A POST-COVID HYPOTHETICAL

TOPIC ***Assessing gifts and other contributions***

FAMILY LAW CPD BREAKFAS

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PRACTICE AREAS

Family Law

- Care & Protection
- Child Disputes
- Parenting Orders
- Property Disputes

Alternative Dispute Resolution (ADR)

Intervention Orders

Alex accepts briefs to appear in, and advise on, matters involving all aspects of family law.

Alex regularly appears in the Federal Circuit & Family Court of Australia and the Magistrates' Court of Victoria.

Prior to being called to the Bar, Alex was a Senior Associate at two specialist family law firms in Melbourne. She provided strategic and litigation advice in all aspects of the family law jurisdiction including:

- Property settlements for married and de-facto couples involving complex corporate structures, discretionary trusts, foreign assets, valuation disputes, tax issues and third parties;
- Spousal maintenance disputes and Binding Financial Agreements;
- Parenting matters involving parental alienation, family violence, relocation, allegations of sexual abuse and parental incapacity associated with mental ill health, terminal illness and drug/alcohol abuse;
- Child support agreements and disputes;
- Family Violence Intervention Orders.

Alex is a member of the Family Law Bar Association and the Women Barristers Bar Association. She is also a founding member and past-President of BottledSnail Productions which is a not-for-profit organisation dedicated to providing creative opportunities to members of the legal community.

Alex read with Helen Dellidis of Counsel and her Senior Mentor was Carolyn Sparke QC.

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Alternative Dispute Resolution (ADR)

Harriet comes to the bar with extensive experience in family law and related jurisdictions (including Intervention Order proceedings).

Harriet regularly appears in the Federal Circuit and Family Court of Australia and the Magistrates' Court of Victoria and accepts briefs to appear in all matters relating to family law.

Prior to coming to the bar, Harriet was a Senior Associate at a leading specialist family law firm where she had carriage of complex parenting matters, including international relocations and parental alienation, and property matters, including matters involving high-net worth individuals, third party property rights, spousal maintenance and jurisdictional threshold issues. Harriet also has significant experience with matters involving family violence. As a solicitor, Harriet regularly appeared as a solicitor advocate both in Court and at mediations.

In 2020, Harriet was a finalist in the Lawyer's Weekly "30 Under 30" family law category. In 2021, Harriet was recognised by Doyle's Guide as a "Rising Star" in family law.

Harriet is reading with Chris Nehmy and her senior mentor is Geoff Dickson QC.

FOLEY'S LIST – FAMILY LAW BREAKFAST

ASSESSMENT OF CONTRIBUTIONS

In response to a Post-Covid Hypothetical

15 SEPTEMBER 2022

PART 1: THIRD PARTY CONTRIBUTIONS

Relevant facts from hypothetical

The property at Sorrento was a surprise Christmas gift from the Husband's parents. In 2015 the parties received a Christmas card which said "*to our son and his wonderful wife, thank you for making us grandparents and bringing such joy to our lives. We hope that you can enjoy this beach house at Sorrento together as a family*".

Financial contributions made on behalf of a party

1. It is not uncommon in family law matters, for disputes to arise about contributions. In accordance with section 79 of the *Family Law Act 1975* (Cth) (**the Act**), contributions may be made "*by or on behalf of*" a party.[1] In matters involving a gift of property, and where there is a dispute as to whether this gift was made to one or both parties, and consequently, there is controversy as to whether the contribution should be regarded as being made on behalf of one or both parties, the wording of section 79(4) of the Act, takes on significant importance.

2. In determining whether a gift has been made on behalf of one or both parties, it is of course necessary for the court to be satisfied that the contribution was made as a gift as distinct from a loan. In family law matters, it can be common for controversy to arise as to whether property was intended to be gifted to parties or whether the ownership of the property was intended to remain with the donor. This paper focuses on the treatment of financial gifts where there is no dispute that the property was gifted rather than loaned.

Made on behalf of one or both parties?

3. There are several authorities on the proper approach to determining whether a gift has been made on behalf of one or both parties. These authorities are summarised at length by Justice Fogarty in *In the Marriage of Gosper*[2] (***Gosper***). In this case, the wife's

[1] Section 79(4) *Family Law Act 1975* (Cth).
[2] *In the Marriage of Gosper* (1987) FLC 91 – 818.

parents had gifted the parties two blocks of land. The husband asserted that the blocks were gifted to the parties jointly and should be considered an equal contribution. The wife argued that the gifts amounted to a contribution made on her behalf.

4. It was noted by Justice Fogarty that the Full Court's treatment of gifts is "*far from consistent*"[3], with some cases treating gifts as a contribution by the donee whilst others considering the gift as a fact or circumstance pursuant to section 75(2)(o) of the Act.

