- (7) Applicant's supplement to oral submissions on contributions (MFI 11).

25 The husband read or relied upon the following material at Trial:

- (1) Further Amended Response filed 7 March 2023;
- (2) Affidavit of Mr Peel filed 3 August 2022;
- (3) Affidavit of Mr Peel in reply filed 17 October 2022;
- (4) Affidavit of Mr Peel filed 4 April 2023 (reverse mortgage);
- (5) Financial Statement of Mr Peel filed 3 August 2022;
- (6) List of objections (MFI 7) and Case Outline (MFI 8);
- (7) Proposed minute of order at Trial (MFI 9);
- (8) Short Aid to Submission (MFI 12).

26 The wife's affidavit was read on the basis that she was not available and there was no issue as to notice, which had been formally given.

27 The executor and the husband were both required for cross examination.

28 Although large parts of the wife's affidavit were ruled inadmissible as to her estimates of figures, the husband candidly admitted to the great majority of relevant figures and matters in his oral evidence. Apart from his evidence about his relationship with Ms H, which I found difficult to reconcile with the objectively available material, I considered the husband to be a generally truthful witness.

29 The executor was cross examined. She agreed with the propositions put to her concerning transfers of money from the wife to her and to the wife's sister Ms J, and also that she had removed large volumes of furniture from the former matrimonial home before the husband took up sole use and occupation and that she still retained this furniture. I considered her to be a truthful witness.

30 The parties also tendered various documents into evidence during the course of the Trial, including a joint balance sheet (Exhibit A) admitted as evidence of agreed values and for use as submissions on matters in dispute, three schedules pursuant to section 50 *Evidence Act 1995* (Cth) (from MFI 3) concerning transfers of money from the wife to the executor and Ms J, and other documents that will be referred to as required.

PROPERTY OF THE PARITES

31 The Court is required to identify the parties existing legal and equitable property interests, whenever acquired, pursuant to the ordinary principles of the common law and equity.

Joint balance sheet

32 The parties submitted the following joint balance sheet, which is Ex A as to the agreed figures and otherwise an aide-memoire in relation to submissions.

Ownership	Description	Applicants value	Respondents value
ASSETS			
1 W	B Street, Suburb C	1,800,000	1,800,000
2 H	Motor Vehicle 1	25,000	25,000
3 H	Motor Vehicle 2	14,000	14,000
4 W	Motor Vehicle 3	10,000	10,000
5 H	Household contents	12,500	3,500
6 J	Household contents previously the property of the Husband and the Wife	0	20,000
7 J	Artwork previously the property of the Husband and the Wife	0	2,500
8 H	Works of Art	8,500	8,500
9 J	Wine, previously the property of the husband and the wife	0	7,500
10 H	Wine	8,500	1,000
11 W	Jewellery previously in the possession of the deceased Applicant Wife	10,000	10,000
12 H	Units in K Unit Trust (Peel Discretionary Trust)	100,000	100,000
13 H	M Pty Ltd	3,000	3,000
14 H	Personal loan to Ms G	160,000	131,138
15 H	Personal loan to Ms H +44K	130,750	130,075
16 H	NAB Acc #...50	188,222	188,222

17	H	NAB Acc #...86 (transposition error on Financial Statement)	154	154
18	H	NAB Acc #...54 (transposition error on Financial Statement)	300	300
19	H	NAB Acc #...78	895	895
20	H	L Bank Acc #...08	250	250
21	W	ANZ #...81	8,083	25,400
22	W	MM Company Account	0	46,000
23	W	Shares N Limited	1,025.28	1,039.52
24	W	Monies advance to Ms Clint	0	130,000.00
25	W	Monies advanced to Ms J	0	65,000
Total			\$2,481,179.28	\$2,723,473.52
ADDBACKS				
26	W	Partial property settlement	200,000	200,000
27	H	Funds expended from NAB Acc #...50 from 24/5/2021 onwards	199,747	
Total			\$399,747	\$200,000
LIABILITIES				
28	J	P Finance	570,715.40 at 11.04.23	575,032
29	H	NAB Visa	2,623	2623
30	W	ANZ Credit card	0	8,258.46
Total			\$573,338.40	\$585,913.46
SUPERANNUATION				
Member	Name of Fund	Type of Interest	Applicants value	Respondents value
31	H	M Super Fund	SMSF	27,677
32	W	M Super Fund	SMSF	15,110
Total			\$42,787	\$42,787

Settling the balance sheet

33 Items 1-4, 8, 11-13, 15-20, 26, 29, 31 and 32 were agreed.

34 During the course of closing oral submissions, there were appropriate concessions made on behalf of both parties in relation to items of small value, and in relation to items in respect of which there was little or no evidence, which substantially narrowed the issues. There remained, however, a number of matters in respect of which there was some controversy.

Item 5 – husband’s household contents

35 It was agreed that the only evidence of the value of the husband’s household contents in item 5 was his concession in the balance sheet. Item 5 was agreed in that sum, despite the husband’s closing written submission.

Items 6 and 7 – joint household contents and art

36 It was agreed that there was no evidence of the value of items 6 or 7, and that they should be treated as “unknown”. For balance sheet purposes, I include these as “\$0.”

37 Nevertheless, the property identified in items 6 and 7 does exist and will need to be addressed.

38 In relation to items 6 and 7, the husband's oral evidence was that when he left the former matrimonial home, pursuant to the order granting the wife sole use and occupation, they had agreed that he would leave the furniture for her use given her medical condition and prognosis.

39 The executor agreed in oral evidence that when the estate agreed the husband should have sole use and occupation of the former matrimonial home, she removed substantial amounts of furniture and a piece of artwork. She said she understood she was entitled to do this, and that it was appropriate to do this, as the furniture formed part of the estate. She gave evidence that these items remain in a commercial storage unit.

40 The husband included in his Response a list of items he said were taken by the executor. During her oral evidence the executor was given the list and marked the list as either:

- (i) One tick, in her possession and she wished to retain it; or,
- (ii) Two ticks, in her possession and she was content for the husband to have it; or,
- (iii) No Ticks, not in her possession, including items she believed were in the possession of the husband.

41 The list as marked was as follows:

Item #	Description	Column 1: Item exists – estate to keep. One tick.	Column 2: Item exists – husband can have. Two ticks	Column 3: Estate does not have / husband may have. No ticks / notations
1	1 x Refrigerator with freezer drawer.		Marked with “two ticks”	
2	1 x Refrigerator with top mounted freezer.		Marked with “two ticks”	
3	2 x black urns		Marked with “two ticks”	
4	1 x Clock		Marked with “two ticks”	
5	1 x Side table			Marked with “[Mr Peel] ?”
6	2 x candle stick holders	Marked with “one tick”		
7	2 x red candle stick holders			Marked with

8	2 x ceramic urns		Marked with “two ticks”	“?”
9	1 x Outdoor dining table and chairs		Marked with “two ticks”	
10	1 x Sofa table		Marked with “two ticks”	
11	2 x outdoor candle holders		Marked with “two ticks”	
12	1 x Wall feature		Marked with “two ticks”	
13	1 x Medical device			Not marked
14	1 x Rug		Marked with “two ticks”	
15	1 x Scales	Marked with “one tick”		
16	1 x Artwork	Marked with “one tick”		
17	1 x Jewellery item	Marked with “one tick”		
18	1 x Heated towel rail	Marked with “one tick”		
19	Multiple garage shelving		Marked with “two ticks”	
20	1 x Mirror			Marked with “[Mr Peel]”
21	2 x candle holders		Marked with “two ticks”	
22	2 x Waste bins		Marked with “two ticks”	
23	1 x Decorative item	Marked with “one tick”		
24	1x Dining table		Marked with “two ticks”	
25	8 x Dining chairs		Marked with “two ticks”	
26	1 x Credenza		Marked with “two ticks”	
27	1 x Hall table	Marked with “one tick”		
28	2 x vases			Not marked
29	1 bag of loose scrap gold items, including (but not limited to) watch cases, and chains.	Marked with “one tick”		

- 42 The executor was not challenged on her evidence about the small number of items she said she did not have, including those she considered were already in the husband’s possession.
- 43 She was not cross examined about the proposed distribution as between the estate and the husband.
- 44 There is no valuation evidence to allow me to weigh the relative values of the three columns.

