

From *Stanford* to *Bevan*: An end to *conflation* and a start to *permeation* in the proper recognition of *justice and equity*

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Introduction

Since the High Court of Australia handed down its decision in *Stanford v. Stanford*² (“**Stanford**”) on 15 November 2012 there has been significant uncertainty about the scope and impact of that decision on the existing jurisprudence of the *Family Law Act (Cth)* 1975 (“**the Act**”) and in particular the discretion to exercise the power to alter property found in Section 79 of that legislation. In a relatively brief judgment the High Court of Australia dismissed a properly grounded application for property settlement on the basis that it would not be ‘just and equitable’ to make an order. In doing so, the High Court of Australia promoted the importance of Section 79(2) and opened the way for the consideration of matters that fell outside those listed in Section 79(4).

However, *Stanford* was a case with very particular facts that were unlikely to be repeated. It was conducted within the framework of the rarely applied power in Section 79(8)³. To further confound matters, the High Court’s judgment made no recourse to the existing judicial commentary on Section 79(4) and in particular the highly cherished ‘preferred four step approach’. For these reasons (and others) the effect *Stanford* would have on subsequent cases was in doubt and a flurry of academic commentary⁴ and a range of inconsistent judicial approaches⁵ followed in its wake.

An opportunity arose for the Full Court of the Family Court of Australia in *Bevan & Bevan* on the appeal delivered on 8 August 2013⁶ (“**the Bevan appeal**”) and the re-exercise of discretion on 19 February 2014⁷ (“**the Bevan re-exercise**”) to resolve some of the post

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² [2012] HCA 52; (2012) 87 ALJR 74; 293 ALR 70.

³ Power to alter property where a party to the marriage has died after commencing proceedings but before they could be concluded.

⁴ Hon. O’Ryan QC, S & Doolan, P. Property Settlement after *Stanford v Stanford*. Family Law Section National Intensive, 2013; Bartfeld QC, M. *Stanford* and *Stanford* Lots of Questions - Very Few Answers, 15 March 2013; Parkinson AM, P. Family property law and the three fundamental propositions in *Stanford v Stanford* (2013) 3 Fam L Rev 80.

⁵ See a summary of different judicial approaches outlined in Kearney SC, M. ‘Palm tree justice’ in a post-*Bevan* world. Family Law Section National Intensive, 2014.

⁶ [2013] FamCAFC 116

⁷ 2014] FamCAFC 19

Stanford uncertainty. On equally unique, but decidedly different facts to those in Stanford, the Full Court gave a sweeping endorsement of the breadth and scope of the new emphasis to be afforded to Section 79(2), removing any suggestion that Stanford could be distinguished on its facts or confined within Section 79(8). Importantly, providing fertile ground for the consideration of new and novel matters within Section 79(2).

Disappointingly the Full Court in Bevan largely resisted the urge to restate or modify the “preferred four step approach” in light of Stanford. Instead, offering up a few selective observations that do little to advance the discussion. In all likelihood, as unsatisfactory as some may find it, for the foreseeable future the Full Court has done enough, just barely, to get us all marching to the beat of the same drum.

The exercise of discretion pre Stanford

The power of a Court vested with the proper jurisdiction to make an order for final property alteration between parties to a marriage is contained within Section 79 of the Act. In particular sub-section 79(1)(a) which permits a Court to:

‘make such order as it considers **appropriate**’ ... ‘altering the interest of the parties to the marriage in the property’⁸ [*emphasis added*].

What is “appropriate” is informed by the two subsequent⁹ sub-sections. Sub-section 79(2), which was the focus in Stanford, is in these terms:

“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” [*emphasis added*].

Sub-section 79(4), which is the battleground of most property alteration disputes, is in these terms:

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

- (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

⁸ Sub-section 90SM(1)(a) gives identical power with respect to the property of a de facto couple and sub-sections 79(1)(b) and 90SM(1)(b) gives identical power with respect to the property of bankruptcy trustee which was formerly property of a party to a marriage or a de facto relationship. All of this commentary in this paper has equal application to those situations.