5. In *Gosper*, Justice Fogarty suggested that the following steps be taken when determining whether a gift is a contribution that has been made on behalf of one or both parties:

   (a) "*the first step is to determine the ownership of the benefaction (see Rainbird & Rainbird (1977) FLC 90-256; Read & Read (1984) FLC 91-527). Confusion often arises at this point because, particularly with gifts of money or in kind, the evidence is confused and imprecise and the actual intention of the donor (the critical issue) may have been ill-defined. However, where the evidence enables the court to determine that it is a gift to one or other or both of the parties, that is an important finding. Normally, where title to property is transferred to one or both of the parties, that would be the strongest indicator of the intention of the donor*";[4] and

   (b) "*the next step is to consider the application of section 79 of the Act to all of the property of the parties, including property received by one or both of them by way of benefaction from a third party. Traditionally, this task is performed by firstly considering the question of contributions under section 79(4)(a) and then, if relevant, the section 75(2) factors. There is no reason to apply a different approach in relation to property having this particular history*".[5]

6. As per the approach set out by Justice Fogarty, it is necessary to analyse the available evidence to determine the actual intention of the donor who gifted the property.

7. Justice Fogarty also held that:

   - "*where a gift is made solely to the donor's relative (for example, a gift by parents to their married daughter) and that spouse applies that property to the marriage,*

[3] *In the Marriage of Gosper* (1987) FLC 91 – 818. at paragraph 34.
[4] Ibid at paragraph 67.
[5] Ibid at paragraph 71.

that is a direct financial contribution solely by that party and will be assessed in the ordinary way alongside other contributions by each party to the marriage"[6];

- "*the critical case is where a relative of one of the parties gifts property to both of the parties to the marriage. Dependent upon the circumstances of the case, it is, in my view, open to the court in such a case to look at the actuality and treat that as a "financial contribution made directly… on behalf of" the spouse relative.*[7] *In many such cases that gift was made only because of that relationship and in reality as a means of benefiting that relative in the marriage*"[8]; and

- "*in other cases, the evidence, including evidence that the donor intended to benefit both spouses, may not justify that conclusion. If so, the application by the parties of that property to the marriage would, at least at that point, be an equal contribution by them*"[9].

8. In *Gosper*, Justice Fogarty concluded on the evidence that whilst the gift of land had been made to the parties jointly, "*it is clear that the motivating circumstance was the relationship between the wife's parents and the wife and it was transferred because she was a daughter*".[10] In assessing contributions under section 79(4) of the Act, the contribution was therefore found to be made solely on behalf of the wife.

Gifts to one party

9. If the court is satisfied that a gift has been made to one party, the court must determine the weight to be given to this contribution. In doing so, the court may:

   (a) allow the party to whom the gift was given to be credited with the value to which the gift has increased as at the date of the final hearing.[11] This may only be appropriate if the relationship was of short duration or lasted only a short time after the gift was made[12];

   (b) give the party to whom the gift was given credit for the initial value of the gift[13];

[6] Ibid at paragraph 72.
[7] *In the Marriage of Gosper* (1987) FLC 91 – 818 at paragraph 74.
[8] Ibid at paragraph 75.
[9] Ibid at paragraph 77.
[10] Ibid at paragraph 79.
[11] See for example *In the Marriage of Freeman* (1979) FLC 90-697.
[12] See for example *In the Marriage of Crawford* (1979) FLC 90-647.
[13] See for example *In the Marriage of W* (1980) FLC 90-872.

(c) in circumstances where the gift has been mixed with other contributions over a long period of time, the court may not attempt to give any particular value to the gift and may instead consider it as a factor to be taken into account with other relevant factors.[14] The longer the relationship, the less weight will be given to such a contribution.

Gifts to both parties

10. As set out above, in *Gosper*, it was held that even where a gift by a relative of a party is made to both parties, it is still open to the court in appropriate circumstances to regard such gift as a contribution made by the party to whom the donor is related.[15]

11. In *In the Marriage of Kessey*[16] (***Kessey***), the Full Court applied the pathway set out in *Gosper*. In *Kessey*, the wife's mother had gifted the parties money to complete renovations at the former matrimonial home, which was registered in the wife's sole name. There was no evidence of the wife's mother's intention in gifting the funds. The husband argued that the gift had been made to both parties and that their contributions were therefore equal. The wife argued that she should receive an adjustment on account of the contribution. At first instance, the trial judge made orders for the wife to receive an adjustment in her favour. The husband appealed.

12. The Full Court, dismissing the husband's appeal, held that the principles set out in Gosper, "*should be regarded as being applicable in all cases where there has been an advance of money or property by a parent (perhaps even by some other relative) of one of the parties, to one or both of the parties (or to their property), and the circumstances of the advance cannot be categorised as a loan, or as any other recognised commercial transaction*"[17].

13. The Full Court held that:

(a) a gift made by a parent to a child of a marriage will be considered a contribution made on behalf of the child unless there is evidence that establishes it was not the intention of the parent to benefit only their child; and

(b) if there is evidence that the parent intended to benefit both parties, the gift will be regarded as an equal contribution by both parties.