45 Given there was no challenge to the executor's evidence, or her view on what the estate should retain, and given that by number of items the distribution is not significantly inconsistent with my view of the appropriate final adjustment percentages, I will order that the husband have those items identified by the executor as already being with him in column 3, and those items which she agreed the husband should have in column 2. The estate will retain the items in column 1.

46 I will make orders that facilitate the husband collecting, at his own cost, the items in the executor's possession which are to be his property from the storage unit within 90 days.

Items 9 and 10 – wine

47 It was agreed that there was no evidence of the value of item 9, or 10, which is the husband's retained wine. There was a nominal concession by the husband as to the value of item 10. Nevertheless, it was agreed that both items should be treated as "unknown". For balance sheet purposes, I include these as "\$0."

48 The husband's evidence was that when he left the house, he asked the wife to allow their joint wine to stay there. He says that when he returned much of that wine was gone. The executor denied that she had taken it, consumed it or otherwise disposed of it. She said that, to the best of her knowledge, no other member of the wife's family had done so either.

49 In relation to the wine at item 9, the husband says that the wife would not have consumed the wine given that her condition and medications would have made that unwise. However, he repeatedly asserted during his oral evidence that the wife had a significant drinking problem and his evidence was that he had locked the wine cellar because of the significant amount of alcohol she was consuming.

50 In relation to the wine in item 9, apart from the lack of any valuation evidence, there is no evidence of what happened to it and it is open that the wife may have consumed it. I treat this as matrimonial assets used in the normal course of events.

Item 14 – loans to husband's daughter

51 In relation to item 14, the parties agreed that the current value of the loan repayable by the husband's daughter is the husband's value.

52 As discussed elsewhere, the husband developed two free standing dwellings at 2 B Street on land purchased in late 2016. The husband sold one of these properties to his daughter Ms G in

mid-2019 providing vendor finance of \$160,087. The loan has since been partially paid down to the current agreed level shown at item 14 in the balance sheet.

53 While this is acknowledged as a loan, it nevertheless involved the use of joint matrimonial funds to advance the husband's daughter and is a factor relevant to the assessments of contributions. That is particularly so where the husband submits that the monies gifted by the wife to the executor and to her sister Ms J, at items 24 and 25 of the balance sheet below, should be taken into account in assessing contributions as they involved the use of joint matrimonial funds.

54 While not relevant to the balance sheet, it is relevant to the assessment of contributions that in about mid-2015 the husband purchased two lots of land at Q Street, Suburb R using his superannuation and part of the proceeds of the property at S Street, discussed elsewhere. He also provided his daughter, and her then husband, \$149,000 to purchase the third associated lot of land. He was repaid those funds in late 2018. As with the loan on the balance sheet, it is relevant to the assessment of contributions that the husband used joint matrimonial funds to the benefit of his daughter.

55 Similarly, in about mid-2017 the husband lent his daughter a further \$122,066.82 from his inheritance. That was repaid in late 2019 when she sold her land at Suburb R. Again, this represents a use of joint matrimonial funds for a period of years to advance the husband's daughter and is a relevant factor on contributions.

56 I will not refer to this again, but take the husband's repeated use of joint matrimonial funds to assist his daughter by way of provision of finance as one of many contribution factors.

Item 15 – loan to husband's friend Ms H

57 In relation to item 15, the parties agreed the value of the loan to the husband's "friend" Ms H. The evidence concerning this loan is dealt with elsewhere where considering the parties' submissions in respect of s 75(2).

Item 21 and 30 – wife's ANZ bank account and credit card

58 The husband relied upon the Inventory of Property contained in the Grant of Probate ("the Inventory"), which disclosed \$25,400 in item 21. The estate was unable to provide a current figure and so accepted this as evidence of a concession. On a similar basis, the husband

conceded the asserted credit card liability at item 30 of the balance sheet, noting item 51 of the wife's financial statement.

Items 22, 31 and 32 - superannuation

59 The husband also relied upon the Inventory in relation to item 22. The Inventory referred to an item "[MM Company] Superannuation" as being worth an estimated \$46,000. This was submitted to be a concession against interest in the same way as the ANZ account at item 21.

60 The estate submitted that this item in the Inventory was a statement of the superannuation in the Super Fund 1 and so already covered by balance sheet items 31 and 32.

61 The estate relied upon Exhibit G, an MM Company Report Summary identifying the sum of \$48,745.39 at 18 May 2021 as being in the name of the "[Super Fund 1]" and also the wife's financial statement of 11 March 2021 item 45 which referred to "Name of Superannuation Plan 1 [MM Company]" at \$46,000.

62 The husband agreed there was no evidence that the wife had any other superannuation fund, and left the matter to the Court.

63 The Inventory of Property refers to this sum as superannuation. There is no evidence that the wife had another superannuation account. The estimate in the Inventory broadly matches the then total in the parties self-managed superannuation fund.

64 I am satisfied that the evidence establishes, on the balance of probabilities, that this inclusion in the Inventory by the executor was a reference to the parties self-managed superannuation fund and so should be excluded from item 22 as it is covered by items 31 and 32.

65 While dealing with superannuation, it is not in contest that the husband should have the wife's superannuation by a splitting order so that although item 32 is currently the estates it will ultimately be transferred to the husband.

Item 23 – wife's N Limited shares

66 It was agreed that the minor difference in item 23 should be resolved by adopting a figure of \$1,025.

Items 24 and 25 – wife's gifts to daughter (executor) and her sister Ms J

67 The husband conceded in closing submissions that the monies the wife advanced her sister and daughter were not recoverable loans.

68 The husband did not submit that these were add-backs, but did submit that they should be taken into account in the assessments of contributions.

69 In relation to the quantum of these advances, the husband provided three schedules pursuant to section 50 *Evidence Act 1995* (Cth) (“the schedules”) (Exhibit 2). The first and third schedule were said to relate to the executor and the second to Ms J.

Advances to executor

70 In relation to the first schedule, the executor denied that the identified account to which \$61,500 had been transferred was her account. The executor denied those sums had been paid to any bank account she had. The husband conceded there was no evidence that these monies had been transferred to the executor and did not press that sum.

71 In relation to the third schedule, the executor agreed that over the period from mid-2005 to early 2020, or just under 15 years, the wife had transferred to her approximately \$45,140 net. That is about \$3,000 per annum.

72 A portion of the money advanced related to the period when the executor was at university and the wife was paying, or subsidising, her rent. It should be noted that at different times the executor transferred small sums back to the wife, which she said she wanted to do for her mother. I understand that the agreed figure is net of transfers back.

73 I accept that the wife advanced these sums to the executor, her daughter, and later the mother of the wife’s grandchild, over that period for love and natural affection. I do not consider these sums excessive. There is no suggestion this constituted waste. I accept the husband’s submission that this should be taken into account in weighing contributions. I will not refer to this again in the contributions section but have considered it.

Advances to Ms J

74 Schedule 2 of Exhibit 2 calculated transfers of \$65,629.70 to Ms J between late 2008 and mid-2008. \$35,629.70 was conceded by the estate as having been transferred.

75 I do not accept that the entry on the bank account statement number 28 in late 2007 “Promissory Note \$30,000” has been established to flow from the entry on that day above showing a transfer to Ms J of \$700. The layout of the transactions suggests to me that the date is set out and then more than one transaction may be listed, with the figure transferred

being set out on the first line of the description. On that basis, I am not satisfied that the evidence establishes that this \$30,000 by way of promissory note was transferred to Ms J.

76 I will take the advance of \$35,629.70 funds to the wife's sister across 2007 and 2008 into account in weighing contributions and the parties' use of monies. I will not repeat this when considering contributions but have taken it into account.

Item 27 – husband's living and other expenses

77 After a careful analysis of the husband's use of monies after the wife's passing and the accounting for them on the balance sheet, the executor sensibly did not press the issue of waste or seek an add back of these funds. I leave this in the balance sheet at \$0.

Items 27A, 27B, 27C – legal expenses paid and monies in trust

78 It was agreed that the wife's and executor's paid legal expenses should be included on the final balance sheet as an "add-back". I have introduced these as item 27A on the final balance sheet at the agreed figure.