⁹ There is no Sub-section 79(3) in the current Act

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.”

Providing the Court’s discretion fits within those two sub-sections, subject to issues of weight, it will have been exercised properly. Over time, guidelines were developed to assist trial judges in exercising what comprised a very broad discretion. The most recent comprehensive pronouncement of these guidelines came in 2003 in *Hickey & Hickey & Attorney-General for the Commonwealth of Australia*¹⁰ (“**Hickey**”). In that matter the Full Court set out the following “preferred four step approach”:

- STEP 1 Make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing.

- STEP 2 Identify and assess the contributions of the parties within the meaning of ss. 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties.

- STEP 3 Identify and assess the relevant matters referred to in ss. 79(4)(d), (e), (f) and (g), (“the other factors”) including, because of s. 79(4)(e), the matters referred to in s. 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step two.

- STEP 4 Consider the effect of those findings and determine and resolve what order is just and equitable in all the circumstances of the case.

¹⁰ [2003] FamCA 395

Guidelines, preferred approaches and pathways are often expounded by appellant Courts. But they do not have the status of legislation and a failure to follow them, in itself, produces no appealable error¹¹. However, as a safe and well trodden path, such guidelines by their very nature can become so customary and so accessible that they risk overshadowing the plain language of the legislation. Ironically, it may have been the adherence to the “preferred four step approach” by the lower Courts in both Hickey and Bevan to the detriment of the plain reading of Section 79 that lead those Courts into error.

Stanford

The very peculiar facts of Stanford caused the judges of the High Court of Australia to review the operation of Section 79 and to do so from a relatively unique position. Unusually for a family law case, the issue was not so much what property settlement order should be made (a question of quantum) but rather should any order be made at all (a question of entitlement). And while initially the entitlement question proceeded under an enquiry of a different section of the Act¹², the High Court decided the latter by seizing upon the plain language in Section 79(2). A section that many family lawyers had to date considered only supportive to the more important Section 79(4). However, the High Court found that section much more powerful in its own right. Raising its importance within the exercise of discretion to something akin to a precondition or enabler of the much more widely known Section 79(4). The principle expounded by the High Court was that independently of the consideration of the matters in Section 79(4) you must also consider whether or not it is ‘just and equitable’ to make any order at all.

After 37 years of cohabitation the wife suffered a stroke that saw her relocate from the former matrimonial home (which was owned by the husband solely and represented the lion’s share of the wealth available for property alteration) to live in full time residential care. The husband continued to visit the wife and made monies available for her care. Albeit, there were disputes between the husband and the children of the wife’s first marriage about how much money should be made available for her. That dispute inevitably led to the commencement of proceedings in the Magistrates Court of Western Australia. A daughter of the wife’s former marriage, on behalf of the wife, sought an order for final property alteration. The relief contended for was the sale of the former matrimonial home and the division of the net proceeds equally between the husband and the wife. At first instance a Magistrate across two separate judgments determined that it was appropriate to make a property alteration order¹³ and that the order should provide for adjustment of 42.5% of the net wealth of the parties in

¹¹ Norman v. Norman [2010] FamCAFC 66 at 60 per Finn, May and Murphy JJ

¹² See the first argument of the appellant in Stanford, which the plurality did not accept.

¹³ [2010] FCWAM 15

favor of the wife¹⁴. The consequent order ultimately would have necessitated the sale of the former matrimonial home. At that point, the husband would be homeless.

Before any of this could happen, the husband appealed to the Full Court of the Family Court of Australia. Between the hearing of the Appeal and the delivery of judgment the wife died. She had been living away from the former matrimonial home in full-time care and necessarily separated from the husband for 3 years. The Full Court upheld the Appeal and re-exercised their discretion deferring in effect what the Magistrate had ordered until the husband's own death, albeit this later payment would now be to the estate of his late wife.