[14] See for example *In the Marriage of White* (1982) FLC 91-246.
[15] *In the Marriage of Gosper* (1987) FLC 91 – 818 at paragraph 74.
[16] *In the Marriage of Kessey* (1994) FLC 92-495.
[17] Ibid at paragraph 81.

14. The Full Court also seemed to suggest that there is an onus on the person married to a child of the donor to establish, on the balance of probabilities, that the gift was a contribution made on behalf of both parties.

15. The most recent Full Court decision to consider the issue of gifts made to one or both parties, is the matter of *Mabb & Mabb & Anor*[18] (***Mabb***).

16. In this case, the husband's parents had transferred the parties 60 acres of property. Following the transfer of the property, the parties established a business on the land. Following separation, the wife and the husband's mother continued to operate the business for a number of years until it was ultimately closed. It was the wife's position that the property had been gifted to the parties on the basis that the husband's parents would eventually build a house on the property and the parties would look after them if required. The husband asserted that the gift made by his parents was intended to be made for his sole benefit. At first instance, the court held that the parties' contributions during the relationship were equal and that the wife had made significantly greater post-separation contributions. The husband appealed.

17. The Full Court, dismissing the husband's appeal, applied the pathway set out in *Gosper* and affirmed in *Kessey*. The Full Court held that:

    - whether the land was to benefit the husband alone, depended on the intention of his parents at the time of the transfer;[19]

    - each party bore an evidentiary onus to establish the facts to support their respective contentions;[20]and

    - while it is reasonable to assume, as the Full Court did in *Kessey*, that the presumed intention of the donor is to advantage the child in the marriage, it is no more than an evidentiary device.[21]

18. In dismissing the husband's appeal, the Full Court held that the "*motivating circumstance in this case was not solely the relationship between the husband's parents and the husband. The motivating circumstance, on the undisputed evidence, include that, in return for the transfer of land, the parents were to achieve the benefit of an assumed*

[18] *Mabb & Mabb & Anor* [2020] FamCAFC 18.
[19] Ibid at paragraph 35.
[20] Ibid at pargraph 37.
[21] Ibid.

obligation, by both parties, for their future support, as well as the opportunity for the parents to continue to live on the property as they apparently desired".

Application of legal principles to hypothetical scenario

19. In the case of the hypothetical, it is likely that a dispute will arise about the transfer of the Sorrento property from the husband's parents. It is likely that the husband would argue that the transfer was a contribution made on his behalf, whilst the wife would argue that the contribution was made equally for both parties.

20. In considering how to resolve any potential dispute arising from the transfer of the Sorrento property, it is suggested that consideration be given to the following:

- As per the approach set out in *Gosper*, the first step in determining whether the gift of the Sorrento property is a contribution made on behalf of the husband or both parties, is to determine the ownership of the contribution. This involves determining the intention of the donor (in this hypothetical, being the husband's parents).

  In determining the intention of the donor, all evidence relating to the transfer of the property, including the Christmas card, the Transfer of Land and the current title would be scrutinised. It would also be necessary to consider how the Sorrento property has been used since the parties received it in 2015, including determining whether the husband's parents continued to use the Sorrento property and who met the outgoings for the Sorrento property.

  Here, we do not know whether the husband's parents are still alive and able to give evidence about what they intended when they gifted the property. Nor do we know whether the Sorrento property was registered in the parties' joint names or the husband's sole name, when it was transferred from the husband's parents.

  Following Justice Fogarty's pathway as set out in *Gosper*, the registration of title is the "*strongest indicator of the intention of the donor*"[22]. Arguably, if the property was registered in the parties' joint names, this would suggest that the gift was intended to benefit both parties.

  In this scenario, it is likely that the content of the Christmas card would be scrutinised closely by the Court. The card, which was made out to "*our son and his wonderful wife*" is suggestive of the gift being made to both parties. Further, the words, "*we hope that you can enjoy the beach house at Sorrento together as a family*" seem to

[22] *In the Marriage of Gosper* (1987) FLC 91 – 818 at paragraph 67.

suggest an intention by the husband's parents that both parties would benefit from the gifted property.

As per *Gosper*, notwithstanding the Sorrento property being registered in joint names, it could still be open to the court to regard the gift from the husband's parents as being a contribution made on his behalf. In order for the husband to successfully argue this position, he would need to establish that the "*motivating circumstance*" in the husband's parents transferring the property to the parties, was because of their relationship with the husband.

21. As per *Gosper*, after determining the ownership of the gift, the court would apply section 79 of the Act in analysing the contributions made by the parties. If the court found that the gift was intended to benefit only the husband, then the contribution will be considered to have been made on his behalf. Conversely, if the court is satisfied that the husband's parents intended to benefit both parties, then the contribution will be assessed as being equal.

22. Clearly, in order to provide both parties with advice in relation to their respective positions, a more detailed understanding of the factual scenario / available evidence would need to be given. Following the Full Court authority set out in *Mabb*, both parties bear the evidentiary onus to establish the facts to support their respective positions.