79 It was agreed that the husband's paid legal expenses should be included on the final balance sheet as an "add-back". I have introduced these as item 27B on the final balance sheet at the agreed figure.

80 It was agreed that the \$50,000 the husband has in his solicitors trust account should be accounted for. It is not clear what portion of these he will receive back. While it might be treated as an asset, for convenience I have treated it as an add-back and introduced this at item 27C on the final balance sheet.

81 The parties both agreed that the interim distribution to the estate and the paid legal expenses should be accounted for or "added-back" in the usual way. That was entirely appropriate.

82 To the extent it is necessary and relevant to make a finding, if the issue was in dispute on the evidence before me I would have found that the interim distribution and each party's paid legal expenses should be included as an add-back, together with the husband's monies in his solicitors' trust account.

83 The husband's closing oral submission included an assertion that there is "a degree of artificiality" to the add-back of legal expenses to the balance sheet. On that basis, it was submitted that the Court would not treat sums added-back in the same way as other assets when considering the extent to which s 75(2) of the Act require an adjustment to be made. In

effect, although conceding the adding back of paid legal fees, the husband submitted that the Court should not in fact account for these sums as if assets when considering s 75(2).

84 In *Trevi v Trevi* [2018] FamCAFC 173, the Full Court reviewed the relevant principles underlying add-backs. The Court noted that monies expended on legal fees are the first of the three long recognised categories of add-backs. The adding back of legal fees arises from the statutory regime in section 117 of the Act which requires each party to pay their own legal costs, except in the circumstances set down in that section (see also *DJM v JLM* (1998) FLC 92-816). While there is always a discretion with add-backs, this statutory underpinning is a relevant consideration when determining how that discretion should be exercised.

85 The expenditure of legal costs by parties, and in particular the quantum they elect to expend against the size of the asset pool in dispute, is in their control. Represented parties are, or should be, aware that in the usual course the money they spend on legal fees will be added-back and treated as their notional asset. The fact that these legal fees are, and will be treated as, the party's own money should cause litigants to take care in the expenditure of legal fees and to ensure they are proportionate to the property pool in issue.

86 For a party to be permitted to argue that the legal expenses they have incurred, which they concede should be treated as an add-back on the balance sheet, should not then in essence be treated as an add-back when weighing the appropriate adjustment pursuant to s 75(2) would effectively circumvent section 117 of the Act and the long standing, and well-founded, principles which underlie this approach as explained in *Trevi*.

87 Even if the broad discretion to consider "other" matters in s 75(2)(o) permitted of the approach suggested by the husband, to give little or no weight to the add-backs for legal fees paid, I would not consider it appropriate. Having addressed the submission here, I will not refer to this again when discussing the s 75(2) factors.

Item 28 – mortgage P Finance

88 The P Finance mortgage over the former matrimonial home was agreed at \$570,000.

Final balance sheet

89 The final balance sheet reflecting the above agreements, concessions and my findings is set out below:

Ownership	Description	Value
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ASSETS				
1	W	B Street, Suburb C		1,800,000
2	H	Motor Vehicle 1		25,000
3	H	Motor Vehicle 2		14,000
4	W	Motor Vehicle 3		10,000
5	H	Household contents		3,500
6	J	Household contents previously the property of the Husband and the Wife		0
7	J	Artwork previously the property of the Husband and the Wife		0
8	H	Works of Art		8,500
9	J	Wine, previously the property of the husband and the wife		0
10	H	Wine		0
11	W	Jewellery previously in the possession of the deceased Applicant Wife		10,000
12	H	Units in K Unit Trust (Peel Discretionary Trust)		100,000
13	H	M Pty Ltd		3,000
14	H	Personal loan to Ms G		131,138
15	H	Personal loan to Ms H +44K		130,075
16	H	NAB Acc #...50		88,159
17	H	NAB Acc #...86 (transposition error on Financial Statement)		154
18	H	NAB Acc #...54 (transposition error on Financial Statement)		300
19	H	NAB Acc #...78		895
20	H	L Bank Acc #...08		250
21	W	ANZ #...81		25,400
22	W	MM Company Account		0
23	W	Shares N Limited		1,025
24	W	Monies advance to Ms Clint		0
25	W	Monies advanced to Ms J		0
Total				\$2,351,396
ADDBACKS				
26	W	Partial property settlement		200,000
27	H	Funds expended from NAB Acc #...50 from 24/5/2021 onwards		0
27A	W	Paid legal fees		\$56,254
27B	H	Paid legal fees		\$271,436
27C	H	Monies in solicitor's trust Account		\$50,000
Total				\$577,690.00
LIABILITIES				
28	J	P Finance		570,000
29	H	NAB Visa		2623
30	W	ANZ Credit card		8,258
Total				\$580,881
SUPERANNUATION				
Member		Name of Fund	Type of Interest	Respondents value
31	H	M Super Fund	SMSF	27,677
32	W	M Super Fund	SMSF	15,110
Total				\$42,787

Summary of balance sheet

On the final balance sheet there are total assets of \$2,351,396.00, total add-backs of \$577,690.00, total superannuation of \$42,787 and total liabilities of \$580,881, for a net total of assets plus add backs plus superannuation less liabilities of \$2,390,992.

At present, the estate has total assets plus add-backs and superannuation less liabilities, of \$2,094,421 and the husband of \$866,571. This largely reflects the wife's and now the estate's sole ownership of the former matrimonial home but the joint liability for the P Finance loan mortgage secured over the former matrimonial home.

CONTRIBUTIONS

The focus of the evidence was on relative financial contributions. Although there was a great deal of evidence around this topic, ultimately the major factual matters about what property each party contributed at different times in the relationship was not significantly in contention.

The main issues went to the way in which contributions should be weighted, including in the context of there being no retrospective valuations of many of the assets, and where the parties benefited from substantial increases in real property values over time as a consequence of market factors unrelated to their individual exertions.

Contributions to the welfare of the family including as homemaker or parent

It was agreed that the parties' contributions to family welfare and homemaking were equal across the course of the 15 year relationship.

I will return later to the fact that the agreement as to equal contributions, which made the focus of the Trial and submissions the financial contributions, should not cause these contributions to be overlooked nor undervalued.

Non-financial contributions to the acquisition, conservation or improvement of property

The parties also agreed in submissions that non-financial contributions to property were equal and a relatively small component of the contributions.

Nevertheless, these contributions also form part of the non-financial contributions which form part of the myriad of contributions between the parties and, as with the family welfare contributions, they must not be overlooked or undervalued when undertaking the holistic assessment required by the Act.

98 As one example, I note the husband's evidence that the property at E Street was incomplete when purchased and required significant improvements. He set out, as one example, some of the co-ordination work undertaken over the next couple of years by each of the parties.

99 Some weight is to be given to the contributions factors.

Initial financial contributions

Joint

E Street, Suburb F, NSW

100 In about mid-2004, the parties purchased the property at E Street, Suburb F, NSW ("E Street"). The parties purchased E Street for \$950,000 using a mortgage.

Husband's initial financial contributions

MP Discretionary Trust and T litigation

101 The husband's largest asset at mid-2004 was his right to receive \$1,750,000 in distributions from the MP Discretionary Trust. That was based on a Judgment in litigation referred to in these proceedings as "the [T Litigation]". The recovery involved legal costs of \$75,000 resulting in the net figure of \$1,675,000. That was a significant initial financial contribution by the husband.

S Street, Suburb U

102 It is agreed that at the commencement of the relationship the husband owned the property at S Street, Suburb U (referred to variously in the evidence as "S Street" or "Suburb U"). The husband had purchased this property in 1997 for \$425,000 with a deposit of \$100,000 and borrowings of \$340,000 secured by mortgage.

103 There is no retrospective valuation as at mid-2004. I accept that it is likely that the value of Suburb U had increased between 1997 and mid-2004, noting the evidence concerning the increases in the wife's property at V Street discussed elsewhere.

104 The husband submitted that inferences as to the value of Suburb U at around the relevant time could be drawn from the fact that by mid-2005 the husband had secured \$1,035,000 in loans from L Bank against the property, as shown in annexure C to his Trial Affidavit.

