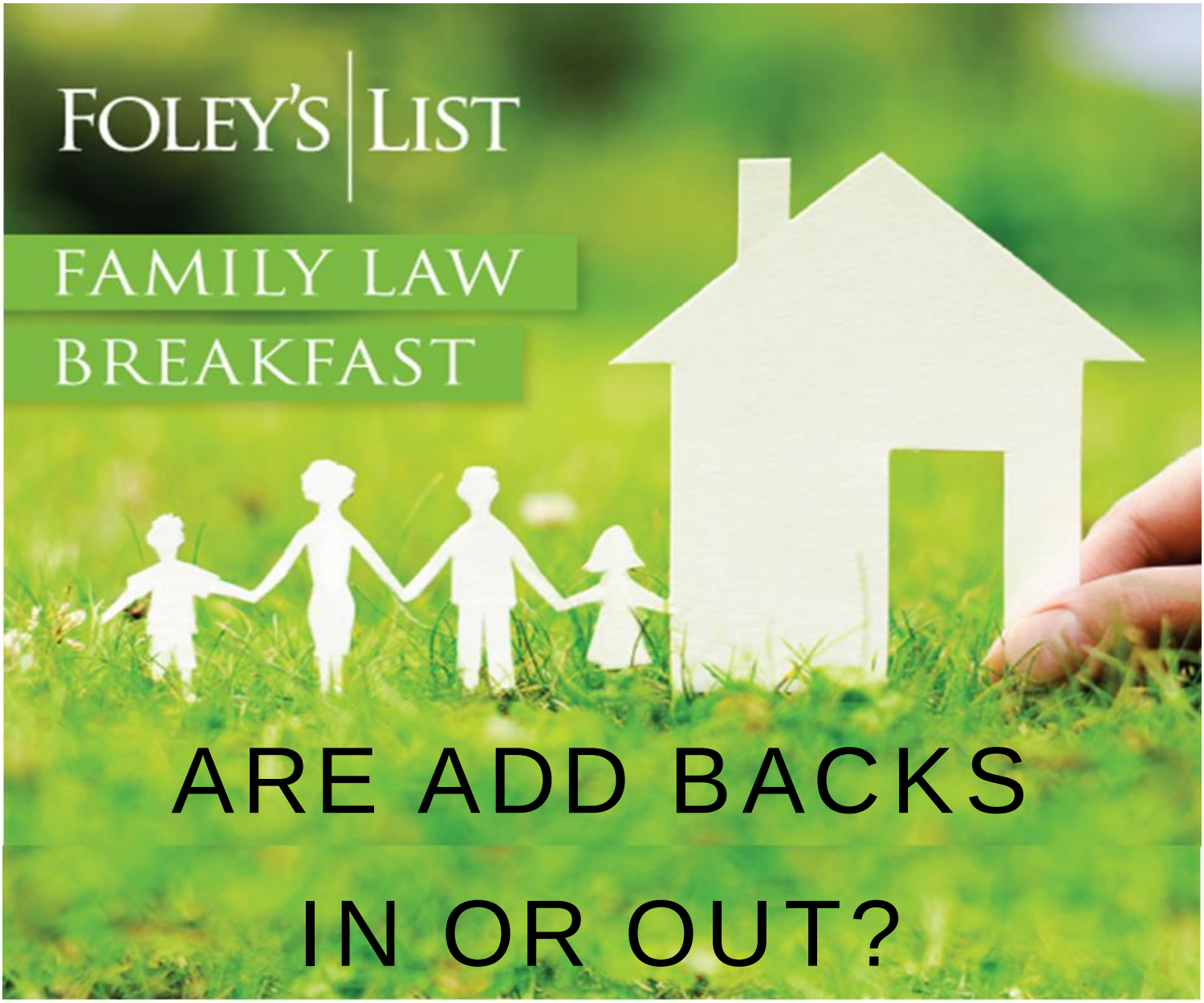

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FOLEY'S LIST

Are Add Backs In or Out?

What should you know these days?

Recent Cases and Developments

Laura Colla *

1. In property proceedings under s79 or 90SM of the *Family Law Act,* the Court is required to consider whether it is just and equitable to make a property settlement order by identifying the legal and equitable interests of the parties in the property in existence at the time of hearing.

2. It has been a long-standing practice of the Family Court, in certain circumstances, to notionally "add-back" sums to the property pool, which is then altered in line with the Judge's discretion (under s 79 or s 90SM).

3. This paper deals with firstly, *practice theory* on add backs (or key principles from the cases), and then considers, what I call *practice wisdom* (the practical learning that arises from the cases).

4. The paper aims to :
    - summarise the key case law principles relating to the use of "add-backs" in family law property matters;
    - explore where we stand given the tumultuous period after *Stanford & Stanford (2012)* 247 CLR 108, *Bevan & Bevan* [2013] FamCAFC 116, then *Vass & Vass* [2015] FamCAFC 51 and Grier & Malphas [2016]FamCAFC:84;
    - assess how the Family Court Judges of our Melbourne Registry have dealt with cases involving add-backs after those cases.

5. The paper concludes by providing some practical advice on how to approach cases which may involve add backs having regard to case law guidance, including the recent decision by the Full Court in *Grier & Malphas* [2016] FamCAFC 84 (24 May 2016).

** Barrister - Foley's List.* *I wish to thank James Gray, final year law student, for his contributions to this paper.*

Practice Theory - Key principles in add back Cases

6. The Full Court of the Family Court in *Omacini & Omacini* (2005) 191 FLR 317 at [30] previously identified "three clear categories" or circumstances where the court has been willing to notionally add-back property :

    a. **Legal fees** Where the parties have expended money on legal fees;
    b. **Premature distribution of funds:** Where there has been a premature distribution of matrimonial assets; and
    c. **Wastage:** Where one party has embarked on a course of conduct designed to reduce the value of matrimonial assets or has 'acted recklessly, negligently or wantonly with matrimonial assets'

7. In Layton & Layton [2014] FamCAFC 126 at [37] the Full Court held that *Omacini* 'did not suggest that no further categories of such cases might be identified'.

8. A number of key principles concerning the notional adding back of property can be discerned from the case-law.

    a. It is a matter of *discretion* for the trial judge whether to notionally add-back property into the asset pool – *Chorn & Hopkins* [2004] FamCA 633 at [56]

    b. Notional property will only be added back in *exceptional circumstances.* This was confirmed by the Full Court in *C v C* [1998] FamCA 143 at [46]:

        Whilst not seeking to place a fetter upon the exercise of discretion of a trial judge in individual cases, it seems to us that the concept of adding monies reasonably disposed of back into the pool ought to be the exception rather than the rule. The parties are entitled to reasonably conduct their affairs post separation in a manner that is consistent with properly getting on with their lives.

c. Any funds added back must be connected to the marriage: *Chorn & Hopkins* [2004] FamCA 633 at [56] and *Eurfrosin & Eufrosin* [2014] FamCAFC 191 at [42].

d. Even if it is established that a party is entitled to have property added-back into the pool, the *de minimis* doctrine may be applied if the proposed add-back is trivial in the context of the overall pool: e.g. *Shimizu & Tanner* [2011] FamCA 271.

Premature distribution of funds

9. When a party to the relationship dissipates funds that otherwise formed a part of the asset pool, the Court may add-back those funds.

10. In T*ownsend v Townsend (*1995) FLC 92 - 569 the husband, after separation, sold a taxi licence for $148 000. The husband benefited from the proceeds. The children did too, but mainly the husband. The wife did not. The proceeds of sale were added back to the pool of assets to be distributed between the parties at the time of trial by the Full Court on appeal by the wife. It was not sufficient in the circumstances to deal with the proceeds of sale received by the husband on just a notional basis. Nicholson CJ said (at 81 654)

> *In my view what occurred in this case, as I said during the course of argument was, in fact, a premature distribution of a proportion of the matrimonial assets. What the husband did was to distribute to himself an asset in which the wife had a legitimate interest. In such circumstances I consider that it would be unjust in the extreme to simply treat such conduct by the husband as a matter to which regard should be had under section 75(2)[1]. It seems to me that the husband has had the benefit of that money. Had he retained, for example, the taxi licence instead of selling it, that would have been brought to account as an item of property which would have been dealt with in the same way as the remaining items of property in this case. Accordingly, I*

[1] 90SF(3)(r) *Family Law Act* 1975 (Cth) is the equivalent section to s.75(2)(o))

am of the view that the correct way in which to deal with the husband's receipt of those monies is to bring them into the pool of assets on a notional basis and make a distribution accordingly.

