



## Précis Paper

### A comprehensive analysis of Add Backs

A comprehensive discussion about the role and relevance of Add Backs within the broader framework of the familial legal system. In accordance with iconic precedents like *Trevi* (2018), the links between gambling and waste are explored and there is a strong emphasis placed on what precautionary measures clients and lawyers can take to minimize administrative burdens/improve legal efficiency.

#### Discussion Includes

- The concept of Add Backs
- *Kowaliw & Kowaliw* (1981)
- *Trevi and Trevi* [2018]
- The practical factor
- Waste and gambling
- A pernickety approach
- Premature distribution of funds
- The source of conflict
- Evidentiary aspects
- Partial property settlements
- The role of clients and lawyers

## A comprehensive analysis of add backs

1. In this edition of BenchTV, Malcom Gittos-Caesar (Principal/Director, Head of Family Law, Coleman Greig) and Karina Ralston (Principal Lawyer, Team Leader at Family Law, Coleman Greig) discuss a range of topics concerning Add Backs, such as waste, gambling, legal fees and a premature distribution of funds, with the goal of gaining clarity on how to better help clients.

### The concept of 'Add backs'

2. The concept of Add Backs is summarized in the following quote by Karina Ralston - *"Add Backs is any form of property that is being notably included in the balance sheet as if it exists now"*. It is no longer included in client correspondence material and is today considered as a factor of the past. For a considerable amount of time, family lawyers were reliant on S 75 (2) (o) of the *Family Law Act (1975)* that covered Add Backs (e.g. property, legal fees), but today, it is not legally recognised and is classified as overly discretionary.

### Kowaliw & Kowaliw (1981)

3. Kowaliw (1981) demonstrated the idea that *"assets didn't dissipate"*. Justice Baker's (who *"never had a successful appeal against him"*) judgement was majorly centred on S 75 (2) (o) which considered Add Backs as 'wastage' and 'notional property'. It used to be common for legal fees (*"which were paid for"*) to be included in the pool of broader assets, in the case of separations. When compared to different types of Add Backs, the category of 'legal fees' is the most black and white in nature.
4. If the legal fees are predominantly paid off by an external/third party (e.g. business/commercial entity), *"whether the legal fees are added back or not"* becomes highly dependant on judicial discretion.

### Trevi and Trevi [2018]

5. In *Trevi* [2018], the husband made his own firm to act on his behalf and subsequently he never paid any legal fees at his own expense (counsel costs were reported to be approximately \$100 000). On the other hand, the wife in this case *"had to retain separate legal representation"* which ended up costing her \$437 000. *"The husband sought for the wife's fees to be added back"*. This simply proves that the proportion of financial contributions is paramount in influencing the judicial discretion and the legally equitable principles at play.

### The practical factor

6. Lawyers generally agree that the practical factors associated with legal fees often go under the radar. Clients are increasingly learning of the mandatory obligation that it is important to disclose how legal costs are met. Often bank account details and relevant records need to be revealed as part of this requirement. To help overcome issues relating to how fees are paid, lawyers must constantly advise clients to keep a very clear financial track record *"of the ways in which they are paying their fees"*.
7. Disclosing how legal fees are paid is classified as an *"accounting exercise"*. Clients need to be well aware of this requirement, *"right at the time of separation and right at the time you obtain legal representation"*. When there are a number of years between the two above mentioned phases, the client needs to ensure that they are up to date with their records. For example, some banking institutions are known to destroy their client information after 7 years.

### Waste and gambling

8. Waste is considered as one of the most 'unclear' areas of Add Backs. 'Gambling' and a pre-distribution of assets pose as the usual examples of waste. A major reason behind clients engaging in gambling is due to their state of vulnerability and desperation, post-separation. Some clients believe that if they spend all the money in question, there will be no possibility to divide it and *"give it to the other side"*. This form of 'asset dissipation' is not taken lightly by the court system.

9. The court looks into the circumstance of a client with a gambling addiction. Beyond how much they have spent, the court assesses their behaviours and attitudes against a non-gambler. If a client has tried to seek help or mediate with the other party, the court will without a doubt, take it into consideration. The ideas of 'financial loss' and money being "*wholly distributed*" are pillars in the conceptual construct of Add Backs.
10. *Holmes* (1990) demonstrated that an excess of unnecessary expenses can be potentially categorised as Add Backs. The gambling cases tend to have additional layers of complexity, because gambling usually does not occur in isolation. Instead it is often tied with "*health problems*" and mental health but in *Holmes*, the court is focused on 1 main question - Is the client in control of their gambling habit or not?
11. When dealing with clients who use gambling as a way of entertaining themselves, lawyers try to examine the client's income sources and pre-existing assets. Family lawyers also try to gather information as to whether gambling counts as one of the client's regular expenses.
12. Waste-related cases becomes complicated when it is difficult to quantify the specific amount that is being put forward as an Add Back.

#### A pernickety approach

13. Courts aim to deter away from a 'pernickety approach' (the idea of nit picking every cent) in the quantification of expenses. Case law specifically conveys that it is absolutely impossible to "*recreate a person's financial circumstances after separation*".
14. It is implied that both parties partake in the financial wins and losses of marriage. This is also conduct related. Some parties are focused on guessing and approaching potential sport clubs and casinos, which they believe their spouse, has visited. This is done to obtain financial records on expenses. Such goes to prove that these parties are more concerned with depriving the other of finances compared to upholding equitable principles.
15. "*When there is a tangible asset that has left the balance sheet*", that is considered to be reasonably valuable, it is worth pursuing instead of going down the rabbit holes of trying to acquire every single dollar from the other party.

### Premature distribution of funds

16. *Townsend* (1995) is an iconic example of the 'premature distribution of funds'. In this case, the husband sold a taxi, which was considered as a major asset. The court counted it as an Add Back.