105 However, in the husband's affidavit, at paragraph [48], he says this mortgage related to the purchase of W Street in about mid-2005, discussed elsewhere. The husband's evidence about

the purchase of W Street was that this involved “discharging the existing mortgage secured on [Suburb U] and providing that property and [W Street] as security for a loan in the amount of \$1,035,000.00.” Given that both Suburb U and W Street stood as security for the loan of \$1,035,000, in my view, it is not appropriate to draw the inference that the bank valued Suburb U alone as being worth \$1,035,000 at that date.

106 While it is likely the husband had equity Suburb U at mid-2004, it is not known how much. Nevertheless, it is an asset which should be given weight as an initial contribution.

M Pty Ltd

107 The husband was a finance professional. He operated through M Pty Ltd of which he was the sole director and shareholder. He sold an unknown portion of his practice in mid-2004 for \$280,141. The sale was effected over three payments between late 2004 and mid-2006. The residue remains on the balance sheet for \$3,000.

Trust interests

108 At mid-2004 the husband was a director of X Company as trustee for the K Unit Trust and so a beneficiary of various trusts.

Peel Family Trust – units in Y Unit Trust

109 Between 2004 and 2010 the husband received \$333,360 in income from this interest. However, there were also legal fees of \$200,000 associated with the interest and receipt of the income. That was a net benefit of \$133,000 over the period. There was no evidence of the value at mid-2004. The wife submitted that the value may have accrued during the relationship. The husband submitted that in the alternative it was the husband’s financial contribution of the net sum during the relationship and I accept that submission.

Peel Family Trust – 17% interest in K Unit Trust

110 The trust interest was purchased for \$25,000 in 1992. It is now agreed to be worth \$100,000. The husband agreed in cross examination that the underlying assets were encumbered and neither the value of the interest nor the extent of the encumbrance were known as at mid-2004. The wife submitted that absent relevant evidence little or no weight could be given to this asset as a contribution as at mid-2004, and that the asset value may have accrued solely or mainly during the relationship due to market factors. It is likely that this asset had some value between the two established figures at mid-2004 but no more can be said than that.

Peel Family trust – Share in Z Property

- 111 This was purchased unencumbered in 1993 for \$17,000 and sold in 2009 for \$35,000. It is likely that it had a value somewhere between those figures in mid-2004 and should be given appropriate weight as a contribution.

Two eighteenth share in AA Company

- 112 This was initially pressed as a contribution of \$100,000, but during oral submissions the husband properly conceded there was no evidentiary basis for any valuation and this was not pressed. It is not taken into account.

BB Discretionary Trust

- 113 The husband says he purchased a recreational vehicle in mid-2004 for \$82,000. That is the only evidence of the value of the interest in that trust and is taken into account as an asset of the husband at mid-2004.

CC Discretionary Trust

- 114 The husband's evidence was that he had an interest in this trust at mid-2004. However, there is no valuation of the trust interest or evidence of it having any assets at that time. The husband's oral evidence indicated that the only relevant activity of the CC Discretionary Trust was the purchase of the property at W Street in about mid-2005. By that time the wife's financial first contribution of \$265,000, discussed elsewhere, had been given to the husband and placed in his business accounts for their joint purposes, including the purchase of W Street. Further, the purchase of W Street by the CC Discretionary Trust involved a mortgage of \$1,035,000 secured over W Street and also over Suburb U.
- 115 There is no evidence that the CC Discretionary Trust had any assets or net value at mid-2004. Accordingly, no weight can be given to the husband's interest in this trust as an initial contribution. This is significant as the husband sought to rely upon his use of monies in this trust at a later date to submit that he made further financial contributions throughout the relationship. There is no evidence that the monies used by the CC Discretionary Trust in undertaking developments at later dates did not come from sources already identified, and accounted for, as initial contributions.

Personalty

116 The husband had personalty of an unencumbered Motor Vehicle 4. In submissions it was put for the husband that the Court would infer or take note that Motor Vehicle 4 was a valuable item at mid-2004, however, there is no evidence of value. The husband also had Motor Vehicle 5, “antique” furniture, “art” and unspecified superannuation. There are no values for any of these at mid-2004. There is no evidence the furniture represented valuable antiques rather than merely old items, or that the art was valuable rather than decorative. Some weight is given to these items.

117 The husband is likely to have had some superannuation. He did not identify what his superannuation interest in his self-managed fund was at that time even though the fund still operates and he is an accountant with access to the entity’s financial records. It is likely, given the use of superannuation funds in later property transactions that the husband had an unknown amount of superannuation accrued at mid-2004.

Wife’s initial financial contributions

V Street, Suburb DD

118 The wife owned a two-bedroom property in EE Street, Suburb FF, NSW, subject to a mortgage, which she sold in around 2001 for approximately \$200,000. She used that towards the purchase of V Street, Suburb DD, NSW (“V Street”) for \$255,000 in late 2001. She sold V Street in about mid-2005 for \$465,000.

119 There is no valuation of V Street at mid-2004. The husband led documentary evidence of the wife’s mortgage. At mid-2004 the wife’s mortgage was \$195,199.45. At the date of sale in mid-2005 the wife’s mortgage was \$214,081.34. The wife would have had to pay the agent’s commission and sale costs. The husband agreed that not long after the sale of V Street the wife gave him approximately \$265,000 and that he mixed it with his business accounts and funds for use for the parties’ mutual benefit. It seems likely that the majority of the \$265,000 funds came from the sale of V Street, but in any event this \$265,000 represented the wife’s interest in V Street and such other funds as she had in the period at or soon after mid-2004.

120 The husband agreed that he mingled the wife’s \$265,000 with his own funds and uses those funds for the parties’ property dealings and living expenses. As noted above, this \$265,000 was provided to the husband at the same time as the purchase of W Street, which was then developed.

121 The wife submitted, and I accept, that the husband did not establish that it was likely that the W Street purchase and development, nor the many other purchases and or developments that followed, could or would have happened had her financial contribution not been added to the husband's, even though his initial financial contribution was clearly greater.

Superannuation and employment entitlements

122 The estate submitted, and I accept, that the wife probably had superannuation and employment entitlements at mid-2004, noting the payments out in 2007 to 2008 discussed elsewhere, however, there is no valuation.

Personalty

123 The wife also had personalty at the commencement of the relationship including furnishings and household contents and jewellery and a motor vehicle. As with the husband's personalty, there is no evidence as to values and only limited weight can be given to this category.

Contributions during the relationship

Wife's employment

124 At the commencement of the relationship the wife was employed, earning approximately \$40,000 per annum. She continued in this employment until retrenched.

Wife's ANZ line of credit, and superannuation and employment entitlements

125 Although most of the wife's evidence in chief on the topic was objected to and rejected, the husband fairly agreed that, probably in early to mid-2006, the wife had secured a line of credit with ANZ and drawn down \$300,000, secured against E Street.

126 It is common ground that this \$300,000 was given to the husband and deposited to his business account for use by him in his financial dealings, including in property development, on behalf of both parties.

127 The husband agreed that the wife paid for the interest on this line of credit with her earnings.

128 The husband gave evidence that in late 2007 the wife received a redundancy payment of approximately \$90,000 and that in early 2008 she received superannuation in two lump sums, being \$53,420.00 and \$117,930.00. That is just over \$262,000.

129 It was common ground that on receipt the wife deposited these monies to the reduction of the ANZ line of credit she had drawn down in 2006.

130 This estate submitted that the wife’s drawing and funding of this line of credit, and her use of superannuation and employment payments to pay it down, were a further significant financial contribution and flowed into and facilitated the ongoing property developments in which the parties were involved.

Wife’s business and employment

131 Following her redundancy the wife started a business. It was referred to in the materials as “GG Pty Ltd”. The wife said that her start-up costs were approximately \$50,000. The husband says that this was a loss making enterprise which made substantial losses exceeding \$200,000 over the course of its operation from about 2010 to 2017. The husband’s evidence at paragraph [69] was that by early 2015 the business was “barely trading”.

132 The husband’s submission was that though she was working from 2010 to 2017, the wife was not in effect making any financial contributions.