PART 2: CONTRIBUTIONS POST-JABOUR

Relevant facts from hypothetical:. The parties commenced living together in 2008 and separated in 2021 after a relationship of approximately 13 years. At the commencement of the relationship, the husband owned an apartment in Glen Iris with equity of approximately $150,000, shares in the amount of $50,000, a Mitsubishi motor vehicle worth approximately $5,000 and $40,000 in superannuation. The wife had about $15,000 in savings and approximately $8,000 in superannuation. In 2012, the husband sold the Glen Iris apartment and used the proceeds of sale, plus a gift of $250,000 from his father, to purchase the Malvern property for $1.8million. The Sorrento property was a surprise Christmas gift from the husband's parents. The parties initially obtained joint valuations of the Sorrento property (valued at $2.7million) and the Malvern property (valued at $3.3million subject to mortgage of $1.25million) but those values are now in dispute.

The wife has been the primary carer of the children (aged 8 and 12) during the relationship and following separation.

Jabour & Jabour [2019] FamCAFC 78

Facts

The parties commenced living together in 1988, had three children together and separated after 27 years. At the commencement of the relationship, the husband owned a property in which he held equity of $70,000. That property became the former matrimonial home. The husband also held an interest in a parcel of land. Approximately 22 years after the commencement of the relationship, the land was rezoned such as to allow it to be used for residential purposes. This rezoning caused a significant increase in the value of the land. At the time of trial, the land was worth over $10 million, and represented over 90% of the total value of the parties' asset pool.

The husband relied upon the Full Court's decision in *Williams & Williams* and a decision of Brereton J in the New South Wales Supreme Court of *Kardos & Sarbutt*, which he asserted together stood as authority for the proposition that in assessing an initial contribution, regard should be had to the value of that contribution as at the time of the hearing, rather than just to its initial value. The trial judge assessed the parties' contributions as **66% to the husband** and **34% to the wife**. The major reason for the significant adjustment in the husband's favour was his initial contribution of the land.

Full Court - Alstergren, Ryan & Aldridge JJ

The Full Court held:

Whatever was the value of the property at the commencement of the relationship its significance has been largely lost given the myriad of the contributions by each of the parties to their various business ventures, through their employment and care of the family over a long relationship, including the contributions made to the retention of the property ... There is no doubt that they both worked hard and over many years they both contributed to the full extent of their capacity within the roles each took within the marriage.

The Full Court outlined a number of authorities from both before and after *Williams* and ultimately rejected the suggestion that any increase in value in assets that were initially contributed by one party should be regarded as entirely that party's contribution. The Full Court held that there should be no adjustment for the increase in value in the land, and therefore assessed contributions as being **53% to the husband** and **47% to the wife**.

Horrigan & Horrigan [2020] FamCAFC 25

Facts

The parties commenced cohabitation in October 2009 and married in 2010. In 2011 the sole child of the parties' marriage was born, who was seven years of age at the time of the primary judgment. The parties separated in 2017 after a relationship of 8 years.

At the time the parties commenced their relationship, the wife owned a residential property at J Town, and the husband owned two grazing properties, one at L Town and the other at Z Town. The primary judge concluded that the net assets of the husband at the commencement of the relationship had an approximate value of a little over **$1.5 million**, and that "at best" (at [205]), the value of the wife's assets at the commencement of cohabitation was **$195,000** (equating to 11.5% of the pool).

At trial, the wife alleged that the husband had been physically and sexually abusive to her, on the basis of which she mounted an argument based on Kennon v Kennon [1997] FamCA 27; (1997) FLC 92-757, that the husband's violence had made her contributions to the relationship significantly more onerous than they ought to have been. The primary judge was not satisfied that the assaults and sexual abuse alleged by the wife were established on the evidence.

The husband alleged that the wife had, unbeknownst to him, gambled extensively during the course of the relationship, and thereby lost a considerable sum. The primary judge found that during the period between June 2014 and June 2017, she gambled about $98,249, and allowing for winnings of somewhere between $54,000 and $58,000, found that she had suffered a net loss of about $40,000.

Before the primary judge, there was an agreed balance sheet of the parties' assets and liabilities as at the time of trial. This disclosed that the pool of property had a net value of $3,634,582. Significant items in the balance sheet were the Z Town property at $2,840,000, the L Town property at $1,800,000, and the J Town property at $145,000. Against Z Town and L Town, there were borrowings of $2,120,000, and there was the sum of $45,000 owing on the mortgage secured over the J Town property.

The trial judge concluded, "Given all of the facts and circumstances about contributions, I am satisfied that the value of the overall contributions, including initial contributions, contributions during the relationship and contributions post-separation, are as to 85 per cent by the husband and 15 per cent by the wife."

