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WHO PAYS THE PIPER? SECTION 75(2) FACTORS IN AN AGEING SOCIETY 'REVOLUTION'

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INTRODUCTION

I am grateful to my co-presenter who in 'Evolution'[2] comprehensively deals with the statutory framework of Section 75(2) of the *Family Law Act* ("the Act") and the evolution of that jurisprudence over the past 28 years. Inevitably, that exercise identifies the competing legislative mandates in Section 43 and Section 81, the overlap in Sections 74 and 79, the constitutional boundaries of the Act and a useful list of current guidelines that have emerged from the relatively small number of decisions we have from our appellate courts. My co-presenter concludes, and I agree, that just as Section 75(2) has dealt with phenomena like low child maintenance awards before the enactment of the Child Support legislation and the indivisibility of superannuation prior to the introduction of Part VIIIB to the Act, Section 75(2) will prove just as effective in it's next major challenge; an ageing population.

The intention in this paper 'Revolution' is to challenge that existing jurisprudence by identifying the tensions that will emerge from an ageing population and explore how they may inform the discretion exercised by courts in the future. I will endeavour to put some of that discussion into context by examining some recent cases and the evidentiary onus that may then rest on litigants seeking to put these types of considerations before a court. As I will attempt to demonstrate the success with which Section 75(2) copes with an ageing population rests on the shoulders of practitioners who come before the courts and how they choose to frame the debate in given cases about Section 75(2) and the role it should play.

DISCRETION: COMPETING CONSIDERATIONS AND THE TENSION THEY CREATE

The exercise of power in Section 74 and/or 79 of the Act is discretionary. The legislation provides no outer or inner limits in terms of quantitative outcome. Provided that discretion is exercised in a principled and well-reasoned manner, no offense will be done to the legislative intent. Recently in *Stanford v Stanford*[3] ("*Stanford*") the breadth of that discretion, at least in

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[2] Jennifer Boland, 'Who pays the piper? Section 75(2) Factors in an Ageing Society "Evolution"', National Family Law Conference, Sydney (2014).

[3] (2012) 247 CLR 108.

respect of Section 79(2), received its widest interpretation yet. Presently, the Full Court of the Family Court of Australia is attempting to write a concluding chapter to a two decade debate about how competing contributions in Section 79(4)(a) – (c) should be weighed against each other within the realm of 'special contributions'. Just as practitioners have creatively fuelled the debate and explored the boundaries of the manner in which contributions has been assessed, in the future it is likely they will need to do the same in relation to how Section 75(2) factors are assessed. The unique circumstances of an ageing society may shift focus towards a more vigorous review from case to case of Section 75(2) and the limits of its jurisprudence. If this occurs courts will be asked to determine wider differences in parties competing positions about Section 75(2) as society makes its own value judgments not only about the weight to be attributed to relevant factors within Section 75(2) but also the weight to be attributed to those cumulative Section 75(2) factors against the cumulative contributions based 'entitlement' arrived at pursuant to Section 79(4)(a)-(c). Practitioners would do well to remember that weight is incapable of being informed by the legislation. Courts must consider the particular facts of each case through the complex prism of prevailing views, attitudes and standards guided at least in part by prior and more contemporary appellate decisions. Pressure to give prominence to one factor or sub-section to the detriment of another will come from a diverse range of competing considerations that will inevitably create tension. Some of those tensions are predicted and explored below.

Entered into for life … in sickness and in health

We have gradually seen the significance of the commitment to marry and the consequent economic responsibilities that follow, erode over time. There is no doubt that marriage as an institution in the early part of the 20th century is remarkably different from the institution it comprises today in the early part of the 21st century. Yet the latter could not exist without the former, and despite the differences the modern marriage remains significantly informed by the central themes that existed more than a century ago. In Australia we now accept that marriage in fact may not necessarily last for life. However we also still believe, at least at the outset of a marriage, that the same is entered into with the *intention* that if it be for life. Including notions like in *sickness and in health.* In this one respect, being the intention at the outset, the contract has not changed substantially in the past 100 years. That is why Section 43(1)(a) of the Act and the themes it represents may continue to be relevant Some will argue that the same necessarily informs the discretion of the courts or even that it provides the foundation for what Section 75(2) stands for. Section 43(1)(a) provides:

> (1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

In 1997, just over 20 years after the commencement of the Act, Gleeson CJ (as he then was) and McLelland CJ in Equity in the NSW Court of Appeal in *Evans v Marmont*[4] highlighted the then societal differences between marriages and de facto relationships when they approved of the following remarks:

> There are some similarities between the provisions of the *Family Law Act* and those of the *De Facto Relationships Act*. There are also differences. Those differences are substantial, conspicuous, and deliberate. The significance of both the similarities and the differences was remarked upon by Clarke JA in *Black v Black* (at 113), and we agree with what his Honour there said.
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> There are at least two major reasons for the differences. The first relates to the limited purpose of the New South Wales Act, which will be explained below. The second relates to the essential legal nature of marriage, which is referred to in the *Family Law Act* (s 43) as an institution, and which is given by that Act its common law meaning as being "the union of a man and woman to the exclusion of all others voluntarily entered into for life". **Marriage involves matters of legal status and public commitment. Included in the formal commitment undertaken by people who marry, and reflected in s 72 of the *Family Law Act*, is a mutual undertaking by each party to maintain the other to the extent of their respective abilities and needs.** No such commitment need be involved in a de facto relationship; hence the substantial differences between the way in which the two Acts address the subject of maintenance." (emphasis added)

A decade later the passage of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and with it the introduction of Part VIIIAB of the Act can be seen as representative of change in society attitudes. Arguably de facto relationships now carry with them entirely the same legal entitlements and rights on separation as marriages; and for states like New South Wales this includes significantly greater entitlements to spouse maintenance and access to the factors in Section 75(2) as re-enacted in Section 90SF(3) when it comes to the exercise of discretion. Some may argue that this giant (and largely unpublicised) change to the rights of couples to a de facto relationship is a direct consequence of the growing incidence and relevance of de facto relationships in Australia. However, a challenging point of view might see the same as a consequence of the growing irreverence towards marriage in light of its propensity to fail and the lessening in community expectations**,** of what obligations separating parties to a marriage have to each other. The increased status Part VIIIAB gives to de facto relationships does not go so far as to import into the de facto 'contract' a term that such relationships are intended to be 'for life'. Yet, those relationships now have the same discretionary considerations to contend with in Section 90SF(3) as are contained in Section 75(2) and likely parity in terms of discretionary outcome when it comes to quantum.