133 In my view there is a significant difference between someone who elects not to work and someone who puts their time and effort into establishing a business, which ultimately turns out to be unprofitable. The wife contributed her time and effort to a venture involving commercial risk. If she had been successful both parties would have benefited from owning a successful business with the profits and capital value that follow that. Unfortunately, the wife’s business was not successful. In that regard, there was no financial contribution and there were losses, but the taking of a risk to found and operate a new business and the time spent on it in the hope to improve the parties overall financial position is not the same as not working and not contributing through that work.

134 The wife’s evidence was that she had not worked since 2017 and that prior to separation in 2019 she relied solely upon the husband for her financial support.

6B Street, Suburb C (the former matrimonial home)

135 In around early 2012, the parties sold the E Street property for over \$1,500,000. The net funds were used to purchase a block of land at B Street, Suburb C, NSW in the wife’s sole name at a cost of nearly \$400,000. The parties then built a large 5 bedroom home at a cost of approximately \$580,000. They rented back the E Street property until moving into the former matrimonial home in mid-2013. It appears that at various times funds were also drawn down against the former matrimonial home to fund various development projects as well as for living expenses.

Parties' property investments and developments – 2005-2020

- 136 The parties engaged in significant property developments starting soon after the commencement of the relationship in mid-2004. The husband's evidence suggested that he made significant *additional* financial contributions by reason of his property developments.
- 137 However, noting that there is no evidence the CC Discretionary Trust had monies not already identified in the assessment of initial contributions, there is no evidence of financial contributions by the husband in the undertaking of property developments not already accounted for in the assessment of initial financial contributions, and noting the inheritances discussed elsewhere.
- 138 In about mid-2005, the husband purchased W Street, through the CC Discretionary Trust for \$985,000. The husband used Suburb U and W Street as security for that purchase. The husband's evidence was that he purchased and subdivided W Street between mid-2005 and late 2010.
- 139 The husband relies upon this, at paragraph [48], as his contribution giving evidence that the purchase was financed by "monies [CC Discretionary Trust] had in its accounts". However, as noted there is no evidence that CC Discretionary Trust had any funds in mid-2004. The evidence also establishes that the loan taken out, for \$1,035,000, was somewhat greater than the purchase price of W Street. That was in the context where the wife had given the husband \$265,000 just prior to the purchase to use towards their financial goals. The mortgage was secured over both Suburb U and W Street.
- 140 It is clear that the husband's interest in Suburb U contributed to the parties capacity to purchase W Street and that the wife contributed \$265,000 at that time. As noted elsewhere, it is also common ground that the wife borrowed \$300,000 from ANZ as a line of credit against E Street and gave this to the husband for use in their joint enterprises in mid-2006, and then paid the line of credit down by \$262,000 in 2007 to 2008, all while the development of W Street was taking place through to late 2010.
- 141 The husband subdivided Suburb U into three lots from about 2009 to 2014. Suburb U is taken into account as the husband's initial contribution. The husband's evidence seeks to treat the sub-division as his sole contribution. The estate submitted, and I accept, that this was the husband dealing with the parties' mutual property, to which the wife had by this time

made a considerable financial contributions, for their mutual financial benefit. The development took place well into the relationship.

142 The evidence does not establish that either the purchase or W Street or the development of W Street and Suburb U probably could or would have occurred without the wife's financial contribution.

143 The parties' purchased the property at 2 B Street, Suburb C in late 2014. Over the period to late 2020 they developed the property by building two free standing dwellings. The husband's evidence was that he purchased this property using funds "from monies I had in my business account" with the inference being this was his sole financial contribution. However, it was common ground that the wife's contributions of \$265,000 after selling V Street, and of \$300,000 by way of a loan she paid the interest on, and then paid down with \$262,000 in employment benefits, had been paid to the husband's business accounts many years earlier

144 Further, in early 2015, the husband and the wife jointly created a credit facility of \$600,000 with P Finance which was secured over the former matrimonial home. \$582,384 of these funds were then used to facilitate the development of 2 B Street. Monies were paid to and redrawn down on this facility on many occasions at differed times across the course of the parties property developments as set out in the husband's affidavits. The outstanding debt remains on the balance sheet and a mortgage over the former matrimonial home. The development depended upon a joint loan secured over the former matrimonial home.

145 In about mid-2015, the husband purchased two properties at Q Street, Suburb R, and provided his daughter, and her then husband, with funding to assist them to purchase the third lot as noted elsewhere. Again, this development took place over many years and involved the use of mingled joint matrimonial funds and the use of those funds to assist his daughter.

146 The HH Unit Trust was incorporated in early 2006. Assets were acquired using the proceeds of the T Litigation. The husband made a profit from this transaction over the period to mid-2009. The T Litigation contribution has already been accounted for.

JJ Litigation - loss

147 The husband was engaged in less successful litigation referred to as the "JJ Litigation", which related to his recovery of professional fees related to a development. The litigation ran across 2016-2020. The fees exceeded the recoverable sum and the excess of fees over recovered

damages was in the range of \$360,000 to \$534,000. The husband was unable to clarify whether the loss was the larger or smaller of these figures.

148 The estate did not criticise the husband for this loss, but pointed to the fact that the husband's commercial dealings included both his losses as well as his gains, all of which are to be weighed and the husband agreed that was appropriate.

Husband's inheritance

149 In mid-2017, the husband inherited \$229,270.

Wife's inheritance

150 In 2015 the wife received a \$100,000 inheritance from her mother's estate. She stated that \$80,000.00 remained in her savings upon separation with the other \$20,000 gifted to her daughter.

Post separation

151 The wife had the benefit of sole use and occupation of the former matrimonial home from 18 February 2020 to her passing. Her evidence was that she paid all outgoings on the former matrimonial home from her savings and that her income was the aged pension of \$933 per fortnight and her source of funds the residue of her inheritance.

152 The husband has had the sole use and occupation of the former matrimonial home from 26 July 2021. The husband submitted that he had made the greater contribution post separation by reason of his payments of the P Finance account. However, he agreed in cross examination that in the context of COVID-19 he sought relief from repayments, making no repayments for a period of time and reduced repayments for another period of time.

153 Each party had the sole use and occupation of the former matrimonial home for a period post separation. The husband made more payments to P Finance than the wife but did not meet the payments for the full period of his occupation. This period favours the husband somewhat.

CONTRIBUTIONS – DECISION

154 The parties agreed that contributions to family welfare and non-financial contributions to property were equal across the course of the 15 year relationship.

155 Where family welfare contributions are agreed to be equal, and all of the evidence is about the financial issues, this can tend to mask their significance. Indeed, the concentration on financial matters at Trial may tend to mask “the myriad of other contributions that were made” (*Jabour & Jabour* (2019) FLC 93-898 at [83] (“*Jabour*”)).

156 Further, the focus on financial contributions at Trial may wrongly tend to suggest that the Act treats family welfare or other non-financial contributions as inherently less valuable than financial contributions in the holistic weighing process. That is not the case, even though the result is necessarily expressed in dollar terms (see eg *Trask & Westlake* (2015) FLC 93-662).

157 There was a flavour of this in the husband’s evidence and in his closing submissions on contributions, which focussed almost exclusively on the relative financial contributions and made little if any reference to the weighing of other contributions.

158 The husband cited *Mallet & Mallet* (1984) 156 CLR 605, which is uncontroversial to the effect there is no assumption as to equality of contributions as a starting point. The essence of the husband’s submission was that his greater initial financial contribution, and greater financial contributions over all, provided most of the capital which the parties used and which has led to the current asset pool, see *Pierce v Pierce* (1998) 24 FamLR 377 (“*Pierce*”).

159 The estate relied upon *Pierce* at [28] and *Jabour* in particular at [73] and [83-84], noting the need to consider the husband’s greater initial and overall financial contributions “as one of the myriad of contributions made” by the parties, further that the wife’s financial contributions were not insignificant and contributed to and ran through all of the property transactions and developments which occurred from mid-2005, and that some of the increases in real property values which occurred market overtime were not the result of development or of the efforts of either party.