His Honour then went on to consider the relevant factors under s 75(2) of the Family Law Act 1975 (Cth) ("the Act"), and concluded that they favoured the wife to the extent of a further 7 per cent adjustment in her favour. Relevantly, the parties consented to orders providing for the child to live with the wife and spend five nights per fortnight with the husband and an interim order was made for spousal maintenance.

Full Court - Strickland, Kent & Tree JJ

As summarised by the Full Court, the wife contended three main deficiencies, or errors, on the part of the primary judge:

> *The first was that the finding that she had made a contribution of 15 per cent to the net pool of assets, did not properly reflect the fact that her efforts and contributions had conserved the husband's properties, which otherwise would have been imperilled. Secondly, she said that the finding of equal contribution during cohabitation was not reflected in the outcome, in that there ought to have been an equal split between the parties of the increase in value of various items in the balance sheet over the period of cohabitation. Thirdly, his Honour had not undertaken an assessment of contributions holistically, but had quarantined pre-cohabitation contributions. We will deal with those matters in that order.*[23]

The Full Court rejected the wife's argument that "*at the commencement of cohabitation, a line is ruled across the balance sheet, and the parties should thereafter share in any increase in value of pre-cohabitation assets in the percentage of their other contributions during the course of the relationship. Indeed such an approach would be the very antithesis of the holistic assessment of contributions during the course of the relationship, which the exercise of the discretion under s 79 of the Act requires*."[24]

The Full Court went on to say that: "*Of course that does not mean that the husband thereby is to be regarded as having contributed all of the subsequent increase in value of the properties. The holistic assessment process requires the myriad of contributions to be identified and weighed."*[25]

As to the wife's broader claim of an overall failure to holistically assess the parties' contributions, the Full Court held that the primary judge "*did not isolate the husband's contribution of the farming properties from the myriad of other contributions, and, in effect,*

[23] At [24].
[24] At [32].
[25] At [33].

weighed them against each other. Nor did his Honour embark upon some quest to find a "nexus" between the contributions of the parties and particular items of property."[26]

The Full Court concluded:

> *In any event, Jabour and many of the authorities it traverses, involved a long relationship of over 24 years. Inevitably the length of the relationship under consideration informs the holistic assessment of contributions. Here the parties' relationship subsisted for a little less than eight years*.[27]

The wife was wholly unsuccessful in the appeal. The Full Court ordered that the husband's costs of $20,000 be met by way of deduction from the wife's final payment of $164,912.

Barnell & Barnell [2020] FamCAFC 102 (1 May 2020)

Facts

The parties began their relationship in early 1995 and were married on in 1996. Their relationship produced two children who were aged 22 years and 16 years. As at trial, both children were living with the wife. The parties separated under one roof in November 2016 and physically separated in March 2017 when the wife and children vacated the matrimonial home, which the husband continued to occupy. Thus, the period of cohabitation was about 22 years.

The parties agreed at trial that at the commencement of their cohabitation the husband had $58,000 equity in the matrimonial home and a parcel of land referred to as B property. Senior counsel for the wife contended that inferring a value for the land at cohabitation of $110,000 would be putting that value at its highest.

The gifts received by the parties during the relationship from the wife's parents totalling approximately $70,000 plus regular Christmas gifts of $1,000 were treated as contributions by or on behalf of the wife.

The trial judge recorded findings reflecting equality of assessment as between the husband's contribution as primary breadwinner throughout the relationship and the wife's primary responsibility for homemaking and parenting.

[26] At [47].
[27] At [48].

The primary judge determined that the combined property interests of the parties, including their respective modest superannuation interests, had a net value of $941,096 and the parcel of land represented $340,000 of the pool.

In assessing contributions to the land, His Honour noted that it was "*common ground that the only contribution made by either party to the conservation of that property over the course of their relationship was the regular payment of fairly modest council rates*."

His Honour determined, by reason of the husband's initial capital contribution of the land that there existed a 25 per cent differential between the parties as to their contributions based entitlements and assessed these at 62.5 per cent to the husband and 37.5 per cent to the wife.

The primary judge made a 7.5 per cent adjustment in favour of the wife for ss 79(4)(d)–(g) factors in arriving at an overall conclusion that the combined property interests of the parties be divided in value as to **55 per cent to the husband** and **45 per cent to the wife**.

Full Court - Ryan, Aldridge & Kent JJ

On appeal, the wife contended that the land formed part of the parties' interests at trial at a value of $340,000, not only by reason of the husband's direct financial contribution of it, but also the parties' indirect contributions of all kinds to its conservation over a lengthy marriage and post-separation period. The wife contended that the trial judge's approach gave undue emphasis to the husband's initial contribution and no sufficient emphasis to the wife's direct and indirect contributions otherwise, including the capital that she introduced via gifts from her family but primarily her homemaking and parenting role.

The Full Court confirmed the principles relating to the s 79 assessment process referred to in Lovine & Connor and Anor [2012] FamCAFC 168, Dickons v Dickons [2012] FamCAFC 154, Wallis & Manning [2017] FamCAFC 14, Hurst & Hurst [2018] FamCAFC 146 and Jabour & Jabour [2019] FamCAFC 78.