The 'clean break principle'

There is legislative, empirical and anecdotal support for the continued relevance of what is best described as the 'clean break principle'. You do not need the legislative pronouncement in Section 81 to encourage separated parties to enter into arrangements that diminish rather

[4] (1997) 42 NSWLR 70, 78-79.

than perpetuate their continued connection with each other. To suggest any different outcome on separation would be counter intuitive. There are many reasons to support a clean break from the larger societal need to reduce future grounds for conflict, to the desire of a separated spouse not to feel dependant upon or trusting in the fortunes or efforts of the former 'life' partner.

Neither does our jurisprudence accept that all rights and responsibilities between spouses must necessarily end on separation, regardless of the weight you choose to place on the matters addressed above in relation to Section 43(1)(a). At a very base level our legislation in its various guises properly encourages co-parenting and co-contribution to the maintenance and advancement of children. But, in a more anecdotal sense parties themselves are not always best served by clean breaks. Many settlements are achieved out of court (but approved by courts by consent) that involve continued occupation of a former matrimonial home until children reach a majority, payments out of a commercial enterprise over time to avoid the need to sell the same, shared intermittent use of former jointly owned holiday homes and in rare cases, continued direct ownership in corporate ventures through complicated shareholding agreements and share class rights.

It is compelling that a court, in the exercise of its discretion under Section 79, will approve settlements that include these features which have necessarily been arrived at by consent, but will rarely make orders to the same effect on a defended basis. Some might argue by the time an independent umpire is required there is little hope of the sort of cooperation these arrangements require in order to work. Others would say that the state of conflict in which people find themselves in proceedings before courts is temporary and once properly defined boundaries are set, they can move on with certainty and in a co-operative manner. The comparison, in any event, presently between what parties will do by consent and what Judges will do on a defended basis demonstrates that, despite the absence of any reference to a clean break in Section 79(4) or 75(2), how very relevant Section 81 or the deemed societal importance of a clean break remains to the exercise of discretion.

The intersection between property alteration and spouse maintenance

The Act has 3 very distinct and independently powerful remedies in Part VIII. It can order one party to pay spouse maintenance to the other, it can order an alteration of property between spouses; or it can do both. Each remedy sees wealth moving from one spouse to the other. Each remedy is guided by the factors set out in Section 75(2). But, there are more differences than similarities and the breadth of the former is not always immediately apparent. The obvious differences which receive our immediate consideration are well known: property alteration is informed by contributions and the Section 75(2) factors whereas spouse

maintenance is only concerned with the later;[5] spouse maintenance is appropriate only where the threshold requirements relating in Section 72 have been met; and property alteration involves a distribution of present property and spouse maintenance most commonly of income. In the majority of cases these major and obvious differences are enough to make a choice between one or another or for both.

The less obvious differences require a better understanding of the Act and more subtle appreciation of the financial circumstances of separating spouses, yet these differences can be far more profound in terms of the effectiveness of the remedy. For example:

- An order for spouse maintenance is capable of variation, revival and discharge in the future; absent the limited circumstances in Section 79A, a property alteration order is not.

- An order for spouse maintenance comes to an end on the death of the paying spouse, it is not a right or entitlement that has any reversion in the deceased's estate and therefore the wealth that was leaving one party and passing to another will now stay with that originating party's estate.

- A property order is necessarily limited by the property (whether in possession or reversion) at the date the order is made, no such limitation exist in relation to spouse maintenance orders which can be satisfied not only out of income (the most common remedy) but also property in an appropriate case or even a mix of both.

- While Section 75(2) is relevant to both property settlement and spouse maintenance it necessarily has a different context and relevance within the two different grants of relief, in particular spouse maintenance is much more concerned with "needs" in no small part through the mandate in Section 72 as was explained in *Clauson & Clauson*.[6]

Some of those reasons have no doubt contributed to the empirical and anecdotal evidence that parties prefer larger property alteration orders over spouse maintenance relief. There are other factors at play, like the high cost of housing, the disincentive spouse maintenance can create for the receiving spouses to work, the stricter requirements for approval for loans from financial institutions. Courts dealing with older separating spouses will have to consider more carefully the impact these more subtle differences have on the factual scenario they are forced to deal with.

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[5] Albeit the constitutional boundaries of the application of Section 75(2) factors would suggest that regard to the roles each party performed during the marriage is central to the operation of Part VIII and indirectly Section 75(2) is therefore informed by contribution. See: Patrick Parkinson, 'Applying the s 75 (2) Factors to the Division of Family Property: A Principled Approach' (2014) 4 *Family Law Review* 77.

[6] (1995) FLC 92-595.

Section 75(2) and its constitutional context

As has been explained by my co-presenter in 'Evolution', Part VIII of the Act has its legislative mandate in the Constitution. The source of power for Section 79 should therefore never be far from the court's mind when exercising its discretion. Hence, it is not simply the mere fact of marriage but the circumstances of the marriage which will dictate from case to case the respective weight to be attached to the matters set out in Section 75(2)[7]. The point is well made by the Full Court in *Waters & Jurek*:[8]

> The connection between the s 75(2) factors and a just and equitable property order is more difficult since the criteria are expressed very broadly and are fundamentally prospective in their operation. The provision does not invite a process of **social engineering** ... (emphasis added)

and Wilson J in the seminal High Court decision of *Mallet* v *Mallet*:[9]

> The objective of the section is not to equalise the financial strengths of the parties. It is to empower the court, following the dissolution of a marriage, to effect a redistribution of the property of the parties if it be just and equitable to do so.