11. The Full Court in *Omacini & Omacini* (2005) 191 FLR 317 at [39] cautioned that the discretion to add-back funds will not be solely enlivened by the mere fact that a party has expended money realised from the disposition of assets that existed as at the date of separation. That would be unduly simplistic. It is necessary to make some assessment of the reasonableness (or otherwise) of the expenditure.

12. For example, *reasonably incurred living expenses* will not be added back. In *M v M* [1998] FamCA 42 the Full Court stated at [2.11]:

There seems to be no appropriate basis for notionally adding back moneys that existed at separation but which have subsequently been spent on meeting reasonably incurred living expenses. Neither the Family Law Act nor the case law require that parties go into a state of suspended economic animation once their marriage breaks down pending the resolution of their financial arrangements. Parties are entitled to continue to provide for their own support. Whether any expenditure so incurred is reasonable or extravagant is a matter that can be determined by the trial judge.

13. In a case of *non disclosure*, the value of the asset may be added back to the pool - refer to *Weir and Weir* (1993) FLC 92 - 338 where the Full Court held that once it has been established that there has been a deliberate non disclosure, the Court should not be unduly cautious about making findings in favour of the innocent party. The Court's power to make an order going beyond the identified property arises once there is sufficient evidence[2] to support a finding that a party has not made a full disclosure of his or her assets. In that case, it was open to the Court to find that the husband did receive substantial benefits at the expense of the wife, from cash funds in a business: The Full Court did not remit the matter but rather made orders requiring the husband to repay to the wife one half of the $100 000 which was not accounted for by him in proceedings.

[2] s. 140 *Evidence Act 1995* (Cth).

14. See also *Gould and Gould* (2007) FLC 93 - 333 where the Full Court found that the husband had not been open and frank, as to his financial affairs. The approach exercised was to either increase the asset pool to take into account non disclosure by a party or to make some adjustment in favour of the other party on account of the non disclosure, pursuant to s.75(2)(o).

Wastage

15. Where one party has *'embarked upon a course of conduct designed to reduce or minimise the effective the value or worth of the assets', or has 'acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value '* the Court may add-back the value of the wasted assets to the pool: *In the Marriage of Kowaliw* (1981) FLC 91-092 at FLC 76,644 where the husband had allowed a prospective purchaser (who did not in the end purchase) of the family home to live there without paying for rent or outgoings for about 12 months. The trial Judge Baker J., found that this action was commercially inept and economically reckless and he alone should be responsible for the consequent loss. It was also found that the husband did not make mortgage payments at the time. There were two children living with the wife aged eight and four years. His Honour had the husband pay, alone, the outgoings as well as the increase in the mortgage.

16. In the case of *D'Angelis* (1999) FamCA 1609 at [41] and [57] - [82] the wife's gambling of family funds was viewed by the Court to be very high in the context of the pool. The assets of the parties were split 65%- 35% in favour of the husband at first instance by Cohen J. In addition to dealing with the loss under s.75(2)(o) he ordered that the wife pay to the husband the sum of $46 321 being 55% of an amount his Honour found the wife had gambled from the parties' funds. On appeal, the Full Court affirmed the approach of the Court at first instance but reduced the amount the wife was to pay to the husband from 55% to 50%.

17. The party alleging the waste has the onus of proof on the balance of probabilities *D and D* [2005] Fam CA 356 at [160]. See also *Panagakos & Panakagos* [2013] FamCA 463 at [65] where Loughnan J said add backs are not presumed nor are they more likely than not. It falls on the party calling for an add back to establish it to the required standard. (There was no add back made in that case for want of evidence). Recall the terms of s.140 Evidence Act (Cth) 1995.

18. Where the alleged loss is difficult to identify and quantify as a matter of evidence the conduct may be taken into account under s.75(2)(o).

19. However it is important to remember that *reasonable 'financial losses **incurred** by the **parties or either** of them during the course of the marriage should be shared by them, although not necessarily equally'* (emphasis added) (Baker J in *Kowaliw*). What you are looking for is an approach which delivers a just outcome in the particular factual matrix of the case, supported by evidence, which can survive the challenge or correction of cross examination. You need more than general, often repeated heartfelt complaints, slogans or a general smear campaign.

Legal Fees

20. In the case of pre-paid legal fees (from capital), add-backs appear to be the norm rather than the exception. This is because of the distinct policy reason for the adding back of legal fees outlined by the Full Court in *DJM v JLM* (1998) 23 Fam LR 396 at [11.6]:

> *… s 117 provides that each party to proceedings under the Family Law Act shall bear their own costs unless the court otherwise orders. Failing to add-back moneys expended by parties on costs frequently has the effect of defeating the policy of s 117 by permitting the pool of available assets for distribution between the parties to be diminished by any moneys that either of the parties have managed to spend on their costs up to the date of trial. We are of the view that the normal approach ought be to add costs already paid back into the pool. While there may be cases where that approach is inappropriate, the reasons why it is not taken ought normally be spelt*

out. We see no reason advanced in this case as to why the costs paid should have been kept out of the pool. This is especially so in light of the costs order which followed requiring the husband to contribute substantially to the wife's costs. Unless the $30 000 was treated as part of the parties' property, the costs order had the effect of having the husband pay for costs which had already been allowed for by the refusal to bring these monies back into the calculation.

21. In *Chorn & Hopkins* [2004] FamCA 633 the Full Court outlined four principles to guide the trial judge when using their discretion to add back legal fees:

[56] In summary we consider that the above mentioned decisions of the Full Court establish that while the treatment of funds used to pay legal costs remains ultimately a matter for the discretion of the trial Judge in determining how to exercise that discretion, regard should be had to the source of the funds.

[57] If the funds used [to pay legal fees] existed at separation, and are such that both parties can be seen as having an interest in them (on account, for example, of contributions) then such funds should be added back as a notional asset of the party, who has had the benefit of them.

[58] If funds used to pay legal fees had been generated by a party post-separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance), they would generally not be added back as a notional asset; … Funds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement may need to be looked at differently from other post-separation income or acquisitions.

[59] Outstanding legal fees themselves are generally not taken into account as a liability.

[60] If, in the exercise of discretion, it is determined that legal fees already paid should be taken into account as a notional asset, then normally any liability associated with the acquisition of the monies used to pay the legal fees should also be taken into account.

***Stanford, Bevan, Vass and Grier & Malphas* – where do we stand?**

22. In *Stanford & Stanford* the High Court held at [37] that the division of property under s 79 firstly required the identification *of 'the **existing** legal and equitable interests of the parties in the property'* (emphasis added).

23. This prompted the *obiter* statement of the of Bryant CJ and Thackray J (with Finn J concurring), in *Bevan & Bevan* [2013] FamCAFC 116 at [79]:

> *We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage — and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property.*

24. The impact of these two judgments has been subject to widespread commentary by practitioners.[3] I do not intend to add much more to that discussion. Needless to say, subsequent Full Court decisions strengthen the conclusion that the notional adding back is both *permissible and appropriate* in the exceptional circumstances identified above. (By way of further background, you may also like to refresh your memory on the way Murphy J., addresses add backs in *Watson and Ling* [2013] Fam CA 57 where the focus is not on add backs but rather the application of s.75(2)(o) in respect of conduct or contribution

[3] See, for example: Alice Carter Add Backs - Clarifying the New Landscape (6 March 2015); Rory McIvor and Chris Nehmy, 'Are they back? – "Add-backs" post *Stanford*' (22 February 2016); Kate Hesford, 'Recent cases on add backs' (21 April 2015); Reconceptualising the Treatment of "Notional" assets in Property Settlement Proceedings by Dr Richard Ingleby (2015) 5 Fam L Rev 168

aspects where it may be found that the non dissipating party may have made a disproportionally greater indirect contribution to the existing property.)