The Full Court held that the primary judge fell into the same error as was made at trial in each of *Hurst* and *Jabour* by isolating the B Property and by adopting a differential of as much as 25 per cent between the parties as to their contributions-based entitlements as a consequence of "quarantining" the B Property, and giving discrete consideration to that contribution.[28] It was

[28] At [42].

noted that "his Honour's approach had the overall effect of according a subsidiary role to the wife's contributions."[29]

The appeal was allowed and the proceedings were remitted for rehearing to enable each party to advance evidence of relevant circumstances since the subject orders were made and of their current circumstances.

Benson & Drury [2020] FamCAFC 303

Facts

At the time of the hearing before the primary judge, the de facto husband was 53 years of age and the de facto wife was 45 years of age. They cohabited in a de facto relationship for about 11 years between early 2004 and late 2014. The parties have two children born in 2005 and 2008.

At the commencement of the relationship, the de facto husband owned real property which had a gross value of $500,000 at the date of cohabitation; and was subject to a mortgage of $40,000 and a loan to his mother of $73,000. This property remained intact at the date of the hearing at a value of $900,000. At the trial, the combined net assets of the parties were $2,259,053.

The primary judge took the view that "the impact of the family violence on [the respondent] made her contributions both during the relationship and in the lengthy post separation period all the more arduous" ([162]) and "assessed the adjustment at 5%" ([163]), over and above the finding that the parties' contributions were otherwise equal.

In weighing up all of the relevant factors, the trial judge concluded that there was no basis for an adjustment to the de facto husband with respect to his initial contribution.

The primary judge then considered, at the third stage, s 90SF(3) of the Family Law Act 1975 (Cth) ("the Act") matters and concluded that there should be a further adjustment in the respondent's favour of 5 per cent (at [173]).

The primary judge then considered the orders that would be made and concluded that orders that achieved a 60/40 adjustment of the parties' net assets were just and equitable.

Full Court - Strickland, Watts & Austin JJ

[29] At [42].

On appeal, the de facto husband complained that the primary judge erred in making the 5% adjustment relating to the Kennon "claim" independently of an assessment of the other contributions of the parties. The appellant also complained that the primary judge gave inadequate weight to his initial contribution of real property.

The Full Court found that the trial judge failed to consider the Kennon issue in a holistic way when assessing contributions. At paragraph 35 of the decision, the Full Court confirms:

> *The contributions which have been made significantly more arduous have to be weighed along with all other contributions by each of the parties, whether financial or non-financial, direct or indirect to the acquisition, conservation and improvement of property and in the role of homemaker and parent. All contributions must be weighed collectively and so it is an error to segment or compartmentalise the various contributions and weigh one against the remainder (Jabour & Jabour [2019] FamCAFC 78; (2019) FLC 93-898 at [73]–[87] ("Jabour"); Horrigan & Horrigan [2020] FamCAFC 25 at [42]–[48]).*

The Full Court was unable to conclude that the trial judge gave inadequate weight to the appellant's initial contribution of real property.

Whilst there was merit in Ground 1 of the appeal, the Full Court concluded that the orders made by the primary judge did not occasion a miscarriage of justice and therefore the appeal was dismissed.

> *We are of the view that considering all of the evidence before the primary judge, including the evidence about the appellant's initial contribution of real property and the impact of family violence on the respondent's contributions, that an appropriate, just and equitable contribution-based division of the parties' net assets is 55/45 per cent in the respondent's favour*.[30]

The finding of the primary judge in respect of s 90SF(3) considerations was unchallenged and therefore the orders providing for a 60/40 division of the asset pool in the de facto wife's favour remained in force with an order for costs against the appellant.

Hobson & Hobson [2020] FamCAFC 251

<u>Facts</u>

[30] At [77].

At the time of trial, the wife was 41 years of age and the husband was a 56 year old. They were both professionals.

The parties' commenced cohabitation in August 2004, married in 2006, and had their twin children in 2007. As at the time of trial, the twins were 12 years of age.

At the commencement of cohabitation, the wife had few assets, whereas the husband was financially established with assets in the vicinity of $2,578,518 and superannuation of $330,538.

During the course of the relationship, the wife was primarily responsible for the care of the children. After taking maternity leave, she returned to work part-time.

The parties finally separated on 31 October 2015 having lived together for 10 years and 10 months.

After separation, the husband was the children's primary carer and remained working as a professional earning around $1.2 million per annum. The wife remained in part time employment on an income of approximately $120,000 per annum.

At trial, the net value of the parties' assets was $12,922,908 and there was superannuation of $2,309,202. The trial judge assessed contributions at 70/30 in the husband's favour with an adjustment of 4% to the wife based on s 75(2) factors. The primary judge therefore divided the property of the parties such that the husband was entitled to 66 per cent of the net asset pool and the wife 34 per cent.

