



# Précis Paper

## Property Settlement

The Hon. Ian Coleman SC (Barrister) discusses *Stanford v Stanford* [2012] HCA 52; 247 CLR 108 and its effect on *Hickey v Hickey* (2003) FLC 93-143.

### Discussion Includes

- *Stanford* erodes the 4 step process in *Hickey v Hickey* (2003) FLC-93-143 and introduces an initial consideration of whether it is just and equitable to make an order
- The 3 fundamental propositions for consideration in determining property settlements
- An altered 4 step process can be extracted from *Stanford*, but the Court does not expressly adopt a "steps" process
- *Stanford* applies equally to de facto relationships

# Précis Paper

## Property Settlement

1. In this edition of BTV, the Hon. Ian Coleman SC (Barrister) discusses the High Court's (French CJ, Hayne, Heydon, Kiefel and Bell JJ) decision in *Stanford v Stanford* [2012] HCA 52 which considered the approach to be taken to property settlements under the *Family Law Act 1975* (Cth). Mr Coleman SC is a former Family Court Judge in the Appeal Division who now privately practices from Culwulla Chambers.

### The Law Governing Property Settlement

2. Following the breakdown of a relationship, an application for the adjustment of property interests is made under s 79 of the *Family Law Act 1975* ("the Act") for married couples. Prior to the judgment in *Stanford*, it was common practice for courts to determine an application under s 79, using a four step approach, approved in *Hickey v Hickey and the Attorney General for the Commonwealth of Australia (Intervenor)* 2003 FLC 93-143.
3. The elements of the four step approach are:
  - i. Identify the property of the parties;
  - ii. Assess the financial and non-financial contributions of each party pursuant to s 79(4);
  - iii. Consider whether there should be an adjustment in favour of either of the parties to take into account factors listed at s 75(2) of the Act, which include each party's age and state of health; their income, property and financial resources; their physical and mental capacity for appropriate gainful employment and whether either party has the care and control of children of the relationship under the age of 18 years; and
  - iv. Consider whether the order proposed will be "just and equitable" to both parties pursuant to s 79(2).

### **SECTION 79:**

#### ***Alteration of property interests***

(2) *The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.*

...

(4) *In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:*

- (a) *the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and*
- (b) *the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and*
- (c) *the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and*
- (d) *the effect of any proposed order upon the earning capacity of either party to the marriage; and*
- (e) *the matters referred to in subsection 75(2) so far as they are relevant; and*
- (f) *any other order made under this Act affecting a party to the marriage or a child of the marriage; and*
- (g) *any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.*

...

- (8) *Where, before property settlement proceedings are completed, a party to the marriage dies:*
  - (a) *the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;*
  - (b) *if the court is of the opinion:*
    - (i) *that it would have made an order with respect to property if the deceased party had not died; and*
    - (ii) *that it is still appropriate to make an order with respect to property; the court may make such order as it considers appropriate with respect to:*
    - (iii) *any of the property of the parties to the marriage or either of them; or*
    - (iv) *any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and*

- (c) *an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.*

#### Background to *Stanford*

4. The parties in *Stanford* were a husband and wife who were married in 1971. They had both been previously married and had children with their former partners. There were no children to their marriage. The couple lived together in a house registered in the husband's name for 37 years. The husband's will left this property, subject to a life tenancy in favour of the wife, to his children. The wife left her estate to her children. In December 2008, the wife was admitted into full-time residential care after suffering a stroke. Due to her failing health and the onset of dementia, she was never able to return home. The husband set aside approximately \$40,000 in a bank account solely for the wife's medical needs and requirements.
5. In August 2009, the wife (by her daughter as case guardian) initiated proceedings seeking that the matrimonial home be sold and the net proceeds (including the husband's superannuation entitlements and their combined savings accounts) be divided equally between them. However, after an appeal to the Full Court of the Family Court had been heard, but before the decision was delivered, the wife passed away. The Full Court ordered that on the husband's death, his estate was to transfer to the wife's legal personal representatives an amount of 42.5% of the property pool. The husband appealed this decision to the High Court.