Still unsatisfied, the husband sought and obtained leave to appeal to the High Court of Australia. His persistence (or rather perhaps the persistence of his children) proved rewarding. The High Court upheld the appeal and dismissed the wife's application for final property alteration. The plurality¹⁵ of the 5 member Court seized upon and considered the plain wording of Section 79(2). In doing so, it distinguished the discretion contained within that sub-section from that contained within Section 79(4):

It will be recalled that [s 79\(2\)](#) provides that "[t]he 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". [Section 79\(4\)](#) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. **The requirements of the two sub-sections are not to be conflated.** In every case in which a property settlement order under [s 79](#) is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order¹⁶.

In the passage set out above High Court identified in Section 79(2) a discretion different to that contained in Section 79(4). The question posed by Section 79(2) was binary in nature. Should the Court order a property alteration or not? That was not a new approach. The same had been said in many cases before, most notably the High Court itself in *Mallet v Mallet*¹⁷. What was different from any prior consideration of Section 79 was the High Court's conclusion that the words "just and equitable" were not only to be informed by the matters set out in Section 79(4). The later observations of the Full Court of the Family Court of Australia are apt descriptions of the problem:

"It appears to have been routinely assumed by litigants, certainly in more recent times, that justice requires the court to assess their claims by reference to [s 79\(4\)](#), even if one contends that the outcome of that assessment will be an order leaving existing property interests intact."¹⁸

¹⁴ [2010] FCWAM 15

¹⁵ French CJ, Hayne Kiefel and Bell JJ.

¹⁶ *Stanford v Stanford* [2012] HCA 52 at paragraph 35.

¹⁷ (1984) 156 CLR 605 at 608.

¹⁸ *Bevan & Bevan* [2013] FAm CAFC 116 at 68.

The High Court considered the expression “just and equitable” was incapable of an “exhaustive definition” because it was “impossible to chart its metes and bounds”. Instead the Court arrived three “fundamental” propositions which must “not be obscured” when approaching the consideration in Section 79(2)¹⁹:

First: Determination of a just and equitable outcome of an application for property settlement begins with the identification of existing property interests (as determined by common law and equity).

Second: The discretion conferred by the statute must be exercised in accordance with legal principles and must not proceed on an assumption that the parties’ interests in the property are or should be different from those determined by common law and equity.

Third: A determination that a party has a right to a division of property fixed by reference only to the matters in s 79(4), and without separate consideration of s 79(2), would erroneously conflate what are distinct statutory requirements.

The effect was to diminish, in relation to this preemptive or overriding discretion, the importance of those matters in Section 79(4) and perhaps more importantly the social standards and expectations those considerations have imported into property alteration to date. Stanford opened up for proper and meaningful consideration, matters which otherwise have not featured or have not had much weight in the exercise of discretion to date. Applied to the facts in Stanford, the High Court found that:

- (a) the bare fact of an involuntary separation does not show it to be just and equitable to alter property particularly where there is continuing use and ownership of common property;
- (b) there were pre-existing arrangements about the use and ownership of common property intended to survive their involuntary separation that were relevant; and
- (c) there was a failure to demonstrate of any need for final support for the wife; and
- (d) there was prejudice to the husband in that he would have to sell his home.

¹⁹ Bevan & Bevan [2013] FamCAFC 116

While the High Court was quick to keep open the possible matters which could be relevant to Section 79(2) it provided these potentially useful comments:

If the parties have made a financial agreement about the property of one or both of the parties that is binding under [Pt VIII A](#) of the [Act](#), then, subject to that Part, a court cannot make a property settlement order under [s 79](#). But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with [Pt VIII A](#), how their property interests should be arranged between them during the continuance of their marriage, the application of these principles [the three fundamental propositions] accommodates that fact. And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some *different* arrangement of their property interests in their individual or commonly held assets while the marriage continues, the application of these principles again accommodates that fact. These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.²⁰

In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common *use* of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying [s 79\(4\)](#).²¹

Taken at its highest, forever more (if it has not already been the case) Courts must regard themselves as compelled by the plain language in Section 79(2) to determine in every matter whether or not it would be just and equitable to make “an” order altering property. The ‘just and equitable’ consideration in Section 79(2) is not confined to a consideration of the matters in Section 79(4). It is a broader enquiry and does not presuppose that there is an entitlement to a property alteration order. While the High Court makes no reference to the fact, this is a fundamental reversal of the emphasis and independence afforded to Section 79(2) in more recent times.