For the same reason the Full Court has discouraged any description of Section 75(2) as a 'needs' based adjustment[10] and as opposed to accepting simply the prospective nature of many but not all of the factors in Section 75(2). Accordingly, the discretion may not always run to capital provision by one spouse to the other for the rest of their life. The weight to be attached to factors like 'age', 'health', 'necessary maintenance' and 'disparity in income' will be affected by the circumstances of the particular relationship. The most obvious example is a 'short marriage' where in the absence of children the disparity of income and/or the necessary commitments one spouse has to support himself or herself may have little weight.

The 4-step approach: ultra vires or legitimate guideline

There is no doubt to the utility of the 3-step or 4-step guideline which has been the subject of appellant redefinition and approval in cases like *Hickey & Hickey*[11] It has many benefits in a jurisdiction that features a wide discretion with such a large judicial compliment and multiple Courts that are expected to work across such a broad geography and socio-economic population. It is a reasoned and principled guideline that likely does justice to the majority of separating couples, or at least helps afford better conformity and therefore certainty to the

[7] Parkinson, above n 5.

[8] (1995) FLC 92-635, 82,376.

[9] (1984) 156 CLR 605, 79,127.

[10] *Clauson & Clauson* (1995) FLC 92-595..

[11] (2003) FLC 93-143.

public at large, which may be justice in itself.

However, perhaps as any guideline must do, the 4-step approach makes a number of presumptions about the way in which Section 79 operates that do not necessarily arise from the plain language of the legislation. While the High Court were not called upon in *Stanford* and so did not have need to consider the 4-step approach, the decision casts doubt on the relevance of the same. Enough at least to cause many judicial officers to reformulate the guideline to suit the new considerations and to cause the Full Court of the Family Court of Australia in 2014 in *Bevan & Bevan*[12] on the re-exercise, to make heroic attempts to meld the new jurisprudence into the old so we might think it has been there all along.

The brevity with which the High Court disposed of the proceedings in *Stanford* gives little encouragement to any Application for Leave to Appeal in relation to the 4-step approach. But, if the same were to occur, the outcome would be very uncertain. Particular interest should occasion the manner in which the 4-step approach deals with the way Section 79(4)(a)-(c) and the contribution based entitlements interact with the Section 75(2) factors. It could be suggested that by arriving at a conclusion pursuant to Section 79(4)(a)-(c) and 'adjusting' the same having regard to Section 75(2) gives a prominence to contributions based considerations that does not arise from the plain reading of the Act. The argument casts real doubt on language like 'contribution based entitlements' and the notion that it is 2 separate exercises of discretion rather than one where all of the matters are weighed together at the same time.

The interests of the state and the community at large

Section 75(3) of the Act expressly excludes a Court when exercising its power to grant spouse maintenance relief to have regard to the entitlement of the party seeking relief to any income tested pension, allowance or benefit. It is an explicit example of the wider policy considerations at play in the area of family law. Just as there are national economic advantages to a domestic union, like the sharing of resources and production of a generation of new workers, there are economic costs to the breakdown of those relationships. Legislation like the Act and the *Child Support (Assessment) Act* serve a variety of needs but a central obligation is to shift the burden of the costs of break down of relationships as much as possible from the state to the individual. In the case of Section 74 and Section 79 this is achieved through the adjustment of wealth between the parties.

The Act was written at a time when retirement in Australia was, absent any private capacity, funded by the aged pension. Recent government policy has cast doubt on the public perceptions of entitlement to such benefits later in life. As the Treasury's five yearly

[12] (2014) 51 Fam LR 363.

Intergenerational Reports and the Productivity Commission's recent report on *An Ageing Australia: Preparing for the Future* make plain, the demands on the State to meet the costs of our ageing population will on present predictions significantly outweigh the revenue base available to pay for the same. Massive legislative reform has already been made from the incentives and obligations of superannuation and the establishment of the Future Fund in the last decade to more recent reform like incentives to employ workers over the age of 55 years and the raising in time of the pension age.

These challenges will likely cause the wider community to expect its citizens to work longer, fund their own retirement and pay more and more for services that were previously funded by the state. The implication may be that despite the constitutional context of Section 75(2), a more needs based approach will become inevitable. The pressure for the same coming not only from a party in need, but also from community standards grappling with the acute lack of resources. For example, the same considerations may inform the courts towards a more generous approach to Section 44(3) or even parliament to a revocation of the same.

The entitlements of the broader family

The very same economic pressure that will be brought to bear on older Australians will be even more acute for younger Australians when their time comes to join the ranks of retirees and aged pensioners. Where once an inheritance was considered a windfall, it may in the future be a necessity. These pressures may not only be relevant to the interests of descendent**s** of separating spouses but may also inform a different attitude to prospective entitlements of the spouses themselves.

In terms of the interest of descendants of separating spouse they have little or no standing both in terms of the plain words of the legislation but also the traditional view of the Constitutional context of the Act itself. The starkest example being the position of children of prior relationships of one spouse who have received an inter vivos inheritance where the children of the other spouse have not. There is nothing in Section 75(2) or Section 79(4) that requires courts to give any consideration to the entitlements of the descendants of the parties to their estate on their death. Yet, in the United Kingdom, in circumstances where their legislation unlike ours is expressly mandated to consider 'needs' and so itself less open to wider considerations, courts have began to toy with the idea of the interest of descendants of separating spouse. In *White v White* Lord Nicholls said:[13]

> I must mention a further matter on which, through her counsel, Mrs. White advanced submissions. It arises out of observations made in *Page v Page* (1981) 2 FLR 198. Ormrod LJ, at page 201, expressed the view that when assessing the amount of a lump sum provision under section 25 it is not legitimate to take into account the wife's wish to be in a position to make provision by will for her adult children. Dunn LJ, at page 203, made a similar statement. Ormrod

[13] [2001] 1 All ER 1, [38] – [39].