25. In *Vass & Vass* [2015] FamCAFC 51 the Full held at [138-139]:

> *There is no error committed per se in adjusting the parties' actual property interests by a calculation involving notionally adding back into the pool sums which have been dissipated by the parties. We reject any suggestion that the decision of Bevan v Bevan … or, more particularly, the decision of the High Court in Stanford v Stanford … is authority for any necessary contrary solution. Some statements made by the High Court may lead to the conclusion that references to "notional property" as have been referred to in decisions of this court and at first instance may need to be reconsidered.*
>
> *The decisions referred to seek to remind the Court that, however the exercise of discretion might seek to deal with property that is said to be the subject of "add-back", proper consideration must be given to existing interests in property, and the question posed by s 79(2) as a separate inquiry from any adjustment to property interests by reference to s 79(4) if a consideration of s 79(2) reveals that it is just and equitable to alter existing interests in property.*

26. Thus the concept of the add back was maintained.

27. In *Calder & Calder* [2016] FamCAFC 36 the Full Court (comprising of Bryant CJ, Thackray and Macmillan JJ) (delivered 11 March 2016) confirmed also that it is *permissible* for a trial judge to add-back notional property. They held at [135]:

> *The trial judge proceeded on the basis that he "suspect[ed] that the payment of legal fees can in an appropriate case fall into the category of circumstances where an add-back of the legal fees into the pool is justified". His Honour's suspicion accords with well-established authority (see for example Chorn and Hopkins at [55]).* ***If there was***

> ***any doubt that the position might have changed as a result of what was said in Stanford v Stanford or Bevan & Bevan …, that doubt has been removed by what was said by this court in Vass & Vass.*** [emphasis added]

28. Given this clear direction by the Full Court, it appears that we have passed the period of turbulent uncertainty generated by *Stanford* and *Bevan.*

29. In *Grier and Malphas* [2016] FamCA 84 the Full Court of the Family Court determined that the wife's appeal should succeed. Bryant CJ wrote the principal judgment with Murphy and Kent JJ agreeing broadly with her Honour's reasons. The decision was delivered on 24 May 2016.

30. The wife successfully appealed the constitution of the pool of assets for which orders for property settlement were sought (balance sheet issues) and contribution issues; that is, the proportions each of the parties should receive.

31. The wife complained that the trial Judge failed to "add back" to the pool, post separation receipt of funds by the husband, as opposed to those received by her. The husband opposed the appeal. Both parties had and used funds after separation and the use of those funds was part of the controversy at trial. There was a four year gap between separation and trial. The message might be this, sort out what you can and if you need to run your add back arguments or s.75(2)(o) case, present it as clearly as you can, getting on to trial as soon as you can.

32. The wife complained in particular that the trial judge failed to place any *weight* on the husband's alleged waste of the parties' assets *after separation.* This affected the balance sheet as it involved items the wife wanted to add back at trial as well as, *in the alternative*, a relevant matter under s.75(2)(o).

33. The wife asserted on appeal that the trial judge did not give appropriate weight to the husband's alleged waste of the parties' assets occasioned by:

(a) the interest incurred on the wife's post separation tax debt where the husband gave no persuasive evidence that he was unable to pay the wife's post separation tax debt from joint funds controlled by the husband, without the need to effect a sale of the matrimonial home;

(b) the husband's use of not less than $1 793 551 post separation without any cogent evidence as to his use of that amount, other than freely and irresponsibly for his own needs (paragraph [57] sets out Bryant CJ's determination on this aspect);

(c) incurring capital loss and acquisitions costs on the purchase and subsequent sale of a property in suburb GG, without any consultation or agreement with the wife*;

(d) effecting capital improvements to the property in suburb KK, which over capitalised the property*.

** (the matters raised in (c) and (d) were not addressed in oral argument in any substantial way).*

34. The parties' Joint Balance Sheet was provided to the trial judge.

35. The parties were able to agree on some add backs, for example those as to legal fees.

36. The contentious add back figures referred to notional as well as existing assets.

37. The trial judge preferred the husband's evidence to the wife's wherever there was conflict or inconsistency.

38. The difference on the pool as pressed by the parties was large. The husband suggested it was $4 729 729. The wife pressed for a pool of $6 396 626. The add backs issue obviously impeded settlement and propelled the trial.

39. Her Honour found that the total assets had a value of $4 936 796 together with superannuation of about $175 000. The Trial Judge added back only legal fees of the

parties (and disbursements) being about $200 000 for the husband and $343 000 for the wife.

In paragraphs [34] - 43] Bryant CJ sets out Her Honour's approach as follows :

[34] In dealing with the question of add backs, her Honour said that all but one of them was in contention ([59]) and noted that a "series of authorities establish that the adding back of notional assets is the exception rather than the rule". Her Honour then cited the following passages from the Full Court in Mayne & Mayne (2011) FLC 93-479:

> *72. Parties to proceedings about the division of property before the Family Court (and the Federal Magistrates Court) frequently urge the Court to add-back assets or funds that have been applied by one party or another for allegedly his or her own purposes after separation. The rationale is that one party should not benefit from a premature distribution of the assets. An obvious example is withdrawing and using money from a bank account either joint or owned by one of the parties. It is also the case that the parties may decrease the pool by increasing liabilities. The issue in such cases is whether the liability should be a joint liability or a liability only of the party who created it.*
>
> *73. The application of the funds removed (or the debt incurred) may have been for a personal purpose (for example, to pay legal fees) or it may have been applied in the sustenance of a party or the children of the parties.*
>
> *74. If the former is the case this has generally found to be a pre-emptive unilateral division of property. If the latter is the case then the principles enunciated in Marker v Marker [[1998] FamCA 42] and Chorn NH & Hopkins RC [(2004) FLC 93-204] apply. If the money was, or part of the money, was used to meet reasonable living expenses then that money, or that part of the money, is not "added-back" or regarded as a pre-emptive distribution.*

[35] In determining the issue of paid legal fees her Honour said:

> *63. It should be borne in mind that the husband received $2.92million from the parties' joint account on 9 April 2009 and some $404,720 from the sale of shares after the separation. With this large amount of money available to him, it seems to me to be an artifice to attempt to quarantine his expenditure on legal costs from these funds. I am of the view that it is more probable than not that he intermingled all funds available to him and used money as he saw fit from time to time. Additionally, he received no income from employment after his contract with [BB Ltd] ended in June 2011. For these reasons, I*

> *will include the paid legal fees of both parties in the list of assets in amounts of $200,300 for the husband and $343,291 for the wife.*

[36] Her Honour then dealt with a number of discrete issues about add backs, rejecting their inclusion before dealing with the major items sought to be added back by the wife. Those major items were:

- *proceeds of sale of shares since separation to date $307,636*
- *monies received from BB Ltd in 2009-2011 $889,915*
- *refund of investment for AA Unit Trust $298,000*
- *surplus of sale proceeds from luxury car $42,000*
- *return on investment in AA Unit Trust $39,617*
- *monies paid by husband for Suburb KK property improvement $153,159*

[37] The total sought to be added back by these items was $1,730,327. In rejecting the inclusion of these amounts in the calculation of the balance sheet, or indeed under any part of the exercise of consideration of s 79(4), her Honour said:

> *70. ... It seems to me that the add-back of any or all of these amounts is fraught with risk of double counting. It should be remembered that the husband injected $1.313million in cash into the purchase price of the [Suburb GG] property. Mr [S] loaned him $1.2million when he purchased the [Suburb KK] property, which he repaid on the sale of the [Suburb GG] residence. He injected $250,000 into the purchase price of the [Suburb KK] property and carried out renovations, using funds from the above sources. I will not add back these amounts.*

[38] Her Honour observed that the husband appeared to have "resiled from the submission inherent in the Joint Balance Sheet" that various items should be included as add backs and indicated in final submissions that only the parties' paid legal fees should be included. The trial judge indicated she thought there was considerable merit in these submissions and said:

> *73. ... I am similarly of the view, however, that the various funds which came into the husband's hands after the separation likewise should not be added back to the list of assets and treated as premature distributions to him.*

[39] Her Honour again highlighted the reason she was not going to add back funds, saying:

> *74. I am of the view that both parties spent money freely and irresponsibly after their separation. It would be a formidable, and probably impossible, task to trace the fate of each dollar which*

came into their respective hands after the separation. As noted, there would be a substantial risk of double-counting in any event. In my view the nature and pattern of post-separation expenditure by both parties also militates against the inclusion in the list of assets of most of the proposed add-backs.