Main case points::

- i. It was a significant part of the asset pool
- ii. The backtracking process and the evidence aspect was crystal clear.

17. Lawyers expected a dramatic legal change after the *Stanford* (2012) case concluded, but they were wrong. *"The High Court specially looked at s 79 and the 4 step process"*, hence the legal and equitable factors were subject to an extent of reform, but the court was clear on the idea that *"you can't divide assets that don't exist"*. *Bevan* (2013) re enforced this fundamental notion. After this case, Add Backs begun to not hold value or influence judgements in court. *Trevy* (2018) showed that there are alternative ways that replace Add Backs and that these ways are more efficient.

18. *"Post-Bevan, the prevailing attitude is that legal fees were the exception to Bevan"*.

19. In correspondence with s 79 (2) of the *Family Law Act (1975)* and the range of precedents, it is clear that the 'facts and circumstances' of each case is unique and as a result, it becomes harder for lawyers to identify a judgement-centred trend.

20. Tips for family law practitioners:

- i. Waste-related cases are *"more likely to run"* in court, clients should be told of likely outcomes and they should know that certainty cannot be guaranteed.
- ii. Many cases like *Holmes* (1990) was very unpredictable during court proceedings and could have steered in various directions.

### The source of conflict

21. It is all too common for clients to wait a long time for a court case to finish along with extra delays, thus it becomes more of a burden to reach a resolution with the client who already feels that they are too deep into the case. This is the core "*source of conflict*" in multiple family law matters. Between the parties, the hostility inevitably grows and worsens with the prolonged court case and this gives rise to a scope for revenge-based legal motives.

### Evidentiary aspects

22. In some cases, the client tries to Add Back an amount of money that is much larger than the pre-existing asset base. In other cases, clients want to Add Back money that was lost in undervalued houses but then the following question is asked - What were the offers? "*That becomes an evidentiary issue.*" There needs to be a logical and clear link between the failure and the actions of some party.
23. The 2017 Sydney housing market was very high and volatile, but now has stabilised. In turn this created major house-price related Add Back issues. Clients affected by this are putting forward the argument of waste; it can be deemed that unfavourable financial decisions (buying and selling) enter into a grey area. If parties want to use the waste-related argument, they need a trail of evidence to prove that the other party placed them in a disadvantaged/unfair predicament, which generated the loss in question.
24. The judgement in *Zubcic* [2018], explained that if a trustee refuses the sale of an asset, it becomes a waste. Evidence-wise, there were no issues in this case. After *Trevi* [2018] the courts emphasised the following question - How is the case exceptional? "*The courts are not going to go through an accounting exercise*", but trial judges can choose to "*go dollar for dollar*" if they believe it is a necessary and worthwhile measure.

**25. Core determinations from Add Backs cases:**

- i. Legal fees from pre-existing assets are comparatively tangible and can be added back.
- ii. Premature distribution which have exceptional elements are likely to be added back if a client has strong evidence (however courts will first turn to s 75 (2) (o) of the *Family Law Act (1975)*).
- iii. Lawyers are not able to provide a more clarified advice in regards to what qualifies as an exceptional characteristic.

**Partial property settlements**

26. Partial property settlements is becoming more popular as a result of the delays. The confusion emerges when the following needs to be decided - Should there be assistance for the legal fees or living arrangements? Living arrangements can be an Add back but it becomes a 'notional inclusion' which can be seen as a disadvantage. *"I'm finding quite often that the language of a partial property distribution is to be determined at the final hearing"*.

**The role of clients and lawyers**

27. Clients have to take extra precautions when making descriptions of expenses. Accurately updating every categorical expense will in itself reduce the potential for a tiresome administrative process. Even assets like motorbikes, which typically depreciate, should be recorded for future reference. This will avoid double counting. If not done, lawyers will have to do the *"accounting exercise"* and as a natural outcome, legal expenses will increase for the client.

28. Though lawyers attempt to transfer their understanding to client, the trial judge has the ultimate power. For the time being, family law practitioners have guidelines but nothing more concrete and set in stone.

## **BIOGRAPHY**

### **Malcom Gittoes-Caesar**

Principal/Director, Head of Family Law, Coleman Greig, Parramatta

Malcom has over 2 decades of experience as a family lawyer and has dealt with a spectrum of high profile cases over the years. Some of his notable achievements include winning the 2019 Partner of the Year Awards and being recognised as a nationally accredited family law mediator and arbitrator. He is also very active in the space of continuing legal education, is an university lecturer and often provides legal commentary on media shows like SBS Insight.

### **Karina Ralston**

Principal Lawyer. Team Leader at Family Law, Coleman Greig, Parramatta

Karina is highly respected family lawyer who specialises in dealing with cases in the following areas of family law; divorce, parenting arrangements, property matters, de facto relationships, relocation and Binding Financial Agreements. She has invested time into conducting pro bono services at the South West Sydney Legal Service and the Women's Legal Centre.

## **BIBLIOGRAPHY**

### **Cases**

*Bevan and Bevan* [2013] FAM CAFC 116

*Chorn and Hopkins* [2004] FamCA 633

*Holmes v Holmes* (1990) FLC 92-181

*Kouper & Kouper* (No. 3) [2009] FamCA 1080

*Kowaliw & Kowaliw* (1981) FLC 91-092

*Stanford v Stanford* (2012) HCA 52

*Townsend & Townsend* (1995) FamCA 144

*Trevi and Trevi* [2018] FamCAFC 173



*Zubcic & Zubcic and Ors* [2018] FamCA 129

Legislation

s 117 of the *Family Law Act (1975)*

s 79 (2) (o) of the *Family Law Act (1975)*