The shortcomings of Stanford

²⁰ Stanford v Stanford [2012] HCA 52 at paragraph 41

²¹ Stanford v Stanford [2012] HCA 52 at paragraph 42

Stanford was always going to prove a difficult case to discern binding principle from as:

- (a) The facts were unique. From the reasonably uncommon sole ownership of the house by the husband to the motivating forces of the children of the wife's first marriage. This was a rare 'perfect storm'.
- (b) The concept of importing other factors outside of Section 79(4) into consideration of 'justice and equity' went against years of well established and frequently tested jurisprudence.
- (c) The question of whether or not this was an intact marriage, was distracting and itself a highly distinguishable fact.
- (d) The power being exercised was not the usual brand of Section 79 relief. The wife had died. This case was determined under Section 79(8).
- (e) The High Court had no need and did not embark upon any attempt to place Section 79(2) and its now independent discretion within the framework of the 'preferred four step approach'.
- (f) Mallet a case which was always regarded as the high water mark of analysis of the discretion in Section 79, and cases like Hickey, were cases concerned primarily with a dispute about the exercise of discretion within Section 79(4) not 79(2). The High Court in Stanford had no need to refer to them.

Bevan

The very different facts of *Bevan* provided the Full Court of the Family Court of Australia with an opportunity to resolve some of the post Stanford questions. In 1994, after 22 years of cohabitation, the husband "[took] to the sea". He left the wealth accumulated by him and the wife during their cohabitation to the wife to manage and invest as she saw fit. Importantly he made numerous representations to the effect the wife was absolutely entitled to that wealth and that he sought none of it. In 1995 he went so far as to give her Power of Attorney so she could better deal with that wealth as she saw fit. And in 2011 he changed his mind. He made an Application for final property alteration.

The 18 years since his departure in 1994 was not a traditional separation, indeed the wife asserted they did not separate until 2000; the husband asserted 2006. The husband alleged post 1994 he had given the wife some share proceeds and an inheritance. The husband lived with the wife and the children from time to time and deposited his income into a joint account.

The husband and the wife had undertaken expensive overseas holidays together paid for by wife from wealth in Australia. But, lately the husband was living with a new partner in the UK in a house owned by her.

The trial judge found that the parties' contributions up to 1994 were equal but made an adjustment in favor of the wife of 10% to take into account matters since that date with no adjustment to be made for Section 75(2) matters. While the trial judge did conclude that he must in light of *Stanford* consider Section 79(2) "in its own right" he erroneously went on to say:

"In my view, in order to properly consider such matters, it is however necessary to also consider what the husband's entitlement might otherwise have been in order to determine whether it is just and equitable to contemplate making an order which will alter the wife's interests in the [M town] property in the context of considering the consequences for each of the parties in making or refusing to make such an order."

This was a clear conflation of the 79(4) matters with the 75(2) discretion. His Honour also concluded there was "no requirement to consider what representations the parties may have made during the marriage or subsequent to separation". Whereas the Full Court considered such matters entirely relevant to a proper consideration under Section 79(2).

In two judgments the Full Court of the Family Court of Australia upheld the Appeal by the wife²² and in the re-exercise of its discretion concluded that pursuant to Section 79(2), principally because of the representations made by the husband, it was not 'just and equitable' to make a property alteration order²³. The list of matters a Court could use pursuant to Section 79(2) had grown. Representations, which at common law and in equity created no entitlement, could in the right circumstances encourage a Court to refuse to make a property alteration order. Additionally, *Bevan* (unlike *Stanford*) was not confined by Section 79(8) and not clouded by the concept of an intact marriage or unintended separation. The Full Court had brought *Stanford* out into the open.