[40] After giving some examples of the parties' post-separation expenditure, her Honour said:

> *76. ... In my view, neither the husband nor the wife displayed any particular financial responsibility after their separation but I can identify no basis upon which either could be regarded as more profligate in that regard than the other.*

[41] In relation to the issue of payment of tax liabilities, her Honour adopted a similar view of the parties' behaviour, saying:

> *77. In my view, this assessment of the parties' post-separation behaviour extends to their treatment of the tax liabilities following the sale of [Company D]. It was completely open to the husband to pay all of these tax liabilities from the amount of $2.92million which he withdrew from the parties' joint account on 9 April 2009. He chose, however, to pay the tax liabilities only of himself and the two corporate entities.*
>
> *78. On the other hand, the wife refused for two years to join in the sale of the [Suburb DD] property and discharge the remaining tax debts. Ultimately, she consented to orders for sale of the property and payment of the tax debts on 24 June 2011. Equally, the wife made no attempt to apply any part of the sum of $830,000 which she withdrew from the [Suburb C property] mortgage account to reduce her tax liability.*
>
> *...*
>
> *81. ... In all of the circumstances, I am satisfied that there is no "unfairness" to the wife in concluding that she refused to cooperate in the sale of the [Suburb DD] property and discharge of her tax debt.*
>
> *82. In these circumstances, it seems to me that both parties contributed to the general interest charges accrued on the tax debts arising from the sale of [Company D]... Having regard to the conduct of both parties in relation to the tax debt, I disagree with the wife's view and I will add back no amount on account of general interest charges.*
>
> (original emphasis)

> *[42] As I think that there is merit in Ground 4(b), I will deal with that issue first. The argument requires a careful analysis of the amounts received by the husband contrasted with those received by the wife post-separation.*
>
> *[43] Counsel for the wife submitted that a close examination of the receipt of funds by the husband and wife post-separation which they had subsequently utilised could not reasonably be dealt with in the manner in which her Honour did at [52] where she said:*
>
> > *52. ... Essentially it seemed to me that each of the parties spent money freely and irresponsibly after their separation. In my view, it is now neither helpful nor appropriate to attempt to carry out an unwieldy tracing exercise in respect of the funds which came into the hands of each of the parties after their separation.*[4]

40. Bryant CJ at paragraph [56] expresses the view that the trial judge's suggestion that it was not helpful or appropriate to attempt to carry out an unwieldy tracing exercise in respect of the funds which came into the hands of each of the parties after separation was not necessarily correct. The purported *his and her add backs* were tabulated for the Full Court at paragraph [52], that is on appeal, but not at first instance. When presented that way, it became very clear who had received what, post separation. The husband had the use and benefit of $1 765 539 compared to the wife having $1 013 022, a difference of some $752 517. The Full Court expressed the view that the difference and the percentage of the pool to which it equates required some consideration by the trial Judge which was absent. The difference warranted an adjustment in favour of the wife by reason of the significantly greater receipt and use of capital by the husband after separation, being mindful too that he was earning an income for part of the post separation period. At paragraph [117] the difference is said to be about 20% of the parties' assets at trial.

41. Bryant CJ said at paragraph [57]

> *In my view there is merit in Ground 4(b). I would not necessarily wish to be seen as endorsing the effect of receipt of these funds as "add backs" to the balance sheet, something which her Honour eschewed. However the receipt of these funds by the husband requires expression in some form, either as a matter to be taken into account under s 75(2)(o), or, as the wife later argues, in*

[4] And at [73], [74] and [76].

relation to contributions. But however expressed, failure to properly account for it leads to the conclusion that the result reached by her Honour was "plainly wrong" (see Norbis & Norbis (1986) 161 CLR 513 per Brennan J at 539)

42. As to the complaint in ground 4(a) regarding interest incurred on the wife's post separation tax liability the trial Judge found that the parties were equally profligate. The husband could have paid the wife's taxation liability upon receipt of the proceeds of sale of $2.92million; he chose instead to pay his own taxation liability and those of two corporate entities. On the other hand, the wife refused for two years to join in the proposed sale of real estate in suburb DD and discharge the tax debts. She did ultimately consent to the sale of the property. Equally she made no attempt to apply any part of the sum of $830 000 which she withdrew from the suburb C property mortgage account to reduce her tax liability.

43. The Full Court took the view that the trial judge's findings were very generous towards the wife. She seemed to fail to mitigate her losses in the face of the husband's behaviour (which she may have perceived to be disrespectful and designed to aggravate or oppress).

44. The Full Court observed that the evidence demonstrated that:-

[66] *The husband had the capacity to pay all of the tax from the $2.92 million he withdrew from the joint account and still have approximately $300,000 left over as well as his income from employment.*

- *Instead, he lent Mr S $1.3 million at a 4 per cent per annum interest rate.*
- *The wife had only $800,000 available to her and had to use it to meet ongoing living expenses and legal fees.*
- *In any event, if the wife had expended all of the funds available to her, it would still not have been sufficient to discharge the tax liability.*

[67] However, her Honour did not base her decision on the wife's lack of capacity to pay all of her tax liability. Her Honour instead based her decision on the wife's failure to agree to sell the Suburb DD property until 2011. That leaves the question of whether her Honour was entitled to find, as she did at [79] to [81] that the husband sought the wife's consent for the sale of the Suburb DD property and the wife resisted it until April 2011.

[68] Whilst I accept that the evidence enabled her Honour to find that the wife resisted sale between 2009 and 2011, that misses the point raised by the wife both at trial and on appeal that sale for the purposes of paying the wife's tax would have been unnecessary had the husband met the payment from the funds he withdrew from the joint account. Effectively, by not paying the wife's liability and then lending the balance of the funds to Mr S, the husband put himself, by his own actions, in a position where there was then no alternative but to sell the Suburb DD property to pay the wife's tax liability and subsequent tax liabilities which the husband incurred as a result of further payments from Company D.

[69] Had her Honour found, as the evidence suggests, that the husband should have paid all of the tax liabilities from the $2.92 million withdrawn, then the question of further interest charges and the sale of the Suburb DD property would not have arisen and that situation was brought about by the husband, a fact which her Honour appears to have overlooked in her reasons for judgment.

[70] It is important not to lose sight of the fact that the issue engaged, however, was whether the interest accrued on the wife's tax debt should have been treated as waste by the husband and added back. Once the husband had acted in a way that prevented him from paying the tax, it seems to me her Honour was entitled to find that the wife could have effectively mitigated the amount of interest accruing by agreeing to the sale of the Suburb DD property earlier, and I do not thus consider that her Honour ultimately erred in what was the exercise of her discretion to determine that she would not take into account the general interest as waste by the husband and add it back to the pool as if it were money in the husband's hands.

45. I note that Murphy and Kent JJ say that other trial Judges may not have made the same finding and that would not necessarily be wrong.

46. Murphy and Kent JJ provide a concise summary on their views regarding add backs with the their bottom line found at paragraph [131] - [133]

[128] Each of the parties used funds available to them in the approximately four years between separation and trial. Included in purposes for which the sums were used were the reasonable living expenses of each. So-called "addbacks" are the "exception and not the rule".[5] *Further, although always of course a matter of discretion it can be said that, in the usual course of events, amounts spent on reasonable living expenses would not often be added back.*[6]

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5 *Cerini & Cerini* (Sub nom *C & C*) [1998] FamCA 143, at [46].