160 While it is important not to undervalue the family welfare and non-financial contributions, the estate’s submission that the relative overall contributions were 50/50 failed, in my view, to give appropriate weight to the husband’s greater financial contributions, including the significant value of the T Litigation which on the evidence was by far the most significant asset of the parties in mid-2004.

161 The husband’s submission, on the other hand, that contributions favoured him in range of 60-65% with a submission of 62.5%, in my view clearly overstated his position. While the

husband clearly made greater financial contributions the husband's submission appears to be predicated on a consideration of either only, or at least primarily, financial contributions.

162 Taking all of the relevant factors into account, including the husband's greater overall financial contributions and the parties' equal contributions to family welfare and non-financial contributions to property, making the leap from the qualitative to the quantitative as I must, I consider that contributions favour the husband by 57.5% to 42.5%.

SECTION 75(2) MATTERS

163 The wife's passing is clearly a relevant factor which affects the process of assessment of s 75(2) factors and which may affect the relevant adjustment.

164 The husband submitted that taking into account all of the relevant s 75(2) factors, there would be an adjustment in his favour of 12.5%, over and above the 62.5% he submitted he was entitled to by reason of his contributions.

165 The estate submitted that taking into account all relevant matters, including in particular the uncertainty around the nature of the husband's relationship with Ms H and the lack of knowledge about her financial position by reason of his failure to provide evidence on that issue, there would be no adjustment to the contributions assessment.

166 In effect, the estate's submission was that the husband did not make full and frank disclosure of his true financial position by failing to inform the Court of the financial circumstances of a person co-habiting with him, and that the consequences of such non-disclosure should weigh against him (see eg *Weir & Weir* (1992) 16 Fam LR 154). The estate's submission was therefore that the final position would be a 50/50 split of the net assets based on the estate's submission as to contributions.

The effect of the wife's passing

167 Given the legal arguments made in submissions it is appropriate to consider the legal impact of the wife's passing on the proper application of s 75(2).

168 In closing oral submissions the husband relied heavily on the decision of the Full Court in *Tasmanian Trustees Ltd and Gleeson* (1990) FLC 92-156 ("*Tasmanian Trustees*"), a decision of Nygh J with whom Strauss and Baker JJ agreed, and on the decision of the Full Court in *Re Parrott v Public Trustee of NSW* (1993) 17 Fam LR 785 ("*Re Parrott*"). The husband submitted the facts in this case are comparable to the factual situations in those two matters.

169 In *Tasmanian Trustees*, the husband suffered from a terminal degenerative condition. The only asset was the former matrimonial home, said to be modest. The husband died between Trial and Judgment. The wife became the sole owner of the former matrimonial home by survivorship as joint tenant. The husband's estate was substituted as a party. Absent a property adjustment order there were no assets in the husband's estate and the wife would retain the former matrimonial home. There was no issue that the first condition in s 79(8) was met. The issue was whether it was still appropriate to make an order. The Trial Judge made no order and the wife retained the former matrimonial home which represented, in effect, the entirety of property pool.

170 The Full Court said at 92-156:

As was pointed out by *Gee J*, in *North and North* (1987) FLC 91-831, the question is whether, having regard to the death of the spouse and any consequences flowing therefrom, it is still appropriate to make the order. As *Smithers J*. pointed out in *Menzies and Evans and Evans* (1988) FLC 191-969 at p. 77,010, the most obvious difference is the fact that the deceased no longer has sec. 75(2) needs for the future, whilst the survivor continues to have such needs.

171 And later at 92-156-157 that:

As I remarked in the course of argument, it would be rare for a court to deprive one of the spouses of the marriage of the entire share to which he or she might be entitled by reason of contribution, having regard to the needs of the other party. But, as I pointed out, whilst it might be rare, it does occur and the obvious example is a situation where the estate is very small, consisting of a modest former matrimonial home, where one spouse has no earning capacity and the other spouse is unwilling or unable to contribute to the support and maintenance of the spouse in possession of the house and any dependants. There is no absolute principle in this Court that a party is not under any circumstances to be deprived of the fruits of his or her contribution, although it is proper to say, generally speaking, that the Court should be reluctant to take that step.

I consider that the proper approach in a matter such as this was taken by *Smithers J* in the case of *Menzies and Evans and Evans*, to which I have earlier referred. I wholeheartedly agree with the learned Judge in that case that the deceased has a prima facie moral entitlement to the share gained by contribution during his or her lifetime and, if this is so desired, to dispose of that share by will to persons who are strangers to the marriage. But the facts of this case are quite different to those in *Menzies and Evans and Evans*.

172 The Full Court found that "In this case the estate is very small and the needs of the wife are overwhelming". On that basis the Full Court found no error in the Trial Judge's decision that the wife's sole tenancy should not be disturbed by the making of orders. The effect of the decision was that the wife received the entire property pool.

173 The passage from the decision of Smithers J in *Menzies v Evans and Another* (1988) 12 Fam LR 519 (“*Menzies*”), approved by the Full Court in *Tasmanian Trustees*, at 528 reads:

The only significant difference in the analysis of the case arising out of the death of the deceased, is the obvious one that, when comparing the position of each of the parties, the deceased no longer has sec. 75(2) needs for the future, while the husband continues to have such needs. This does, in my view, alter the situation in a way which should be reflected in the outcome of the case. Even though his needs can be met out of income, the fact that he does have to meet them, and that the deceased does not have such needs, is the significant factor here. This aspect of the case should be of moderate significance only however in view of the amount of the assets, the age of the husband, and the extent of his future needs. Save to the extent necessary to reflect this aspect of the case it would in my view be wholly inappropriate that the deceased should be deprived of the benefits of her contributions over so many years. That is to say that it is still appropriate, following the death of the deceased, that the outcome of the case should depend, largely, upon the extensive contributions of the parties over so many years.

174 In *Re Parrott*, on which the husband also placed significant weight in submissions, the wife had commenced property adjustment proceedings. The husband then died intestate. At trial the wife’s assets consisted of furniture and \$2,240 and the husband’s estate of \$75,649. The wife had already been paid \$17,265, which was taken into account, as were the Public Trustee’s costs of \$4,000. The wife’s contributions were assessed at 20%. That contribution assessment was not challenged.

175 At Trial the wife was 62, “had virtually no property ... the wife's only income consisted of the widows pension of \$165 per week” and she was “suffering from severe insomnia, chronic anxiety state, hypertension and vertigo” and “had no earning capacity.” There was no issue that s 79(8) was satisfied. The Trial Judge made an adjustment of 7.5% for s 75(2) factors.

176 The Full Court found that this gave insufficient weight to the wife’s age, state of health, financial circumstances, and future needs including for a reasonable standard of living. They re-exercised the discretion to adjust by 50%, which resulted in the wife receiving approximately 75% of the estate.

177 The Full Court noted that there was no evidence of any beneficiaries, and continued at 790:

However we note the comments of Lindenmayer J in *In the Marriage of Doyle* (1989) 13 Fam LR 200; [1989] FLC 92-027 at Fam LR 202; FLC 77,398, that it must be presumed, from the enactment of s 79(8), that the legislature intended that one party to a marriage which has broken down to the point that proceedings have been commenced for orders altering the interests of the parties in property should not profit by the fortuitous death of the other party prior to the determination of those proceedings.

While this is so, it is clear enough that the death of one party has a profound effect

upon the balance of s 75(2) factors, as the Full Court pointed out in *Tasmanian Trustees Ltd v Gleeson* (1990) 14 Fam LR 189; [1990] FLC 92-156.

178 The Full Court in *Re Parrott* continued at 791:

If one were to envisage a continuum, with cases typified by the *Tasmanian Trustees* case at the one end and the *Menzies* case at the other, this case would fall closer to the *Tasmanian Trustees* case.

179 The husband also cited the decision of Justice Brereton in *Grace v Grace* [2012] NSWSC 976 (“*Grace*”). His Honour said at [290]:

The impact of death on the appropriateness of making an order may arise in several ways. First, the effect of the deceased's will may be to discharge the moral obligations that would otherwise have underpinned an adjustive property order. Secondly, a deceased spouse has no future needs, and thus no s 75(2) factors operating in her or his favour [*Tasmanian Trustees Limited v Gleeson* (1990) FLC ¶92-156]; thus the death of a party *can* have a profound effect on the balance of the s 75(2) factors [*Parrott v Public Trustee of NSW* (1994) FLC ¶92-473], although that will depend on the means and needs of the surviving spouse and the adequacy of his or her contribution-based entitlement to provide for them.