> LJ repeated this in his third general proposition in *Preston v Preston* [1982] Fam 17, 25. Brandon LJ was of the same view: see page 36.
>
> I agree with this proposition to a strictly limited extent. I agree that a parent's wish to be in a position to leave money to his or her children would not normally fall within paragraph (b) as a financial need, either of the husband or of the wife. But this does not mean that this natural parental wish is wholly irrelevant to the section 25 exercise in a case where resources exceed the parties' financial needs. In principle, a wife's wish to have money so that she can pass some on to her children at her discretion is every bit as weighty as a similar wish by a husband…

Support for the relevance of these matters under our legislation can be found in the following statement by his Honour Justice Kay in *Sterling & Sterling*[14] with which the Full Court approved in its decision in *Stanford & Stanford*:[15]

> … [T]he pressures to ensure that each party to the marriage has an estate available to pass on to their descendants grows. The real protagonists in this type of litigation may often not be the parties to the marriage but their heirs and successors. An issue clearly arises as whether it is appropriate that the Family Law Act be utilised as the means by which the competing claims of the next generation should be aired.

Consider also the state of the current conservative approach that our courts presently take to the contingent nature of prospective inheritances of spouses and particularly where one spouse has already received an inheritance in a relationship where the other spouse has a prospective inheritance but has yet to receive the same. In the last decade the Supreme Court of New South Wales within its 'family provision' jurisdiction has made a pronounced shift in the level of priority or preference shown to widows and widowers in favour of a far more balanced consideration of the competing claims of children of previous relationships. The movement raises the question how courts' discretion is being informed by wider community attitudes to blended families and also separately how 'contingent' the courts administering the Act should treat prospective inheritances.

One possible impact on an ageing society may be to broaden the economic dependence from generation to generation within a family. Already, in the last decade there is ample anecdotal evidence in the Sydney Registry of the Family Court of Australia of the preponderance of parental contribution either by way of gift or loan to the equity in matrimonial homes in the Eastern Suburbs of Sydney. The sheer disparity between annual incomes and the cost of breaking into the property market have produced that outcome. Conversely, the ageing population may see parents residing within their children's nuclear family units, making direct and indirect financial contributions to property in which they have no legal title.

Section 75(2)(o)

[14] [2000] FamCA 1150, [26].

[15] (2011) Fam LR 240, 258.

All of the matters set out above are advanced on the basis that they have potential relevance for and impact upon the otherwise prescribed matters contained in Section 75(2). If that is not compelling then at the very least the same must have the capacity, arguably in a much more direct fashion, to inform the Court's discretion via Section 75(2)(o). That is not the focus of this paper but it would be remiss to ignore the latitude which Section 75(2)(o) offers the Court. The sub-section has received some recent Full Court attention in *Bevan*, albeit obiter, and in the grounds of appeal advanced before the Court in *Stanford*, albeit upheld for different reasons. By its very nature Section 75(2)(o) offers opportunities to respond in a much more direct manner than the focus of this paper. However, the Court will be careful to avoid Section 75(2)(o) becoming a back door instrument of change and more apt dealing with unique and unusual matters difficult for parliaments to foresee than plain considerations which are prevalent across broad tranches of the community, which the matters discussed above are.

PUTTING THE TENSIONS IN CONTEXT: SOME EXTREME CASES

Each of the considerations referred to above are present today in the way the Family Court and the Federal Circuit Court informs itself about discretion inside Section 75(2). The circumstances of an ageing population are going to increase the relevance of Section 75(2). At the same time those circumstances will force courts to make more decisions about the weight to be attributed to the Section 75(2) factors. Tensions between the considerations referred to above will become greater. Presently the competition between these considerations resolves itself easily in most cases. However, there are from time to time exceptional cases whose very unique facts bring those tensions to the forefront. The cases do not all necessarily fall within the factual circumstances specific to older spouses. Rather, the cases, because of their own particular facts, serve to provide useful illustrations of where the current jurisprudence is being tested and allows an opportunity by analogy to see how the considerations discussed above have been applied in that pursuit.

Stanford v Stanford[16]

There are many unique things about the *Stanford* litigation not the least of which is that in varying respect**s** the matter has had the benefit of 6 different judicial determinations. Twice in the Magistrate Court of Western Australia[17], again twice in the Full Court of the Family Court of Australia[18] and if you count the determination for special leave, twice also in the High Court of Australia. The litigation quite properly will remain well known for the decision of the High Court on the discretion at large in Section 79(2) of the Act. It is ironic that *Stanford* may become better known in time for reasons entirely unrelated to the High Court decision. Or, at

[16] (2012) 247 CLR 108.

[17] [2010] FCWAM 1 and [2010] FCWAM 15.

[18] [2011] FamCAFC 208 and [2012] FamCAFC 1.

least, have an impact upon the real outcome of cases for reasons that have more to do with what the Full Court said than what the High Court did. Notwithstanding, the decision of the former was reversed in the most absolute and resounding manner by the latter. This is because of the increasing incidence of forced separation on older Australians and the consequent needs those circumstances create. As the Full Court of the Family Court of Australia said in the Appeal[19]:

> The appeal raises the question as to whether and if so in what circumstances, the Court should make an order for property settlement pursuant to s 79 of the *Family Law Act 1975* (Cth) ("the Act") where a marriage is still intact but where a physical separation has been forced upon the parties by reason of one of the parties' health.
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> The question has particular relevance in contemporary Australian society. The parties are aged. The wife must have high care in a nursing home because of her frailty, both physical and mental. The husband wishes to remain in their home which is within his ability.