The preferred four step approach

Bevan (like *Stanford*) ultimately did not need to travel the path of the 'preferred four step approach'. The Full Court on the re-exercise disposed of the application (like *Stanford*) without moving on to the evaluations traditionally made in Steps Two and Step Three and probably also Step Four. At paragraph 71 Bryant CJ. And Thackray said:

"*Stanford* will also serve as a reminder that the four step process "merely illuminates the path to the ultimate result". **Any future restatement** of that process should

²² *Bevan & Bevan* [2013] FamCAFC 116

²³ *Bevan & Bevan* [2014] FamCAFC 19

incorporate acceptance of the fact that the power to make any order adjusting property interests is conditioned upon the court finding that it is just and equitable to make an order.” [emphasis added]

In the remainder of the Bevan appeal and the subsequent Bevan re-exercise no such attempt of restatement was made. Bryant CJ. and Thakray J. do however make a number of observations which are relevant to the issue. Some commentators might argue the point and contend that those comments go so far as to constitute an endorsement of the existing approach or at least an argument against any need for change. Before considering these observations it is appropriate to place them with the context of the perceived failings of the ‘four step approach’ post Stanford.

1. As has been said before, the High Court made no attempt to place the newly expounded emphasis on Section 79(2) within the ‘four step approach’. The High Court neither approved nor disapproved of the approach²⁴.
2. The words “Section 79(2)” do not appear in the four steps as expressed in Hickey. Not necessarily, a fatal omission in itself. However, it must be relevant that the words “Section 79(4)” do appear and in several places.
3. While the words ‘just and equitable’ do appear, in Step Four:
 - (a) They are expressed within an entirely different consideration to Section 79(2). In Step Four the task is to resolve what order is just and equitable” where as in Section 79(2) the task is to resolve whether it is just and equitable to make an order.
 - (b) There have been inconsistent judicial interpretations of the task set in Step Four²⁵ suggesting no consensus having been developed that would safely permit the Section 79(2) enquiry to sit comfortable within Step Four.
 - (c) Cases that have attempted to house Section 79(2) within Step Four have not been directed to the proper enquiry as found in Stanford. For example in *Teal*:

“By implication however s 79(2) requires if the Court is to make an *order* under s 79(1) altering the interests of the parties to the marriage in property, such an *order* must be just and equitable. This legislative imperative is often described as the requirement that a judicial officer “stand back” and look at the reality of the percentage division at which she or he has arrived. That requirement requires consideration of the actual assets to be retained by each party, and may include

²⁴ Bevan & Bevan [2013] FamCAFC 116 at paragraph 65.

²⁵ CCH, Family Law and Practice: The just and equitable requirement: s 79(2) or s 90SM(3) at 37-640.

consideration of the effect when one party is to retain the greater proportion of his or her entitlement in superannuation of the nature, form and characteristics of the superannuation. It is also relevant when assets included for division are “notional” assets or “add backs”, including paid legal fees, or when a business which requires retention of business premises or re-financing is to be retained as part of one party’s entitlement (see *Loude & Loude* [2009] FamCAFC 52).²⁶”

“It will often require consideration of whether the percentage adjustment arrived at after assessment of contributions under s 79(4)(a)–(c), and adjustment for relevant factors under s 79(4)(d)–(g) when applied to the actual assets and liabilities requires the making of an order slightly outside the precise percentage arrived at as a result of the statutory imperatives. This exercise has particular relevance when a judicial officer is dealing with modest assets, and/or where the parties’ respective earning capacities are minimal or non-existent. Considerations such as we have just described applied in *Phillips & Phillips* [2002] FamCA 350; (2002) FLC 93-104, where justice and equity required an order which enabled the wife to retain the matrimonial home rather than the home being sold in accordance with a strict percentage adjustment.²⁷”