6 See, for example, *Browne v Green* (1999) FLC 92-873 and *Gollings and Scott* (2007) FLC 93-319.

[129] As the Chief Justice points out, with those principles in mind, the trial judge adopted a broad-brush approach to the parties' respective expenditure. No error is established by reason alone of that approach; authority eschews "overly pernickety analysis" and s 79 demands neither an audit nor an exercise in accounting.[7] *However, when significant sums of money are said by one party or the other to have been "wasted"*[8] *or to amount to a unilateral "premature distribution of property"*[9] *and the evidence is suggestive of either or both, an analysis of the relevant sums and their use is needed.*

[130] Here, that process could readily have been undertaken and summarised by reference to the aide-memoire to which the Chief Justice refers in her reasons, noting, as does her Honour, that what was done for us could have very readily been done for the trial judge but was not.

[131] With respect to the experienced trial judge, we agree with the Chief Justice that the evidence discloses a very significant disparity in the sums expended by the parties and that her Honour did not address that disparity or examine the purposes for which the money was used. We repeat that this is a matter of discretion and could have been done either by "adding back" or, as has been suggested as often preferable by decisions of the Full Court, by reference to s 75(2)(o).[10]

[132] In our respectful view, the omissions just referred to led to her Honour's discretion miscarrying by reason of the failure to take account of a relevant consideration.

[133] We agree, with respect, with what the Chief Justice says in respect of the trial judge's treatment of the interest on taxation owed by the wife but not paid by the husband from funds available to him at the time of paying his own tax and that of the relevant company. The argument that the husband "wasted" that sum by reason of his actions was available to the wife but rejected by the trial judge. Other judges may have come to a different conclusion, but no error of discretion is demonstrated.

47. Although successful, and although the parties had a large asset pool, the time between trial, appeal and actually receiving the judgment was lengthy (three years). The matter had to be reheard. A partial lesson for practitioners may be - resolve the add back issues where you can having regarding to the alternative under s.75(2)(o). If you cannot for

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7 See, for example, *Norbis v Norbis* (1986) 161 CLR 513; *Brandt & Brandt* (1997) FLC 92-758; *Ferraro and Ferraro* (1993) FLC 92-335.

8 In the sense in which that expression is used in *Kowaliw and Kowaliw* (1981) FLC 91-092 and the cases which have followed it.

9 *Townsend and Townsend* (1995) FLC 92-569, and the authorities which have followed it.

10 See, for example, *Browne v Green* (above); *Shimizu & Tanner* [2011] FamCA 271, per Bryant CJ and *Kowaliw* (above).

whatever reason, do what you can if it's in your client's interests to get on to trial sooner rather than later with the consideration in mind that the more time that passes pending trial the more time clients have to complicate the case narrative. When presenting your add back or s.75(2)(o) case set out the sought add backs by name, amount, source, date and use in say an aide memoire to be clear. The trial judge and the other side need to be clear on what you are asking for and why, before they can analyse what you are proposing. You want to avoid the trial Judge not really appreciating say the percentage value of the purported add backs relative to the pool.

The Melbourne Registry

48. I will now explore how add-backs have been approached by the Family Court in the period immediately before and after the decision in *Vass & Vass* was handed down (on 30 March 2015). In particular, I will focus on the approaches of Family Court judges of the Melbourne Registry.

Macmillan J

Calder v Calder [2016] FAMCAFC 36 (delivered 11 March 2016)

49. Justice Macmillan sat on the Full Bench in *Calder & Calder* (discussed above). This case concerned add-backs for legal fees. The legal expenses incurred by the husband were disbursed from a trust that was controlled by the parties prior to being wound up before trial. The wife had funded her legal fees from a loan to her business. The amount spent on legal fees was relatively even between the parties.

50. At first instance, and in accordance with the wife's case, the business loan was not accounted for in the asset pool. It was the wife's position that because of this, only the husband's legal fees should be added back into the asset pool. The trial judge rejected this submission, and refused to add-back the husband's legal fees on the basis that neither side had *'made any overarching submission that the entirety of legal costs should be brought back to account'* at [169] [2014] FamCA 1106.

51. On appeal, the Full Court overturned the trial judge on this issue and held that it was appropriate for only the husband's legal fees to be added back. This was because:

    (a) The wife's legal expenditure *had 'in effect, been added back'* by the decision to disregard the business loan when identifying the pool of assets and liabilities; and

    (b) The trial judge was required to assess the claim in the bigger picture of the entirety of costs expended. In this case it was appropriate to add-back only the husband's legal expenditure because the wife would be disadvantaged otherwise.

52. At [138] the Full Court noted that these were an *exceptional* set of facts, and that normally, *'no purpose would be served by looking at just one part of the expenditure on legal costs'*

Brook & Brook [2016] FamCA 321 (delivered 6 May 2016)

53. *Brook & Brook* is a first instance decision of Macmillan J that was heard in October 2015. This judgment also considers the adding-back of legal fees. The facts are relatively simple. After separation, property acquired during the relationship was sold and the proceeds were used by the husband to meet some of his legal expenditure. The source of funds used to meet the wife's legal expenditure was not identifiable.

54. At [204] Macmillan J cited *Vass & Vass* (the same paragraph as I have included above) and then proceeded to hold at [205-206]:

    It is certainly open and in fact may be appropriate in certain circumstances in order to do justice to the parties to add-back those amounts spent by the parties on their respective legal fees. However I am not satisfied that it would be just and equitable to do

so in this case in circumstances where although it is possible to identify the exact amount spent by the father out of funds that might have otherwise been available for division that is not the case with respect to the legal fees paid by the mother.

Whilst there is no dispute that the mother has had the benefit of approximately $80,000 from the sale of shares and her redundancy package of $67,000, the evidence as to how much of those monies, which arguably might otherwise have been available for division between the parties, she has spent on legal fees is vague and uncertain at best…

Lake & Brand [2016] FamCA 375 (delivered 20 May 2016)

55. *Lake & Brand* is a first instance decision of Macmillan J that was heard in late 2015 and early 2016. The case involved the adding back of property that was alleged to have been wasted by the husband.

56. The parties separated in 2010. After that, the husband purchased a yacht in 2011. It was the husband's case that he purchased the yacht using funds loaned from his family company (which he was a director of at the time). However, it was found that the husband had withdrawn money from his superannuation account and returned the funds ostensibly loaned to him. Macmillan J., therefore refused to include the loan as a liability in the asset pool.

57. The husband also alleged that he only owned 31 of the 64 shares in the yacht, with the three children of the marriage holding the balance in equal shares. These shares were transferred to the children as gifts sometime after the purchase of the yacht. The wife asserted a value of $157 500 for the yacht. The husband asserted his so called 48% share was $77 500. Macmillan J treated this as an instance of the husband divesting himself of an interest in marital property. Consequently, it was held at [132]:

> *… I am satisfied that the husband's conduct in divesting himself of his interest in the boat meets the test in Kowaliw & Kowaliw (1981) FLC 91-092 and that the husband has at the very least acted recklessly, negligently or wantonly dealt with matrimonial assets. In circumstances where the children are not parties to the proceedings I propose to adopt the latter course. I will include the husband's 48 per cent interest and take into account his having gifted 52 per cent of his interest in the yacht to the children when I come to consider the s 75(2) factors.*

58. Macmillan J did not notionally add-back the value of the shares to the asset pool (in the more orthodox manner). Instead the she elected to consider the husband's wastage with reference to the s 75(2) factors (which ones in particular, it is not clear) at [182]:

> *Having considered all these matters I am satisfied that there should be a small adjustment in the husband's favour… However I have also had regard to the fact that the husband having purchased the boat thereafter divested himself without either the knowledge or consent of the wife of 33 of the 64 shares in that boat which based on its current value represents approximately $81,000 of its value, or approximately seven per cent of the total value of the parties' property (excluding superannuation), a not insignificant sum in the context of these proceedings.*

Cronin J

Gissing & Sheffield (No 3) [2015] FamCA 1019 (delivered 20 November 2015)

59. *Gissing & Sheffield (No 3)* is a first instance decision of Cronin J that was heard in mid-2015. The de facto property settlement case involved a number of different allegations relating to wastage of jointly-owned property.