In that matter, after 37 years of cohabitation in what appeared to be a contented and happy second marriage, the wife suffered a stroke that saw her relocate from the former matrimonial home (owned solely by the husband 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 three times per week and placed $40,000 in an account for the wife's needs. This was an intact marriage where, for circumstances beyond the control of either party to the marriage they were living apart. 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. In particular, the children of the wife sought from the husband the sum of $300,000 for a bond to enable the wife to be moved from her present care facility to what her children believed would be a better facility that would enhance their mother's quality of life. The husband did not agree. His view was that the services provided to the wife were adequate and the proposed move would not enhance her quality of life. While there was some discussion of a reverse mortgage, it was generally accepted that to pay the $300,000, the former matrimonial home would have to be sold. Ultimately, the Magistrate found as a question of fact that the $300,000 sum was not required as the type of facility the wife's daughter desired for her mother was not appropriate for her care requirements. But, by then the litigation had taken on a life of it's own. Sadly, by the time the Full Court had upheld the husband's Appeal the wife had died.

In the Magistrates Court of Western Australia, a daughter of the wife's former marriage, as Case Guardian for the wife, sought the sale of the former matrimonial home and the division of the net proceeds equally between the husband and the wife. A son of the husband's former marriage, as Case Guardian for the husband, opposed that relief and sought either spouse maintenance for the benefit or the wife or deferral of the enforcement of any property alteration relief until the husband died or sold the home, whichever was the earlier. The

[19] [2011] FamCAFC 208, [2] - [3].

learned Magistrate determined that it was appropriate to make a property alteration order and that the order should provide for adjustment of 42.5% of the net wealth of the parties in favor of the wife. The orders made necessarily required the husband to sell the former matrimonial home where the husband lived.

Much of the Magistrate's first Judgment and a portion of her second Judgment was taken up with considerations of jurisdiction and whether the same should be exercised. In doing so she considered a convoluted range of first instance and appellate decisions before concluding that jurisdiction existed notwithstanding they were both party to an 'intact marriage'. The Full Court approved. She next considered whether that jurisdiction should be exercised in this particular case. Of this the Full Court disapproved (although the error was not of itself appealable) concluding that once jurisdiction existed, there was no discretion about whether it should be exercised. The High Court had an entirely different view: the question the Magistrate asked was correct, but poorly framed. It was not a question of whether the jurisdiction should be exercised but rather within the said jurisdiction whether an order should be made at all. Importantly, the High Court provided scope within the latter question for consideration of a wide range of matters (not necessarily limited to the considerations stated in Section 79(4)).

Whether the question was wrongly formulated or not, the exercise the Magistrate embarked upon required her to weigh up a range of competing considerations. In deciding she should exercise the discretion she said:[20]

> Although (the wife) did not initiate these proceedings or seek to determine the financial relationship between the parties before her stroke, the financial issues between the parties ought to be determined. (The wife's) case is that she has contributed to the assets of the marriage and thus has an entitlement. She now needs a sum of money to provide for her future financially and she will benefit there from. (The husband's) case is that (the wife's) needs are being met and paid for from her income and there is no benefit to her by the making of an order under s 79. To the extent that her needs are not met, he will maintain her.
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> I consider that the financial aspects arising from the relationship of these parties ought **be finally determined thus avoiding further proceedings between them**. The fact that the parties did not intend to separate or intend the consortium vitae to break down does not, in my discretion, preclude me from exercising the jurisdiction that I have arising from the marital relationship. (emphasis added)

In arriving at that conclusion the Magistrate was not completely blind to the potential interest of the case guardians in the outcome having said:[21]

> On the most favourable view, both case guardians had as their primary motivation the interests of their respective parents. It cannot be ignored, however, that both had good reason to protect those interests, having regard to their likely inheritance.

[20] Ibid [25] – [26].

[21] Ibid [44].

In their first Judgment the Full Court upheld the appeal. The appeal succeeded in two respects. Firstly, that the learned Magistrate had not considered whether spouse maintenance was a more appropriate remedy and secondly, and not unrelated, the finding that the wife's life would be improved by the making of an order was against the weight of the evidence. Having succeeded on those grounds it was not necessary for the Court to proceed to determine the remaining grounds that included a complaint that the trial Judge (Magistrate) did not adequately take into account the effect of the orders on the husband both in terms of Section 75(2) and the wider requirements in Section 79(4). While deliberately avoiding any conclusive view in light of the possibility the matter would be remitted for re-hearing the Court did say:[22]

> An important submission on behalf of the husband was that the Magistrate failed to consider the s 75(2) factors in favour of the husband which would have been against the sale of the house.
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> The wife submitted that her Honour properly considered and analysed the s 75(2) factors. It was also said that the complaint about the s 75(2) factors should be viewed in the context of there being no challenge to her Honour's assessment of either the asset pool or to the parties' contributions.

and then later:[23]

> We are of the view that there can be no doubt how and why the decision was made and orders resulted but it seems the Magistrate confused the provisions of s 75(2) with the requirement that the orders be just and equitable.

and:[24]

> … we agree that her Honour did not give adequate reasons as to why she thought that the order was just and equitable having regard to the matters raised in this ground particularly:
> - The effect on the husband of requiring him to sell his home of 48 years;
> - The potential effect on the husband of the wife predeceasing him;
> - Why the financial issues of the parties needed to be finally determined when the proceedings could be adjourned without prejudice to any continuation of the proceedings at a later time; and
> - Why an order for periodic maintenance was not appropriate.

The Judgment ended, contrary to earlier comments about the need to be cautious about expressing any definitive view in case of a remittal, with the rather directive conclusion that "it seems open to the wife in our view to seek orders for periodic maintenance" and no doubt had the matter been remitted for decision on the same facts that would likely of been the outcome.