(Emphasis in the original)

180 Justice Brereton also referred, at [291], to the decision of Justice Watts in *Miklic v Miklic* [2010] FamCA 741 at [127] where Watts J said:

Past cases have considered how the death of a party should be taken into account when assessing the availability of an adjustment under s 79(4) in relation to future needs. Clearly, the husband has no future needs of the kind referred to in parts of s 75(2). On the other hand, some care should be taken not to nullify the deceased party's contributions due to the lack of future needs (see *T & D & Anor* (2006) FamCA 1248).

Husband’s right to bring a late family provision claim

181 The husband was not included in the wife’s will. The husband was cross examined on a conversation with the executor soon after the wife passed, in which he said he was considering commencing proceedings in relation to the will (see the *Succession Act 2006* (NSW)). That claim is now out of time, but might be amenable to extension.

182 The husband gave evidence that he had no intention of seeking leave to commence such proceedings out of time, and further that he was content for this Court to proceed on the basis that no such claim would be made by him in determining these proceedings.

183 It was conceded for the husband, as I understand it, that the husband’s evidence, and my reliance upon it in determining this proceeding, would create an estoppel as between the husband and the estate prohibiting the husband from seeking to make a claim against the

estate out of time. I proceed on the basis that no claim will be made by the husband in determining, as I have, that there should be orders adjusting the property rights of the estate and the husband.

The executor's financial position and reasonableness of inheritance

184 The executor led evidence of her financial position. The financial position or needs of the estate's beneficiary are not relevant factors for consideration within the legislative scheme which governs this determination. I have not taken them into account (see for example *Menzies* at 528).

Factors submitted to be relevant

185 Many of the other factors in s 75(2) are not relevant to this case. The parties made their submissions by reference to the factors they consider relevant to the husband, and I have considered these.

Age and state of health and physical and mental capacity for appropriate gainful employment

186 The husband is almost 70 years of age. He says he is, as he said at Part C of his financial statement, a retired finance professional with no personal exertion income. He submitted that he had no current earning capacity. This is submitted to be so although he still owns a practice valued at \$3,000 on the balance sheet. He also gave evidence of very poor eyesight.

187 In cross examination the husband agreed that he still has in mind that he might undertake some property developments in future, in the hope of making a profit, but this is dependent upon him obtaining appropriate financing. The estate relied upon this, and the husband's skills as an accountant, as indicating a residual earning capacity.

188 I accept that the husband is of an age where he has quite reasonably retired. While he may be able to make some money undertaking property development work in the future, given his history and knowledge of this field, that is subject to financing and is highly speculative.

189 I accept that the husband has only a nominal earning capacity, no other source of income and relatively limited superannuation. This is a factor which favours an adjustment to the husband.

A reasonable standard of living (g)

190 The husband submitted that the "... balance sheet is insufficient to provide for the husband's housing and living expenses".

191 The husband's case that his contributions assessed entitlement is insufficient to provide a reasonable standard of living starts from the proposition that he needs to retain the former matrimonial home, a large two story five bedroom free standing property in Suburb C worth \$1.8 million.

192 Apart from a desire to continue living in the former matrimonial home, the husband does not provide any reason why it is necessary for a single person to reside in a large five bedroom house in order to maintain a reasonable standard of living. Further, the husband's evidence in cross examination was that he plans to downsize in about five years in any event, and I note that he was content to live in a 2 bedroom flat after leaving the former matrimonial home.

193 It is an unfortunate, but extremely common, result of separation that neither party is financially able to retain the former matrimonial home, despite their often very strong emotional attachments to it.

194 The question of a reasonable standard of living requires an assessment of the cost of appropriate housing and of his access to capital on which to live, taking into account his contributions-based entitlement means as well as his reasonable needs.

195 I am not satisfied that a reasonable standard of living requires the husband, as a single man, to live in the former matrimonial home.

196 I am not satisfied that the husband's desire to retain the property for 5 years before downsizing is a basis on which he should receive an adjustment of the capital from the estate required to keep the property now.

197 The husband did not lead evidence of the cost of a smaller property in Suburb C of the kind to which he proposes to ultimately downsize. However, it is open to infer that a smaller property would have a lower value.

Financial circumstances of any person co-habiting with a party

198 The husband's evidence in chief about his two loans to Ms H are minimal.

199 In his Trial Affidavit at [122], the husband said that “[In mid-2021] I lent \$83,750.00 to a friend to enable a deposit to be placed on the purchase of an "off the plan" strata unit on [KK Street, City LL].” He did not name Ms H. This loan was included in his financial statement, filed 3 August 2022, at item 38 “investments” as “Personal loan to [Ms H]” in the sum of \$83,750.

200 In cross examination, the husband confirmed that the money was lent to Ms H, and that the balance sheet sum of \$130,075 was the same loan “expanded”. He said Ms H’s son was involved in a serious court battle and she asked him for the further loan and he made it which has taken the loan to it’s current figure. He said that he expects repayment of this loan on the completion of the off the plan property Ms H is purchasing at KK Street, but did not say when he thought that would be. It appears that there is no security for this loan. The husband gave no other evidence concerning the loan.

201 The husband agreed that Ms H lives with him but denied that there was a romantic relationship. He said they share as she had to move out of an apartment and that she pays rent, although there is no evidence from the husband about the receipt of rent in his affidavit nor in his financial statement and he did not seek to lead oral evidence of this at Trial.

202 The husband agreed that Ms H attended his relative’s wedding with him, although she did not know his relative, and that she made a financial contribution to the wedding gift.

203 My view was that the husband’s evidence concerning Ms H was unsatisfactory. He gave extensive evidence in his affidavits about the circumstances of his loans to his daughter, but only nominal evidence about his loan to Ms H and for some reason did not name Ms H in his affidavit, calling her only “a friend”.

204 He did not disclose that he was receiving rent for sharing his property, which he should have on his case, and while it is one thing to lend a child money without security, the proposition that the husband has lent a substantial portion of his net wealth to a friend without security, who just happens to live with him and to attend family weddings of people she does not know with him, while also contributing to the gift, strained credibility.

205 The husband could and should have disclosed that he was living with someone, and of the rent they were paying, and dealt with the matter with a degree of transparency. He elected not to do so. While I do not consider this lack of disclosure to disentitle the husband to any adjustment as submitted by the estate, it causes me to be cautious in my assessment of the

husband's future needs given that a financial resource, in the form at least of a tenant and possibly of a new partner with her own property interests, has not have been fully and frankly disclosed.

Summary and findings

206 The wife had, and through her estate continues to have, an entitlement to her share of the portion of the parties' net property pool attributable to her contributions. She was, and is, entitled to dispose of her share to her child, the executor, through her will rather than having it pass to her now ex-husband. The husband is not entitled to profit from the death of the wife merely because she passed before there was a Trial and Judgment. However, the Act requires the wife's assessed contribution entitlement to be subjected to a consideration of s 75(2) factors, and clearly given his age and overall financial situation the husband has future needs which the wife does not.

207 As Justice Brereton said in *Grace* the death of one party "can have a profound effect on the balance of the s 75(2) factors". Cases such as *Grace* and *Menzies* make it clear that whether or not it does depends on the holistic assessment of the facts of each case (see eg *Tomasetti and Tomasetti* (2000) FLC 93-023 especially at [113]–[114]).

208 The husband submitted that given his lack of earning capacity, the size of the estate and the capital required to retain the former matrimonial home, this case falls on the same point in the "continuum" identified in *Re Parrott* so as to require that he receive 75% of the net property pool.

209 I do not consider the available net property pool in this case comparable to those in *Tasmanian Trustee* and *Re Parrott*. Obviously the figures cannot be compared in absolute dollar terms to those in cases from earlier years, but net assets, including add-backs and superannuation after liabilities, of \$2,390,992 is not nominal. It is comparable to many property pools in matters before this court involving people of comparable age who both have normal life expectancies and who each require accommodation.