60. The respondent and applicant were equal partners in the business. Throughout the relationship, the parties jointly purchased two properties (and registered them in the

name of the respondent de facto wife). The properties were heavily encumbered by one mortgage. At the end of relationship, the respondent (de facto wife) locked the applicant out of one of the properties that he had been residing in. She also excluded him from business income to which he was entitled. Business stock that was stored by the applicant in the property was placed into storage by the respondent. The respondent failed to pay the storage costs, resulting in the sale of the stock by the storage unit. The other property was largely left vacant by the respondent. The respondent extended the mortgage to purchase shares which eventually reduced by 70% in value. Soon after, the respondent ceased paying the mortgages even though she was the only party who had the capacity to make the payments. This precipitated a mortgagee sale of the properties.

61. The applicant argued that the respondent wasted property by:

    (a) allowing the mortgage to remain unpaid resulting in mortgagee sales;
    (b) drawing funds from the mortgage and acquiring shares that significantly dropped in value;
    (c) allowing one of the properties to remain vacant thereby causing loss; and
    (d) not paying storage fees causing a sale by the storage proprietor;

62. As to the unpaid mortgage, Cronin J held that wastage was established for money spent on the repossession process (such as legal fees). However, it was held that the loss of the properties was not ascertainable as the mortgagee sales were extremely favourable and no loss was apparent.

63. The extension of the mortgage to purchase shares amounted to waste by the respondent. However the loss flowing from this was held not to be the decrease in value of the shares, but rather the *lost opportunity* to pay the outstanding mortgage. Whilst Cronin J could not quantify this loss, it was considered at [180] a reason to adjust in the applicant's favour overall under s 90SM.

64. The failure to rent out one of the properties did not result in a quantifiable loss as no *evidence* was tendered as to whether tenancy arrangements would have changed had the properties been transferred to the applicant.

65. Finally, as to the items lost in storage, the applicant's wastage argument was established. At [187-188] Cronin J held that:

> *… the respondent acted recklessly or wantonly with assets in which the applicant had a significant interest and caused not just the costs of the storage for which she must be held responsible but also the unquantifiable costs of the lost items. The effect of her action has reduced the number of assets (albeit I am unable to say with precision as to quantum) and also reduced the total amount which is available for division. The applicant should not be seen as responsible for that*.
>
> *The power in s 90SM is to divide what the parties have. If assets have been removed or reduced, the court cannot do justice to one party by ignoring the reduction. An adjustment in favour of the applicant ameliorates that problem.*

Cotter v Eggers-Cotter [2015] FamCA 879 (delivered 21 October 2015)

66. *Cotter v Eggers-Cotter* is a first instance decision of Cronin J that was heard in mid-2015. The case concerned the adding back of legal fees. The husband's legal fees were paid from a bank account to which distributions from a jointly held trust were paid into after separation. The wife's legal fees were paid using borrowed funds. The parties had previously consented to an order that the wife would be solely responsible for the debt.

67. Cronin J added back the husband's legal fees. The previous consent orders raised the question as to whether the wife's debt should form part of the property pool, along with her added back legal fees. At [129] Cronin J held that the both the legal fees *and* the liability should be included, reasoning that:

…The parties consented to an order that funds would be borrowed and that the wife would be responsible for the debt. Whilst that may be so, if her legal fees are added back as having been "prepaid", the picture becomes distorted unless the liability is equally added back into the equity picture. It is clear that had the wife not prepaid her fees, there would be no such asset and no such liability. One cannot be taken without the other. Accordingly, the only fair way is to include both asset and liability and look at the matter from a joint perspective. The fact that the wife and the husband noted on the order of 17 September 2015 that it was to be treated as a liability cannot bind the Court

Bennett J

Eldred & Eldred [2015] FamCA 61 (delivered 9 February 2015)

68. *Eldred & Eldred* is a first instance decision of Bennet J that was heard in mid-2014. This was before the Full Court handed down its decision in *Vass*. At present, Bennett J has not handed down a decision since *Vass* that has dealt with add-backs as far as I can tell. *Eldred & Eldred* thus only provides an indication as to how her Honour may approach the issue in the future. However the case is a useful illustration of how s 75(2)(o) has been used to achieve a similar result as the add back mechanism.

69. After separation, the parties had liquidated the majority of their assets. The husband sought a 55%/45% division of real and personal property in favour of the wife. The wife sought what equated to 75/25 division on a much wider pool of assets due a large number of add-backs that she sought to include. All of the proposed add backs were sums of money that had been dissipated by either party. They included proceeds from the sale of jointly-owned assets, an interim partial property settlement previously paid to the wife, and legal fees already paid by both parties.

70. At [286] Bennet J, citing *Bevan*, held that s 79 only empowered the Court to make *"orders altering the 'property of the parties' as distinct from altering property which no longer exists or which can only be notionally attributed to the parties"*. She further stated:

I also agree that there is ample scope in s 75(2)(o) to ensure a proper and appropriate outcome including, in my view, a dollar for dollar allowance for moneys wasted or expended unnecessarily or unreasonably or which inequitably diminished the property of the parties. I am not indicating that the facts in this case warrant a dollar for dollar allowance. However, in a case which justified such a course, the application of s 75(2)(o) can produce the same result as an "add-back"..

71. Bennet J adopted the following approach when considering the add-backs under s 75(2)(o) at [343-349]:

There are a number of matters which fall for consideration under s 75(2)(o). In particular the funds already received and expended by the parties. These are:-

a) the $170,000 received by the husband from the proceeds of sale of the family home;

b) the $120,000 received by the wife from the proceeds of sale of the family home of which she maintained $50,000 was attributable to her maintenance;

c) the retention by each party of their taxation refunds being $35,000 by the husband and $24,807 by the wife;

d) the benefit of $34,000 received by the husband on the disposal of his car post separation; and

e) the benefit of $16,000 received by the wife on the disposal of her car post separation.

The first thing to note is that the funds total $437,807 and the parties have only $503,995 or thereabouts in liquid assets and the wife's business left to divide between them. The funds equate to 36 per cent of what the parties had at or shortly after separation. It follows that I must have careful regard to the fact that the parties received those funds and how they applied them.

I am satisfied that post separation the husband has been in a more fortunate financial position than the wife. He has not had a lot of money but he has had an income which is greater than the wife's income and fewer family expenses to meet. I am comfortably satisfied that the wife applied the $50,000 to necessary living expenses for the family. I give very little weight to the $50,000 paid to the wife.

The parties have each paid some legal fees. The wife has paid $90,000 and the husband $80,000. They each have a lot more to pay. Pre-payment of legal expenses has reduced their liabilities. This is a direct financial benefit received by each party. I accord significant weight to these payments.

I will notionally deduct the pre-paid legal fees from the $170,000 received by the husband and $120,000 received by the wife…

I take into account that, in addition to the proceeds of sale of the home, the husband received a greater taxation refund than the wife and that each retained the refund for their own use. These refunds were attributable to income earned prior to separation.

I take into account the amount that each party received by trading in their car after separation. … I take into account that the husband has retained the benefit of $35,000 whereas the wife has retained only $16,000 in cash which has been expended

72. After taking into account a range of other s 75(2) factors, Bennet J concluded at [355]:

Having regard to all of the factors under s 75(2), I conclude that the wife should receive an adjustment which is equivalent to 25 per cent to the existing property of the parties.

Johns J

Rankin & Rankin [2016] FamCA 250 (delivered 29 February 2016)

73. *Rankin & Rankin* is a first instance decision of Johns J that was heard in early 2015, but after the decision in *Vass* was handed down. The case concerns the adding back of legal

fees. The facts were as follows. The wife sought that husband's expenditure on legal fees be added back to the pool. The husband had paid for his legal fees using income that he had generated *after* separation, a fact that would generally prohibit the adding back of the fees (see excerpt from *Chorn & Hopkins,* above).