Ultimately, the Full Court itself re-exercised discretion in its second Judgment at the urging of the parties. The wife had by then died, her estate had limited if any need. The husband was alive. The Full Court adopted the Magistrate's contribution based findings and simply deferred

[22] ibid [107] – [108].

[23] ibid [118].

[24] ibid [119].

the payment of the same until the husband's death. In doing so the Full Court's only regard to Section 75(2) was as follows:[25]

> The husband sought an adjustment on account of various factors in s 75(2). As he will, pursuant to the orders we intend to make, have use of the property until his death, in our view there is no need for a further adjustment.

The litigation highlights the tension between many of the considerations referred to in this paper and because of its particular passage through 3 courts and the hands of 9 different judicial officers an example about the differences in approach to the resolution of those tensions:

- In the Magistrate's decision to exercise the Section 79(4) power she appeared to largely rely (ironically so) upon the need to determine the dispute between them and avoid further proceedings identifying one of the central benefits of the clean break principle. Whereas the Full Court were critical of the Magistrates failure to consider spouse maintenance and the deferral of property relief, outcomes which might lead to further proceedings and continued economic dependence on the husband.

- In advancing the relevance of spouse maintenance the Full Court hinted at circumstances where, contrary to established thinking, spouse maintenance might be considered in priority to (rather subsequent upon) the making of an order for final property alteration.

- The very limited impact which Section 75(2) had on the Full Court is insightful perhaps of the Constitutional context in which the section operates and the fact that it is not a slave to the assessment of needs but also in relation to the disproportionate weight courts often attributes to contribution and the idea that the same is an 'entitlement'.

- The impact from judgment to judgment on the ultimate outcome in terms of the interest of the beneficiaries of the wife's estate. Ranging from hundreds of thousands of dollars to nothing at the hands of the Full Court. Not to forget the same impact albeit slightly removed on the ultimate beneficiaries of the husband's estate when he does pass away.

***Stiller & Power* [2011] FMCAfam 996**

In *Stiller & Power* the Federal Circuit Court of Australia was called upon to determine an application for property alteration between parties to a marriage, each 74 years of age. They were both in reasonable health. They had been married for 20 years. In that time the wealth

[25] Ibid [56].

of the husband reduced such that at trial he was worth $315,000 and a bank had commenced proceedings to take possession of his home. In the same period the wealth of the wife had increased and at trial she was worth $3.9 million. The marriage was unusual in a number of respects. The parties did not intermingle their wealth, neither made any direct financial contribution to the other, they lived together mostly only on weekends and while on holiday and the husband had retired at 56 years of age yet the wife was still working albeit now earning only a modest income. The husband had borrowed extensively against his home, capitalized the interest in the borrowings and invested in a made to order European sailing boat. A combination of the devaluation of his home securing the loan and the capitalised nature of the advance had financially undone the husband. He contended for a 50% adjustment of the combined wealth of the parties. She sought an order that the husband pay her $84,000 being an amount she had loaned him.

The learned Magistrate determined to deal with the matter on an asset-by-asset approach, and perhaps in a novel manner as the husband's wealth was one pool and the wife's the other. Ultimately the Magistrate concluded that there is no basis for an adjustment pursuant to Section 75(2) notwithstanding 'the Wife clearly is in a significantly superior financial position to the Husband' and 'the ultimate result is … for a man of his age, a financial tragedy'. In arriving at the conclusion 'less it be regarded as the Court being unsympathetic to the current plight the Husband is in' the Magistrate said:[26]

> …it must be recorded that the comparative positions stem from:-
> a. The Wife's superior initial financial positions;
> b. Poor decision making by the Husband in that:-
> - retiring at age 56, he failed to maintain an adequate flow of income. His qualifications may have allowed him to seek out positions in the [omitted] industry. There is no evidence he sought to do so;
> - the decision to purchase *"[A]"* was simply beyond his means unless he was prepared to sell the [R] property;
> - the financing options created an accumulating debt with no significant option to increase his income beyond the maximum rentals achieved after using his superannuation to improve his property.
> - although he could not be blamed for not seeing the global financial crisis, he seems to have almost naively accepted his property and only asset could not reduce in his estimations of value.

The learned Magistrate concluding that:[27]

> It would, in my view, be an impermissible exercise of judicial discretion and a form of social engineering in this case to make some adjustment from the Wife's pool of assets to the Husband merely because they went through the Act of marriage in 1991.

At the time this case was determined the High Court's decision in *Stanford* was still almost a year away. The circumstances of the parties marriage and the manner in which by agreement they had conducted their financial affairs would have made for an interesting argument

[26] [2011] FMCAfam 996 [61].

[27] Ibid [63].

pursuant to Section 79(2) as a preliminary matter to any consideration of the matters in Section 79(4). However, this case was decided not within the broad discretion *Stanford* assigned to Section 79(2) but a balancing of the factors in Section 79(4) and particular Section 75(2). The conclusion being that the contributions each made to the pool of the wealth of the other did not warrant any adjustment and what Section 75(2) factors the husband might advance counted for little in the circumstances of this particular relationship.

The case is again an example of the extremity of discretion and built upon such a unique factual matrix that it may be unlikely a similar case will ever arise. It might even, with the greatest respect to the learned Magistrate, be properly appealable. The question must also be asked whether the result would have been the same if the gender of the parties was reversed. Irrespective of all those matters, yet again through novel circumstances the previously identified tensions emerge:

- The Constitutional context of Section 75(2) and the emphasis on the roles adopted during a marriage are central to the outcome. The bare nature of the quantum of the result proves the consideration cannot have been limited to Section 79(4)(a)-(c) but necessarily must have also informed the Section 75(2) discretion. It is interesting to record early in the Judgment the Court identifies an issue about whether the parties really lived very often as *"man and wife"*.