- (d) Judicial commentary, while not appellant in nature, has cogently and in a well reasoned manner concluded “that the testing of any proposed orders by reference to [s 79\(2\)](#) was never a fourth substantive step (properly so called) in the property settlement exercise²⁸ .
 - (e) The manner in which the Court in *Stanford* disposed of the case suggests that there is a threshold or preliminary consideration in Section 79(2) that is inconsistent with leaving it for determination at the bottom of the list.
4. There is a confusing²⁹ line of authority that suggests that irrespective of Section 79(2) the concept of making an order that is ‘just and equitable’ applies to the Section 79(4) albeit those words appear nowhere within that sub-section.
 5. The first fundamental proposition expressed in *Stanford*, while self-evident to the task being met in Section 79(2), is different perhaps than the expression used in Step One. Moreover, if an attempt to marry the first fundamental proposition and Step One is to be made, where in practice do ‘add backs’ and ‘notional property’ now feature³⁰ .

In those circumstances since *Stanford* a variety of observations have been made from suggestions the ‘four step approach’ needs to be discarded entirely, to the addition of an extra step and even arguments about where that extra step should be placed.

²⁶ Teal & Teal [2010] Fam CAFC 120 at paragraph 70

²⁷ Teal & Teal [2010] Fam CAFC 120 at paragraph 71

²⁸ OSF & OJK [2004] FMCAfam 63 at paragraph 26 and *Jewel & Jewel* [2013] FCWA 81 at paragraph 61.

²⁹ O’Ryan QC, S & Doolan, P. *ibid*.

³⁰ It is not the intention of this paper to take this particular issue any further save to suggest the issue diminishes quickly having regard to the commentary by O’Ryan QC, S & Doolan, P. *ibid* and *Kearney SC, M. ibid*.

With those questions unresolved there was some anticipation that on the Bevan re-exercise the Full Court may necessarily weigh in. But, like in Stanford the Bevan re-exercise turned entirely into a case judged within Section 79(2) with no need to consider Section 79(4). But, helpful or otherwise some observations can be teased out of the two Bevan judgments:

The Bevan appeal

1. It is misleading and unhelpful to describe the 79(2) enquiry as a ‘threshold issue’³¹ because:
 - (a) It cannot be a threshold because the initial enquiry as to existing legal and equitable interests precedes it; and
 - (b) although s 79(2) is cast in the negative and amounts to a prohibition against making any order unless it is just and equitable to do so, the corollary is that if the court does make an order, such order itself must be just and equitable.

Rather the Full Court describes the enquiry as ‘permeating the entire process’.

2. It will be less likely that the separate issues arising under s 79(2) and s 79(4) will be conflated if judges refrain from *evaluating* contributions and other relevant factors in percentage or monetary terms until they have first determined that it would be just and equitable to make *an* order³².

The Bevan re-exercise

3. Only if [whether it would be just and equitable to make any order] is answered in the affirmative would it be necessary for to consider the extent to which any interest should be altered³³.
4. Provided that the ‘fundamental propositions’ articulated in Stanford are not obscured [the four step approach] continues to provide a proper, transparent, certain and structured approach to the presentation and determination of applications pursuant to section 79³⁴.

Not all of these observations sit comfortably with each other and some of the reasoning seems lacking in weight. They are more likely than not inconclusive as to the current status of the preferred approach and certainly do not end the debate. Absent a determination trial

³¹ Bevan & Bevan [2013] FamCAFC 116 at paragraph 86.

³² Bevan & Bevan [2013] FamCAFC 116 at paragraph 89.

³³ Bevan & Bevan [2013] FamCAFC 116 at paragraph 28.