#### Resolution of the Case

6. The High Court allowed the appeal, noting that the Full Court failed to canvas whether the order would have been made if the wife had not died, as necessitated by s 79(8)(b)(i) of the Act. The judgment at [30] also confirmed that "proceedings do not cease to be a "matrimonial cause"...upon the death of a party" by virtue of s 79(8)(b). Further, parties do not have to be separated before property settlement orders can be made.
7. Perhaps more importantly for the purpose of precedential value, the High Court set down "three fundamental propositions" at [35]-[46] regarding s 79(2). The three fundamental principles were said to be:
  - i. Identify the "existing legal and equitable interests of the parties in the property";
  - ii. When determining whether an order is just and equitable, do not assume "that the parties' rights to or interests in marital property are or should be different from those that then exist"; and

- iii. When determining whether an order is just and equitable, do not assume that it is just and equitable for a party to have a right to the property by reference solely to the s 79(4) factors.
- 8. Specifically, the High Court ruled that it is not "just and equitable" to separate the assets of elderly married couples simply because they involuntarily separate, where one spouse is forced to move into a nursing home. It was not shown that, had the wife not died, it would have been "just and equitable" to make a property settlement order. However, the High Court ruled that there may be circumstances when married couples separate involuntarily, in which a property settlement order can be made by the courts. The majority stated at [45], "for example, demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order."
- 9. In addition to the above, Mr Coleman SC explored what he considers the process will be for property settlement applications in light of *Stanford* and the changed application of equitable principles. In *Stanford*, the Majority highlighted that applying the actual words used in the Act, the court must first consider whether it is just and equitable to make an order, rather than consider whether the orders are just and equitable as a fourth step.
- 10. Accordingly, the approach to property settlement post-*Stanford* may be:
  - i. Look at the parties' existing legal and equitable interests, being their individual interests rather than the joint property of the parties;
  - ii. Decide under s 79(2) whether it is just and equitable to make an order altering the parties' existing legal and equitable interests; and
  - iii. Examine the considerations under ss 79(4) and 75(2) – in particular, consider what the practical effects of an order might be.
- 11. Mr Coleman SC notes that after *Hickey* s 79(2) was a "tidy up" provision but *Stanford* altered it to require preliminary and substantive consideration.

### Significance

- 12. The facts of *Stanford* are unique and the history of litigation raises a number of interesting considerations, including the relevance of a physical (but not marital) separation of the parties and the death of a party prior to the making of final orders. While Mr Coleman describes *Stanford* as "the most significant case in relation to property settlement in 30 years" and agrees that it represents a significant departure from the approach taken in property settlement matters since the introduction of the Act in 1975, the practical effect of this change may not be revolutionary.

## **BIOGRAPHY**

### The Hon. Ian Coleman SC

Barrister, Culwulla Chambers, Sydney.

The Hon. Ian Coleman SC was admitted as a Lawyer in 1974, called to the NSW Bar in 1975 and appointed Senior Counsel in 2013. He has a long history on the Bench in the Family Court of Australia, having been appointed to the Trial Division in 1991, the Appeal Division in 1999, and serving from 2009 to 2013 on the Western Plains. He was a Judge Advocate for the Australian Defence Force from 1992 to 1997 and a Commissioner of the Australian Law Reform Commission from 1993 to 2003. He is also currently an Adjunct Professor at the Western Sydney University, School of Law.

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Dasith Vithanage is an Associate at A R Conolly and Company.

## **BIBLIOGRAPHY**

### Focus Case

*Stanford v Stanford* (2012) 293 ALR 70; [2012] HCA 52

### Benchmark Link

[http://benchmarkinc.com.au/benchmark/composite/benchmark\\_19-11-2012\\_insurance\\_banking\\_construction\\_government.pdf](http://benchmarkinc.com.au/benchmark/composite/benchmark_19-11-2012_insurance_banking_construction_government.pdf)

### Judgment Link

[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2012/52.html?stem=0&synonyms=0&query=title\(stanford%20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2012/52.html?stem=0&synonyms=0&query=title(stanford%20)

### Cases

*Bevan & Bevan* [2014] FamCAFC 19

*Hickey v Hickey and the Attorney General for the Commonwealth of Australia (intervener)* (2003) FLC 93-143

*Mallet v Mallet* [1984] HCA 21; (1984) 156 CLR 605

*Watson and Ling* [2013] FamCA 57

### Legislation

*Family Law Act 1975* (Cth)