Full Court - Strickland, Ainslie-Wallace & Tree JJ

On appeal, the wife complained that the primary judge applied excessive weight to the husband's initial contribution and did not apply adequate weight to the wife's financial and non-financial contributions and that the overall adjustment was manifestly unjust and not reasonably open on the evidence.

After assessing the conceded disparity in both initial and post separation contributions, the Full Court found that the outcome adequately supported the contribution-based entitlements as found by the primary judge. However, it was noted: "The fact that we may have chosen a different percentage division is insufficient to establish appealable error, unless it is plainly unreasonable, unjust or wrong. We are not so persuaded." [31]

[31] At [26].

The wife also contended that the primary judge misconstrued an aspect of *Jabour* when (at [64]) her Honour concluded:

> *The parties are each likely to have a significant capital base following an adjustment of their property interests. As was observed by the Full Court in [Jabour] at [134], in a case where there is a significant capital base available to each party, s.75(2) of the Act adjustments are less significant*.

The Full Court accepted that the trial judge was in error by discerning some general principle from Jabour that the significance of s 75(2) factors diminish in a case where each party, on a contributions based assessment, are entitled to a significant property settlement.[32]

It was noted that "the magnitude of the adjustment of four per cent, reflected in actual dollar terms, is $609,284.40 (including superannuation). To put that in perspective, that is less than one year's after tax income of the husband, even assuming that his income was only $1.2 million".[33]

The wife's appeal was successful and the Full Court sought submissions addressing whether the Full Court should re-exercise the discretion or whether the matter should be remitted for re-hearing. The parties subsequently entered into consent orders providing for the husband to pay to the wife the further sum of $1,100,000.

Roverati & Roverati [2021] FamCAFC 89

Facts

The parties married and commenced living together in 1983 and had two children together who were both adults at the time of trial. They separated under the one roof in 2016 after a relationship of around 33 years.

In September 2003, the wife inherited a one-quarter interest in a property with her three brothers ("D Street"). In 2003, the property was valued at $189,000 with an associated rental account balance of $12,547 meaning the wife's share was worth approximately $50,000. In June 2006, the wife and her brothers established a discretionary trust and transferred D Street and its associated rental account to that trust. The wife and her three brothers were the trustees, and their respective children were the beneficiaries. The wife never received any distribution from the trust.

[32] At [31].
[33] At [37].

The husband inherited certain real and personal property in 2006 following the death of his father which he claimed had a total value of $445,486. The husband also established a trust and transferred the assets including the F Street property into that trust. The husband was the trustee, appointor and beneficiary of the trust which made distributions totalling $79,108.51 to the parties. The F Street property was valued at $400,000 at the time of the trial.

The trial judge assesse that the parties' contributions were equal and made orders dividing the asset pool on a 50/50 basis between the parties.

Full Court – Strickland, Ryan & Austin JJ

On appeal, the husband asserted three grounds of appeal:

1. *The learned primary judge erred in assessing the contributions of the parties in giving no weight, or insufficient weight, to the inheritance received by the husband*. This ground was not established.

2. *The learned primary judge failed to consider the use to which the parties' respective inheritances were applied in assessing the parties' contributions*. This ground of appeal was successful with the Full Court concluding at para [39]:

   There is no recognition that approximately 30 per centum of the asset pool at least was derived from the husband's inheritance, and his Honour's failure in that regard cannot be masked by suggesting that his Honour duly applied the requisite holistic approach in assessing contributions, and that to find other than equality would be to reduce the wife's contributions to of secondary importance.

3. In assessing the contributions of the parties, the learned primary judge gave inadequate reasons. This appeal ground also had merit with the Full Court noting at para [42] that:

   > *It was incumbent on the primary judge to not only take into account and afford appropriate weight to the introduction of the inheritances into the relationship, but also to have regard to the use(s) made of those contributions (Dickons & Dickons at [14]).*

In re-exercising the discretion, the Full Court concluded that the respective contributions of the parties should be assessed at 55 per centum/45 per centum in the husband's favour.

Austin J was in dissent and considered that the appeal should be dismissed noting that the percentage differential amounted to about $65,000. His Honour concluded that "that differential does not tend to show the decision was plainly wrong because it exceeds the

generous ambit within which reasonable disagreement is possible, but rather tends more to show a modest difference in the exercise of discretion".[34]

Goldsmith & Stinson [2022] FedCFamC1A 96

Facts

The parties commenced cohabitation in 2004 in northern New South Wales and each introduced assets into the relationship. The wife was a professional and the husband operated and owned a skilled professional activities business in Town A.

In 2000, the husband's father purchased two rural properties in the region, known as 'Property D' and 'Property P'. The interest the parties had in these properties was a matter of controversy at the first trial. This was in circumstances where the parties had constructed their family home on Property D.

The parties finally separated in 2017 after a 13 year relationship, although they continued to live under the one roof until 2019. They had two children together, aged 15 years and 12 years at the time of the appeal. The children lived with the wife and spent five nights per fortnight and half of the school holidays with the husband.