74. Johns J, however, held that the husband's legal fees should be added-back because the husband had avoided his obligations (post-separation) to maintain his children and former wife. At [135] her honour stated:

> *Recent decisions considering the issue of add-backs have not diminished the authority of Chorn & Hopkins with respect to legal fees. That decision provides guidelines as to how the Court may treat paid costs. However, those guidelines do not bind the Court and they may be departed from in appropriate circumstances…*

75. Johns J then outlined the facts that amounted to special circumstances at [137-139]:

> *At the time the husband earned the income applied to the payment of his legal fees, he had an obligation to support the wife and the children of the marriage…*
>
> *… the husband did not service the mortgage liabilities on the parties' properties, thereby increasing the debt payable upon settlement of the sales of those properties. Further he substantially reduced his child support liability by providing an estimate of his income to the Child Support Registrar which substantially reduced his obligation to pay child support. Income which otherwise would have been available to support the wife and the children was applied to the payment of his legal fees. The husband has effectively executed self-help with respect to his legal costs and in doing so has disregarded his [legal] obligations…*
>
> *Such matters may be taken into account pursuant to the provisions of s.75(2)(o) of the Act. However, in my view a percentage adjustment will not achieve justice and equity in the overall context of this case in circumstances where:-*

- *the asset pool excluding superannuation is only $803,000;*
- *the husband has paid $230,000 to his lawyers in preference to his obligations to the wife and the children; and*
- *such payment has been made from income which he has been able to earn, in part, through the contributions of the wife.*

A similar approach was adopted by Ryan J in *Beklar and Beklar* [2013] FamCA 327 at [206].

Thornton J

Ortona v Peters [2015] FamCA 99 (date delivered 26 February 2015)

76. *Ortona v Peters* is a first instance decision of Thornton J that was heard in late 2014. As with the decision of Bennet J in *Eldred,* it was heard before the Full Court handed down its decision in *Vass*. The same qualifications therefore apply.

77. The facts were as follows. The de facto wife submitted that the following should be added-back: money expended by the husband on legal fees from a joint account; and money paid to the husband by an insurance company for property damage to his motor vehicle after separation.

78. At [337- 338] Thornton J cited *Bevan* as authority preventing the inclusion of notional property in the joint asset pool. She instead proceeded to deal with the wife's submissions under s 90SF(3) of the Act.

79. The insurance payout was not considered under s 90SF(3) because the husband spent the money on reasonably incurred living expenses. Her honour held, with respect to the legal fees at [400-401]:

> *The husband's family law legal fees have diminished the value of the total property of the parties. I take into account as a relevant factor that the husband spent $10,139 from joint funds on legal advice about family law matters prior to separation. It is not appropriate to enter into a mathematical exercise when considering this factor.*

However, I have regarded this payment of legal fees by the husband as a fact or circumstance which the justice of the case requires to be taken into account under s 90SF(3)(r) of the Act.

Practice Wisdom - Practical advice about add-backs

80. Add backs are permitted, but they are still the *exception* not the rule.

81. The five questions stated by Murphy J in *Kouper & Kouper (No. 3)* [2009] FamCA 1080 at [108] will be of some assistance in determining if an add-back is appropriate (you may like to style them in your own language for future reference or simply use the framework as is):

(a) *Is it contended that property (including money), that would otherwise be available for distribution between the parties if a s 79 order is made, has been dissipated with a consequential loss to the property otherwise potentially divisible between the parties at the date of trial?;*

(b) *If so, is it alleged that the dissipation of property was in respect of things other than what, in the particular circumstances of this particular marriage, can be classified as "reasonable living expenses"?*

(c) If it is asserted that any loss to the divisible property results from dissipation of property other than in respect of such expenses, why is it asserted that the result should be a sharing of that loss by the parties other than equally?

(d) *If it is contended that this be the result, why should there be an add-back (which brings to account, dollar for dollar, such past expenditure in current dollars) as distinct, for example, from there being an adjustment being made pursuant to s 75(2)(o)?; and*

(e) *How should either any "add-back", or adjustment pursuant to s 75(2)(o), be quantified?*

82. It may be sensible to run the arguments in the alternative, ie. the add back and the s.75(2)(o) arguments. Further a trial judge's exercise of discretion on what is often a complex issue in a large case can be difficult to predict. Thus, consider seeking orders on the basis of the add back argument being successful and in the alternative what the proposed orders should be if there is no add back but a consideration of s.75(2)(o), stipulating a fixed sum claimed under the consideration of s.75(2)(o).

83. The balance sheet should include in a separate heading, the *his and her* add backs sought, identifying the add back, when it was taken, its purported value, its source, what it was used for and whether or not it is agreed by the other side.

84. Trial judges are open to considering add back arguments and considering material in support of arguments under s.75(2)(o). The application of section s.75(2)(o) considerations is not transparent or clear which means it is difficult to predict. Recall this was the case in the post-*Vass* decision of Macmillan J in *Lake & Brand.* That decision may be a useful guide how to frame a claim in this way. Where add backs are in issue then ensure that there is sufficient evidence and explanation in submissions as to why they are sought and how a decision in your client's favour may be fairly open on the tested evidence in the case, overall.

Evidence

85. Be clear on the evidence before the Court which supports or resists the add back being included in the property interests of the parties. It may be prudent to consider doing all you can as the practitioner, with instructions, to get to final hearing sooner rather than later thereby avoiding a long time lag between separation and trial. The smaller the gap the less time there is for clients to complicate the case narrative. Consider ensuring that your client spends post separation funds reasonably and that the he or she is able to account for lump sums received from capital along the way – see *Grier and Malphas* [2016] FamCAFC 84.

Submissions

86. Ensure you have prepared submissions which are sustainable on the *evidence* not slogans; do not rely upon the "general vibe". Do not "speak in code" hoping the trial judge might tell you what your client's add back case is and help you along regarding both approaches.

Orders Sought

87. The order sought as to the s.75(2)(o) claim might read something like:

> *Balancing all relevant and identified s.75(2) factors the adjustment in favour of the husband should be X.% resulting in him receiving $Y*
>
> *OR*
>
> *For reasons identified under s.75(2)(o) the husband should receive a further $X and on account of the balance of the identified s.75(2) factors, an adjustment of Y% in favour of the husband is in order, resulting in him receiving a total of $Z.*

Section 106B

88. As an alternative to the add back argument or the s.75(2)(o) considerations, you may consider the (usually complex) application of s.106B where property has been disposed of so that the Court sets aside a transaction or instrument - *Kennon v Spry* (2008) 238 CLR 366, where $4 million was injected back into the pool.

Applications for Interim Injunctive Orders

89. Where there is unauthorised disposal of property you may consider applying for an urgent injunction to preserve the current assets where the facts can sustain such an application - *Waugh v Waugh* 2000 FLC 93 -052. Remember the undertaking as to damages and if one is not sought by the other side to consider offering it to the Court on your client's behalf with instructions.

Prepaid Legal Fees from Capital

90. Legal fees paid with joint funds or from joint capital may be added back.

91. It is crucial, when arguing for an add-back, that you are able to identify precisely the amount of joint property that has been spent on legal fees. The wife's inability to do this in *Brook & Brook* was fatal to her request for the add-back of legal fees. It is therefore important for practitioners to check as to what funds have been spent on legal fees, when and how they have been sourced, well prior to trial or the settlement conference.

Legal Fees Paid from Post Separation Assets

92. Legal fees paid from assets acquired post separation such as a windfall or inheritance may not be added back if the asset does not arise in connection with the marriage or relationship and there is no contribution made to it by the other party. Identify the source of the add back and its connection to the marriage/relationship to avoid the problems which arose in *Gissing v Sheffield* at [174]. See also *Eufrosin and Eurfrosin* [2014] FamCAFC 191 where the wife had a post separation lottery win and dissipated it. There was no add back at first instance or on appeal. See also *Jong & Yeng* [2014] FamCAFC 156

Legal Fees Paid from Post Separation Income

93. Legal fees paid from post separation income *may* be added back, in circumstances which warrant such a course, in the exercise of discretion and where the mechanism of s.75(2)(o) may be deemed to be insufficient enough to do justice between the parties in all the circumstances of the case - see Rankin. If you firm is getting paid for its work as it is done, then do check that your client is honouring his or her obligations as to child support, spousal maintenance, and if reasonable, the maintenance of the assets of the parties.

Unpaid Legal Fees

94. Generally speaking, it is best to not include unpaid legal fees in the asset pool - *Chorn & Hopkins* [2004] FamCA 633 as this may give rise to complications should a costs order be made under s.117. The amount owed and how they are to be paid may be a matter for

consideration under s.75(2)(o) generally subject to the trial judge's discretion so do let the judge know what they are putting a figure in next to the heading "legal fees unpaid" but in the numbers column, you may like to write "personal" for your client and TBA for the other side.