- Highly compelling needs appear to have had limited impact with contribution once again possible having a disproportionate emphasis. In doing so the inevitable cost to the State of this soon to be pension recipient gets no mention. Is there a case for a different outcome if the husband could establish a need for aged care and that to the extent that was met by the state it was to the detriment of another person in need.

- What would have been the outcome, if the husband brought his case not for relief by way of property alteration but instead for spouse maintenance. If so, how far would the greater emphasis on 'need' and entitlement in Section 72 go to balancing the matters which weighed against a Section 75(2) adjustment in the property alteration case.

Marlow-Dawson & Dawson (No. 2) **[2014] FamCA 599**

The single instance Judgment in the Family Court of Australia of *Marlow-Dawson & Dawson* (as yet unreported) does not concern elderly spouses, nursing home bonds or pensions. Regardless it is still useful for present purposes because of the considerations that arose. A husband aged 48 years and a wife aged 49 years had cohabitated for 12 years and had been separated for almost as many. In the period between when the parties separated and judgment the husband had returned to live in the UK, re-partnered and fathered twins now

aged 2 years and provided to the wife substantial financial support exceeding almost $1 million for the benefit of her and their 3 children now aged 20, 18 and 14 years of age. In the same period the wife had returned to live in Australia, purchased and renovated property, completed a degree in political science at the University of Queensland and largely raised the children without much physical assistance from the husband. Their cohabitation had commenced at a time when neither party had any wealth of significance. The wife had relocated with the husband for reasons related to his career from Australia to London and then to Hong Kong. The husband was an equity partner in Linklaters and from 2006 to 2011 his average after tax income was $1.5 million per annum. However, after the trial concluded but before judgment had been delivered additional evidence was admitted to the effect the husband had been ejected from the Linklaters partnership and presently had no other employment. The pool was in the vicinity of $6.6 million.

In oral and written submissions much time was taken up with the wife's claim for what the trial judge described as "the 25 per cent orders" being a claim for 25 per cent of the after tax income of the husband derived over a future 10 year period. The basis for the same was an apparent dissatisfaction with the value of the husband's interest in the Linklaters partnership, which comprised a small capital account. The outcome according to Senior Counsel for the wife did not reflect the "true value" of the basket of rights that comprised the husband's interest in the Linklaters partnership and, absent being able to place a value on the same, "the 25 per cent orders" would do justice. As only Senior Counsel can, the fact that the husband had subsequently left the Linklaters partnership, was passed off as irrelevant to the principles that underpinned the claim. In a well reasoned exploration of the definition of what constitutes property capable of alteration pursuant to Section 79, the trial Judge found ample basis to dismiss the same and return to a consideration of the more conventional approach to property alteration.

The husband had contended for a contribution-based entitlement that slightly favoured him. He failed. The Court determined the contribution-based entitlement as equal. The trial Judge went on to consider the relevant Section 75(2) factors and found that the wife had no immediate prospects of employment, that the husband had a capacity for exceedingly high remunerative employment, that the wife would continue to play a supportive role for the children including those over 18 years of age, that the wife had contributed substantially to the husband's income earning capacity, and that there was an obvious disparity in the parties' respective earning capacities. He then proceeded to make an adjustment of 20% in favour of the wife representing a 40% disparity or almost $2.65 million. The monetary value of such an adjustment almost 10 years post separation is controversial. The wife has already received considerable post separation benefits, approaching $1 million, from the ongoing income of the husband.

In terms of the matters the subject of this paper:

- As opposed to *Stanford* and *Stiller & Power*, this case is an example of how the length of the marriage and the roles the parties performed during the marriage requires much more emphasis on factors like disparity in income, earning capacity and necessary living costs.

- At the same time, it demonstrates, the relevance in appropriate cases of the expectations of marriage in certain circumstances and the enduring obligations the same can impose long after separation.

- The doomed "25 per cent claim" is an apt example of the limitations of property alteration as opposed to spouse maintenance. Although it ought be understood that in arriving at the 20%, Section 75(2) adjustment the Court dismissed the wife's spouse maintenance application. One can't but wonder in rejecting the "back door" spouse maintenance claim of the "25 per cent orders", whether the Court did not take away with one hand and give with another through a higher than might otherwise have been the case Section 75(2) adjustment. While ultimately "the 25 per cent orders" failed, Senior Counsel for the wife used the claim well to tease out the respective tension in Section 75(2) and the quantitative value of the husband's income earning capacity moving forward.

Carmel-Fevia & Fevia (No.3) **[2012] FamCA 631**

Like *Stanford*, the proceedings in *Carmel-Fevia & Fevia (No. 3)* are better known for its Appeal decision that any first instance treatment. In this case it is the decision on the remittal from the Full Court that deserves consideration. The wife aged 53, a homemaker, and the husband aged 60, a company chairman, had lived together for 6 ½ years and produced two children (9 ½ and 6 ½ years of age respectively at trial). While initially post separation the children lived with the wife most of the time, within a few years the husband was spending time with the children 5 nights out of 14 and half school holidays. The husband's children of 2 prior marriages had lived with the parties. In particular in respect of his second marriage 3 children (all under 5 and deeply disturbed) had lived with the parties each alternate weekend for the first 3 years and then 80% of the time. The pool comprised $434.5 million of which $4.5 was owned by the wife. At the commencement of cohabitation the pool comprised $364 million of which the wife's contribution was $116,000. The husband made the only direct financial contribution. The wife, albeit with much paid help, was a homemaker and parent throughout the relationship. The wife sought 12.5%. She received from the trial Judge for contributions 15% of the increase in wealth ($10 million) less a partial property order of

$500,000 but in addition to what she then owned ($4.5 million) and $10 million for Section 75(2) factors leaving her with total wealth of $24 million.