210 I do not accept that the husband requires an adjustment to retain the former matrimonial home for five years until he downsizes. There is no reason he needs a five bedroom home now, and his proposal would generate a windfall profit for him when he downsizes in five years' time.

- 211 The husband did not lead evidence of the price of a smaller house, but I proceed on the basis of proportionality in a market in the same suburb or area.
- 212 The husband also sought to argue that when looking at the contributions based entitlement, his actual financial position and access to cash to purchase the former matrimonial home, or to house himself, is relevant and that his actual current access to capital will make it difficult for him if he does not obtain a significant adjustment in his favour.
- 213 The fact that the husband has chosen to loan \$260,000 to his daughter and Ms H, the loans to Ms H apparently being quite recent, and put that capital temporarily out of his hands, is not a basis on which the husband has a need which should reasonably be met by reducing the wife's, through her estate's, legitimate contribution based share in the property pool.
- 214 The fact that the husband chose to spend at least \$270,000 and up to \$320,000 on legal fees, is dealt with elsewhere.
- 215 The husband had not disclosed his rental income from Ms H, on his case, and I take into account the lack of transparency on the husband's part around Ms H when weighing what is just and equitable.
- 216 The husband's overall financial status, including his age and lack of earning capacity, are relevant as is a reasonable standard of living, however, as stated, I do not accept that a reasonable standard of living requires him to continue to live in a five bedroom home for the next five years before downsizing as planned, and his needs must also be weighed keeping in mind the wife's rights referred to earlier in the context that he has, and she does have, s 75(2) factors.

Adjustment

- 217 Weighing all of these factors and the husband's means and needs, whilst concerned about the husband's evidence concerning Ms H, I am nevertheless persuaded that it is appropriate to make an adjustment in favour of the husband.
- 218 Considering the totality of the evidence, I find that there should be an adjustment of 7.5% in the husband's favour. In addition to the husband's 57.5% contributions based entitlement this means that the husband receives 65% of the net property pool and the estate 35%.

ORDERS SOUGHT

- 219 Both parties proposed that there should be a super splitting order so that the husband retains all of the superannuation in the self-managed superannuation fund. I will make an order to that effect in the form proposed by the estate.
- 220 Both parties proposed that the husband should have the opportunity to retain the former matrimonial home, if he is able to do so. The husband led general evidence in his further supplementary Affidavit filed 4 April 2023 about his enquiries regarding a reverse mortgage. He did not obtain any evidence of the fact that a lender would lend him money.
- 221 The estate's final minute of order (MFI 10) proposed a payment of \$946,079 to the estate with the simultaneous transfer to the husband of the former matrimonial home and the P Finance mortgage with machinery provisions to facilitate that transaction. That is based on a 50/50 adjustment given the estate's final proposed balance sheet.
- 222 The husband's final minute of order (MFI 9) proposed a payment of \$280,000.00 to the estate with him to receive the former matrimonial home and mortgage. He proposed payment of \$100,000 within 5 business days and the remaining \$180,000 on "the latter of 6 months from the date of orders or 30 September 2023". That is based on a 75/25 adjustment in the husband's favour based on the husband's final balance sheet.
- 223 In terms of the sale of the former matrimonial home, if the husband is unable to, or elects not to, retain the former matrimonial home the parties had quite different proposals for sale.
- 224 The estate's proposal was that if the husband does not pay the determined sum within 42 days there would be a sale of the former matrimonial home by private treaty. The real estate agent would be agreed between the parties, or else nominated by the President of the Real Estate Institute in the usual way. The sale price would be agreed between the parties, or failing agreement as nominated by the agent. The reserve price would be 80% of the sale price, with offers above that to be accepted. The husband would be required to do all things reasonably necessary to present the former matrimonial home for sale. The estate proposed the usual disbursements including the payment of the P Finance mortgage, payment of agent's commission and expense, legal sale costs, and then payment to the estate of the determined figure and the remainder to the husband.

- 225 It was proposed that if the former matrimonial home does not sell by private treaty, it should go to auction with a similar reserve of 80% and terms for the ongoing re-offering for sale by auction until sold.
- 226 The estate proposed that the husband continue to have sole use and occupation of the former matrimonial home on the basis that he pay all mortgage repayments to P Finance, statutory fees, insurances and other outgoings while in occupation.
- 227 The husband's proposal, if a sale is required, is that the former matrimonial home would be vested in him as trustee for sale. The husband proposed that the former matrimonial home be listed for sale within 7 days of being vested in him. He did not propose a reserve or mechanism for setting a reserve and proposes, as I understand it, that he would have sole control over the sale price as sole trustee. If the property does not sell in 3 months, he proposed that it be listed for auction with a reserve price of \$1,830,000. That reserve price is above the agreed valuation of the former matrimonial home. No reasons were given why the reserve would be set above the agreed value of the former matrimonial home. If the former matrimonial home does not sell for a price above the agreed current value no provision is made for its future auction at a later date. In effect, in practice, the husband's proposed terms are likely to result in the former matrimonial home not being sold.
- 228 The husband proposed his continued occupation of the former matrimonial home on similar terms to the estate.
- 229 The husband proposed the transfer to him of the furniture and property he sought.
- 230 During oral submissions the parties accepted that a rise and fall clause addressing the uncertainty of a sale price and windfall benefits, or losses, should be used in the event of a sale.
- 231 Both parties proposed the usual orders confirming their interests in their other assets and liabilities and for an order pursuant to section 106A to be included.

ORDERS MADE

- 232 I refer to my findings as to the final balance sheet.
- 233 On my findings as to the appropriate adjustments, for the estate to receive 35% of \$2,390,992 it would need to retain \$836,847. For the husband to receive 65% he needs to retain \$1,554,145.

234 The estate's net assets, excluding the former matrimonial home and the mortgage and
superannuation, but taking into account add-backs and other liabilities, total \$294,421.

235 Therefore, if the husband retains the former matrimonial home, mortgage and all
superannuation, to achieve that result the husband must pay the estate $(\$2,390,992 \times 0.35) =$
 $\$836,847.20 - \$294,421 = \$542,426.20$.

236 I will order the husband to pay to the estate \$542,426 as a condition of retaining the former
matrimonial home with the mortgage.

237 If the husband does not do that then the former matrimonial home will need to be sold, with a
rise and fall clause.

238 The rise and fall clause will need to be premised on the exclusion of the former matrimonial
home and of the mortgage from the calculations, and with the husband to have all of the
superannuation. In that event the estate, as noted, will be deemed to have \$294,421. The
husband's net asset position, excluding the former matrimonial home and the mortgage but
giving him all of the superannuation, is \$866,571 and he will be deemed to have that amount
for the purposes of the rise and fall clause.

239 The rise and fall clause will then order the net proceeds of sale after the payment of the
mortgage, any charges running with the land required to be paid to transfer the property, and
all sale costs, to be distributed so as to achieve the ordered distribution.

240 The husband should have a reasonable period to arrange finance and pay these monies. Six
months as proposed by him is not a reasonable period. Six weeks as proposed by the estate
is, on the other hand inadequate. The husband should have three months to put his financial
affairs in order and to pay the estate the determined figure if he can and if he chooses to.

241 If husband does not make that payment within three months, I will make orders for the sale of
the property by auction which I consider fair.

242 No submissions were made as to why the estate as a party to the proceedings, and the party
which currently owns the former matrimonial home, should not be involved in the sale in the
usual way. There has been no behaviour on the part of the estate which would cause me to
appoint the husband as sole trustee for sale or to vest the former matrimonial home in him,
rather than in the estate, pending sale.

243 The husband will continue to have sole use and occupation of the former matrimonial home,
on terms that he meet the outgoings including the P Finance mortgage as to interest and
capital. That is not unreasonable given the occupation of the home. There will be provision
for an adjustment at sale if he fails to make these payments.

244 I will make the agreed order pursuant to section 106A of the Act.

245 I will make orders for the transfer of the title in, and of the chattels identified in the schedule
set out elsewhere.

I certify that the preceding two
hundred and forty-five (245)
numbered paragraphs are a true copy
of the Reasons for Judgment of the
Honourable Justice Smith.

Associate:

Dated: 23 May 2023