Fairness

95. If you are adding to the pool pre-paid legal fees, you need to include say the loan that allowed those fees to be included, even where the parties have agreed that the loan for those fees is personal to the party borrowing the funds. The consent orders may say that and often do. It is not uncommon for judges to allow add backs in the calculation of the pool where the parties consent to that approach. It is also possible for parties to consent to an add back forming part of the asset pool but to then ask for the trial judge to decide on quantum.

96. Quiz Question - What if, however, there is an interim order allowing for the wife to receive say $100 000 from the proceeds of sale and the interim consent order (as is often the case) says the payment to the wife is partial property settlement (by consent). Her later instructions (supported by bank statements) are that, in fact, over time, the wife spent half of that on reasonable living expenses, pending trial? Would it be fair to simply add back, as a cash advance not $100 000 but say $50 000 because of *what is true,* in the face of the consent order pronounced by the Court and agreed to as the parties' bargain (where they had legal advice)?

The Value of the Add Back - current or past or lost opportunity value?

97. Consider *evidence* as to quantum, source and proportionality of the sought add back. If you wish to assert a claim for add backs it is prudent to set out the evidence in admissible form on which you rely prior to undertaking settlement discussions at a round table, conciliation conference or mediation and certainly well prior to any final hearing. If it is too hard to ascribe a value to the asserted add back (for example the costs paid to buy a car, furniture, shares, commodities because of say timing issues), it may be more prudent and fair to make allowance for its consideration under s.75(2)(o). Alternatively consider if an adjournment is appropriate.

Is the purported add-back Property or a Financial Resource?

98. Remember to consider whether or not the add back to which you refer is property as defined under the Family Law Act or a financial resource. If you assert it is property ensure it fits the definition of property and you have evidence to support the assertion - See *Duff* (1977) 15 ALR: 476, see also Ryan J in *Beklar (Supra)* [2013] FLC 93-545 at [118] and Bender J, in *Russell & Russell* [2016] FCCA 137 at [130-147].

Fair Crack of the Whip - Significant Erosion

99. Where the pool has been seriously eroded it may be that a dollar- for-dollar add back is fair and equitable. Be careful however to ensure that the purported add back does not overly (artificially) inflate the asset pool such that the Court is being asked to make an order that exceeds the assets in existence in the here and now, making the order an embarrassing nonsense and not enforceable.

Don't Sweat the Small Stuff

100. Add backs are not normally made where the quantum involved is minimal in terms of its percentage of a pool. Thus, a donation of say $148 000 was not added back where it constituted .04% of the pool - see *Shimizu & Tanner* [2011] FamCA 271 at [81].

Conduct Counts

101. It is prudent to ensure that your client, whether seeking or resisting the add back argument conducts himself or herself responsibly in family law litigation by complying with interim orders, rules as to discovery, disclosure of assets and that he or she is as truthful as possible, so findings as to credit are not adverse to them. It is also prudent to have your client mitigate any loss arising from the other party's conduct, as irritating as that might be to your client. See *Georgiades & Georgiades and Ors* [2014] Fam CA 856, where the husband was unco-operative and recalcitrant in respect of his obligations to make full and frank disclosure. He did not properly explain how some $217 800 came into and left his account. The funds went in and were disbursed by him in the three years prior to separation. The husband did not lead evidence as to how the funds were used. The trial judge found, and the Full Court accepted, that it was open to the Court to find that, in the

absence of full and frank disclosure, those funds just might still be available to the husband, as opposed to the notion that they had been dissipated or returned to their source.

And what about You?

102. Last, but not least, a little bit about the *professional* you. Your timely advice and *professional influence* on your client's conduct counts. Consider what you see as your professional obligations as to the advice you and your firm (as a matter of policy) give to clients (if any) regarding the construction of the pool and their conduct as a party to proceedings pending final hearing or settlement conference. Is your and your firm's approach to advise on asset pool matters laissez faire, wilful blindness, facilitative or directive? Do you even have an obligation to work that out? Many solicitors in parenting matters micro manage the case to secure the best possible outcome for their client ensuring they do not lose their case on account of his or her conduct. Do you think the same considerations practical and ethical apply to the professional management of the add back case?

103. It is not uncommon for clients to behave poorly, but matters are a lot simpler to settle or run to trial where lawyers attempt to exert their reasonable professional influence (via advice) in a way that keeps things as simple and as clear as possible. The less white noise in a case the better, in my view. Applying the applicable legal templates to the facts then becomes a lot simpler. The parties can also then focus on the process and outcome rather than on distracting conduct issues as to add backs. So for example, if your client, the husband, can indeed pay his and the company's tax as well as the wife's why not suggest that he does so, subject to professional financial advice? If the husband is perceived by your client, the wife, as disrespectful and inflammatory when he fails to pay her personal tax when he could have and probably should have, why not mitigate the loss sooner rather than later and agree to sell property to meet the taxation obligation and reduce interest?

Concluding Remarks

104. *Stanford* tells us that the Court must identify the parties' legal and equitable interests in assets in existence at the time of the hearing and alter them if it is just and equitable to do that.

105. The add back issue arises often in a case particularly given the length of time it takes to get from separation to a final resolution of a matter.

106. Notionally adding back property which has been dissipated or converted into something else is possible in exceptional circumstances.

107. Cases are not usually static or simple. The consideration of an add back argument will usually be but one issue amongst many in any given case.

108. It is important to consider the manner in which the add back argument arises and the way you seek it be treated early and to consider what *evidence* you will call to substantiate the claim in the context of the case's narrative as a whole so the outcome is fair and equitable to both parties in light of the assets accrued between them, their contributions to the asset pool (financial and non financial), how those assets have been used and enjoyed before and after separation (and how that has come about). There are also future needs to consider.

109. The cost benefit analysis of the add back argument (and its alternatives in the form of contribution and/or s.75(2)(o)) is of course important.

110. You need to be clear on how you want to put your client's add back and/or s.75(2)(o) case in monetary terms and orders sought. Tactically, at a round table conference, conciliation conference or mediation, you may simply wish to push for a bottom line figure, all in, without any reference to the arguments. Alternatively, the parties might be encouraged

to understand each other's cases as to add backs, not accept the arguments, but agree to settle on a compromise figure in any event.

111. When in trial preparation mode, it is important to be able to predict as best as possible the outcome of the arguments in light of the exercise of discretion of the judge who is allocated to hear your client's case, to say nothing of how your client may perform in the witness box, remembering that there will be a solicitor and barrister testing and challenging your client's argument, usually with vigour.

112. We have been massaging add backs into the property settlement equation for a very long time. We do currently and we will in the future. With the guidance offered by the Full Court, our task is permitted. Most cases including add back issues do settle. Adjustments are agreed to by the parties *with your assistance*. Where the parties are too far apart on the add back issues, then of course the case must run and it is your obligation to perceive it and present it competently.

113. It will be interesting to see whether or not what is essentially a cash advance or financial adjustment between people who were and often still are linked in an important personal and social relationship, (often for a long time), will be called in the future. I am not sure there really needs to be a change of description.

114. At the moment there does not seem to be a pressing call for change of approach and it will be interesting to see what arises from future decisions on the topic by the Full Court (with members of the Appeal Division changing in due course) and any High Court authority (remembering of course that *Standford* was not even a case directly about add backs!)

115. It will also be interesting to see if there is any way of making the considerations which apply easier to put before the Court and what mechanisms might emerge to make predicting an outcome clearer, to assist practitioners in resolving or, if necessary, running a case to trial. The application of s.75(2)(o) is difficult to predict.

116. Clients at ground level of course want simplicity, certainty and to keep legal expense to a reasonable minimum. Practitioners having grappled with the developments in the case law and having an appreciation of the alleged facts and evidence available to support such facts, will do well to resolve the issue of any add back by way of agreement where they can. If not there's a lot of detailed, creative and disciplined work to be done to advocate for and achieve the best possible result for your client (which, remember you're supposed to enjoy doing as a family law practitioner!).

It's Tricky Business - Good Luck!

LAURA COLLA

Foley's List

Barrister

August 2016

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