The Section 75(2) adjustment of $10 million is substantial. It was due in no small part to the approach taken by the trial Judge to Section 75(2)(g). The husband had conceded that the wife ought receive a capital adjustment such that she not need to work for the rest of her life. A concession he came to regret when the wife introduced detailed accounting and actuarial evidence to the effect she required a capital sum of $23.6 million for that purpose alone. The debate centred around the standard of living the wife ought expect post separation. In determining the wife's claim the Court distinguished the often quoted passage of his Honour Justice Strauss in *Wilson & Wilson*[28] that the standard of living referred to in Section 75(2) is 'not necessarily the same standard as that enjoyed during cohabitation'.[29] The trial Judge concluded that *Wilson* dealt with Section 75(2) as it applied to the maintenance power and was not a binding guideline when dealing with the property alteration power. Rather, the trial Judge said:[30]

> If, as part of an agreed marriage relationship, a certain lifestyle is a norm, the[n] subject to financial capacity it should continue.

and:[31]

> I see no reason why the wife should not have the benefit of a standard of living judged by benchmarks set by the husband during the marriage.

Once again the case identified the varying treatment the respective tensions this paper identifies being dealt with differently from case to case:

- The manner in which *Wilson* was distinguished demonstrates the different relevance Section 75(2) has to property alteration compared to spouse maintenance.

- At the same time the conclusion reached as to the relevance of the standard of living places much more emphasis on considerations of expectation of marriage and the enduring obligations from the same.

- And finally, akin to *Marlow-Dawson*, a creative claim, albeit failed, might be attributed back door success by placing front and centre in a judge's mind considerations of quantum and the like, which might otherwise not have weighed upon the exercise. It is interesting to compare the $23.6 million which the wife sought based on her actuarial

[28] (1989) FLC 92-033

[29] Ibid 77,453

[30] [2012] FamCA 631 [161].

[31] [2012] FamCA 631 [179].

evidence in order to maintain herself (and to some extent the children) for her lifetime with the $24 million award arrived at by the trial Judge. The wife of course wanted her $23.6 million capital sum in addition to any contribution-based entitlement. However, what she got in the end was a considerable sum, that on her own evidence would support her for the whole of her life.

The evidentiary burden

Both *Marlow-Dawson* and *Carmel-Fevia (No. 3)* are illustrative of the power of putting before the Judge in a manner he/she is forced to consider, evidence and claims which can inevitably lead to a better appreciation of the factors in Section 75(2) particular to any individual case. In that light, it is remarkable how much evidence is devoted to the parties' contribution based entitlements decided under the Act in cases where courts inevitably determine a equal contribution based entitlement. Contrasted with the much wider ranging list of factors in Section 75(2) and the less predictable discretion that flows, it is surprising how little affidavit and expert evidence is devoted to Section 75(2). This will change with an ageing population.

One obvious reason for the imbalance in evidence is the prospective nature of many of the Section 75(2) factors and how they compete. This presents challenges both in making the evidence relevant and admissible. *Carmel-Fevia* and *Marlow-Dawson* provide examples of cases where the effort has borne fruit. There is undoubtedly a suggestive power at play when a party puts a capital amount before the court for consideration, as was the case in those two matters. In *Marlow-Dawson* it was not even put forward in relation to Section 75(2) directly but rather in a back door manner via "the 25 per cent claim", but still effective some would suggest.

What evidence will be appropriate and relevant will vary from case to case. Litigants should be ready to meet high thresholds imposed by the courts**.** But, in the right cases, where the Section 75(2) adjustment will significantly effect the final outcome and there are competing tensions as has been discussed earlier in this paper, the following expert evidence may need to considered:

- Actuarial evidence of life expectancy relative not only to age (which is relatively straight forward) but the individual health circumstances of the parties (which is more complex).

- Remuneration evidence of likely future income of the parties including the longevity of present employment and opportunities for re-employment in retirement.

- Forensic accounting evidence that projects the current value of the current or future necessary living expenses of a party.

- Medical and allied health evidence about the prognosis and treatment not only now but in the future with detailed assessments of the level of care that is likely to be required.

Parties themselves will need to consider the merits of providing, most commonly through their own affidavits, lay evidence of:

- The current limitations their existing health conditions impose not only on themselves but their surroundings and the level of care they need.

- The circumstances of their employment in particular the nature of the workforce around them, limitations they presently encounter in performing their designated duties and any other events or considerations that may inform their employment future.

- Their family arrangements and the capacity of family to care for them as they get older.

- Necessary living costs which may support any analysis by experts referred to above including costs of aged care places, relocation to a private residence without stairs or lifts, specialist medical attention, modification of premises to take into account the limitations on movement and strength.

- Where any of the above matters can be reasonably predicted into the future then prospective evidence of what can be foreseen remembering to provide a strong evidentiary basis for the same.

Through a variety of means courts ought, in appropriate cases, be taken to the relevant law as it stands from time to time on matters such as the pension age, the quantum of benefits and the entitlements to care for the aged. If available, information of limitations specific to the geographical area of a party may be relevant. Care will need to be taken to make sure the same is admissible. The single expert rules, the non-mathematical nature of the discretion, the limitation of judicial hearing time, the quality of reliable data, and the cost of producing the evidence will all need to be weighed carefully when considering this type of evidence. Recourse to judicial notice will fail and reliance on published research particularly from organisations like the *Australian Institute of Family Studies* need to be advanced in a proper way cognisant of the particular evidentiary aspects of research.

CONCLUSION

The Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia are uniquely practiced institutions at taking the temperature of Australian

society. They do it in a number of different ways but by and large receive this guidance from the litigants themselves and the lawyers they retain as to how their cases are presented and what causes (within the legislative factors) they choose to champion.

The challenges that an aging population presents to individuals and our wider community will inevitably find their way into the factual matrix of cases to be determined pursuant to the Act. The prospective and comprehensive nature of the Section 75(2) exercise will once again become the tool whereby justice and equity are done. As our Courts come to terms with the same there will be fertile ground for debate which will move outside the confines of the plain language of Section 75(2) to wider considerations about what should inform the weigh that attaches to those factors.