³⁴ Bevan & Bevan [2013] FamCAFC 116 at paragraph 19.

judges will do their best. Of the approaches to emerge post Stanford one of the most robust is set out in *Jewel & Jewel*³⁵ in the following terms:

- (a) The first “step” in the property settlement exercise is to identify, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in their property.
- (b) The second “step” involves ascertaining whether it is just and equitable to make an order altering the interests of the parties in their property. In most cases – relevantly, where the parties have separated and are no longer living in a marital relationship – the underlying assumptions that the parties had to the effect that the existing property ownership arrangements were functional (or perhaps irrelevant) and could be varied by agreement between them, no longer apply. That fact alone should ordinarily persuade the court that it is just and equitable to make orders altering the parties’ interests in their property. It is only *after* the Court has concluded that it is just and equitable to make such orders that it should proceed to take what might be regarded as the third and fourth steps.
- (c) In the third “step”, the court should identify and assess the contributions of the parties within the meaning of ss 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties.
- (d) In the fourth “step”, the court should identify and assess the relevant matters referred to in ss 79(4)(d), (e), (f) and (g), including, because of s 79(4)(e), the matters referred to in s 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established as a consequence of the previous step.
- (e) Finally, the court should consider the effect of the various findings and assessments it has made and make such orders as it considers are just and equitable in all the circumstances. As I have recorded above, my view is that this process does not amount to an opportunity to make a further adjustment; it is an opportunity for the judicial officer to determine finally how, in reality, just and equitable orders might be achieved having regard to all the circumstances of the case.

However, if the future jurisprudence of the Family Court of Australia is going to permit individual ‘preferred approaches’ to be advanced from case to case, the author’s preferred approach would be in these terms:

- (a) The first “enquiry” in Section 79 is that contained with Section 79(2). This requires:
 - (i) the identification, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in their property³⁶;
 - (ii) the identification and weighing of any matter in the circumstances of the particular case that the Court considers relevant to the first enquiry;
- (b) The second “enquiry” in Section 79 is that contained within Section 79(4). This requires:

³⁵ [2013] FCWA 81 at paragraph 72.

³⁶ This is put forward as a mandatory step notwithstanding some suggestions that the equitable interest need only be determined in the rare cases where Section 79(2) is not easily satisfied.

- (i) the identification and weighing of the contributions of the parties within the meaning of ss 79(4)(a), (b) and (c) and determination of the contribution based entitlements of the parties;
- (ii) the identification and weighing of the relevant matters referred to in Sections 79(4)(d), (e), (f) and (g), including, because of Section 79(4)(e), the matters referred to in s 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established as a consequence of the previous step;
- (iii) consider the effect of the various findings made and make such orders as are just and equitable in all the circumstances.

Foreign judgments, non-binding pre nuptial agreements and prior representations

Before leaving Bevan it is important to add that while not the immediate interest of this paper there are a number of other important considerations to be drawn out of Bevan. Like the hints laid down in Stanford about the relevance of a non-binding financial agreement, Bevan provides fertile ground for the consideration of oral representations particularly where, unlike in Bevan, proper evidence as to actions taken in reliance of the representation are pleaded. All will depend on the surrounding facts but the impression seems to be of an incremental building of all the necessary elements to something greater in this arena.

Where are we at now?

We know that Section 79(2) does permit the disposal of an application for property alteration on the basis that it would not be just and equitable to alter the property of the parties. We also know that unlike a consideration of quantum the Court is not limited in the matters it can take into account in exercising its discretion in Section 79(2). We know that in an appropriate case the Court can answer the Section 79(2) question without considering those matters contained in Section 79(4). We also have guidance of at least two factual circumstances that will be sufficient pursuant to Section 79(2) to refuse to make an order. We can expect that trial judges will continue to use a formulation of words drawn from Stanford to ensure Section 79(2) has been properly considered.

We don't know for certain but suspect that the four step approach is alive and well but going to be expressed in different words from time to time. We suspect that Section 79(2) will be dealt with as a separate enquiry and prior to any Section 79(4) assessment.

What we don't know is how far the Court in any given factual circumstance will take the exercise of its discretion under Section 79(2) and in particular the force and effect it will give to representations made during a subsisting cohabitation. And of course we don't know whether the High Court will seek in an appropriate case to weigh in again.