At the time of the first trial, the husband's elderly father (who was a party to those earlier proceedings) was alive, however he passed away in 2018 before final orders were pronounced. This caused the evidence to be re-opened. The primary judge found that the husband inherited three properties with an agreed total value of $1,940,000 which, after allowance for the agreed value of the former matrimonial home (including sheds situated on the land), meant the adjusted value of the inherited properties was $1,340,000.

Before the primary judge, the property pool was mostly agreed at a net sum of $5,254,763. The orders made by the primary judge effected a division of the property whereby 42.5 per cent was given to the wife and 57.5 per cent to the husband. There was no adjustment based on s 75(2) factors.

Full Court - McClelland DCJ, Baumann & Hartnett JJ

In the appeal, the wife challenged the percentage adjustment made in the husband's favour by the primary judge after taking into account the husband's post separation inheritance and

[34] At [77].

the failure of the primary judge to make an adjustment in the wife's favour pursuant to s 75(2) of the Act.

The wife submitted that the inheritance received by the husband should not have resulted in an adjustment in his favour because, prior to receiving the inheritance, the husband "had an unassailable claim to an equitable interest in each of the properties known as [Property D] and [Property P] for the "full extent of the properties".

The Full Court did not accept that the husband had an unassailable claim to his father's properties during the relationship and that:

> *In our view, the primary judge correctly found that the respondent did receive a benefit post separation from his inheritance. Nothing turns on the primary judge's description of the inheritance as being "significant". Clearly, it was an issue of significance where, at the trial, the respondent contended that he was solely entitled to the benefit of the inheritance – a position rejected by the primary judge.*[35]

As to the discretionary assessment of a 7.5 per cent adjustment to the husband (equivalent to, in effect, 15 per cent of the property pool or $788,214), the Full Court was satisfied that this was well within the broad discretion available to the primary judge.

The wife was unemployed when her Summary of Argument was filed and she asserted error based on the finding by the primary judge that the wife "has recently obtained employment with a salary package of $182,000". However, by the time the appeal was heard, the wife was employed on a salary of $170,000 plus superannuation and therefore this ground of appeal could not be maintained.

The Full Court dismissed the appeal and made an order for the wife to pay the husband's costs fixed in the sum of $14,500 being 60% of the indemnity costs claimed.

Other relevant cases

Samper & Samper [2021] FamCAFC 140: Where, given the way the parties presented their cases, it was open to the primary judge to value the husband's business at the mid-point of a range given by an expert – Where the wife operated a second business under a partnership structure with the husband – Where findings as to the wife's income and the profits from the partnership business were open to the primary judge – Inheritance – Where the husband received an inheritance post-separation – Assessment of post-separation contributions –

[35] At [27(d)].

Immaterial error – Where the primary judge did not err when considering s 79(4)(d)–(g) factors – Appeal dismissed – Costs ordered in a fixed sum.

Shnell & Frey [2021] FedCFamC1A 55: Where the wife appeals from a property settlement order – Long marriage – Where the primary judge gave inadequate reasons for the conclusion reached – Where the primary judge erred in the treatment of CGT – Appeal allowed – Re-exercise of discretion – Costs ordered in a fixed sum.

Vinci & Adamo [2021] FedCFamC1A 53: Appeal from order splitting the appellant's pension – Respondent entitled to 50 per cent of each splittable payment – Challenges to contribution findings and form of order – Adequacy of reasons – Factual findings – Attribution of weight – Where the legislative pathway was followed – Findings open on the evidence – No error established – Order varied under the slip rule – Appeal otherwise dismissed.

Basara & Wasen [2021] FedCFamC1A 83: Contributions assessment – Marriage of 38 years – Challenge to finding that contributions were equal – Adjustments under s 75(2) of the Family Law Act 1975 (Cth) – Challenge to five per cent adjustment where unilateral use of funds by each spouse -– No matters of principle – Appeal dismissed – Appellant to pay the respondent's costs in a fixed sum.

Alston & Alston [2021] FedCFamC1A 96: Appeal against property settlement orders for 50/50 division of the property by husband who was self-represented – Long marriage of 36 years - Where there was no error in the primary judge's assessment of contributions – No error of fact or law established – No merit in any grounds of appeal – Appeal dismissed – Indemnity costs ordered in the sum sought by the respondent.

Aldrin & Celona [2021] FedCFamC1A 16: Where the appellant appeals from final orders adjusting the parties' property interests 70/30 per cent in his favour – De facto relationship of less than 4 years duration with no children - Findings of fact – Assessment of contributions to be approached holistically and not as an audit of the figures assessed by the primary judge – Mathematical precision not required – Where findings of the primary judge were reasonably open on the evidence – Where primary judge erred in failing to include a value for the appellant's interest in a business as an initial contribution by him – Appeal succeeds on this ground only – Appeal allowed – Matter remitted to Division 2 – Costs reserved.

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