

What's all the fuss?

The effect of the High Court decision in Stanford

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Stanford v Stanford

- What's it all about?
- Once upon a time in a land far far away, there lived an elderly couple, Mr & Mrs Stanford. They had been happily married (although for each their second marriage) for almost 40 years. Both had children from their earlier marriages, some of whom were more wicked than the others.

- All was well for Mr & Mrs Stanford until time began to pass and old age started to catch up on them. Mr Stanford suffered two strokes but to his luck had a full recovery. But in December 2008 Mrs Stanford suffered a stroke which left her in need of full time care.

- Mr Stanford, being the decent and caring husband that he was, organised for Mrs Stanford to be moved into an appropriate aged care facility close to his home where he continued to dutifully visit her three times a week (even though dementia had set in for her).

- However, along came the evil sisters! You see Mrs Stanford's girls did not think that the local aged care facility was that flash. In fact they did not want their mother living there and started to rock the boat. Mr Stanford thought that the facility was perfectly appropriate for his wife, to whom he was still married.

- His stepdaughters however had a different view and before he knew it he was facing an Application pursuant to the Family Law Act in the Magistrates Court at Western Australia, and the risk that his house was to be sold.

- This upset Mr Stanford greatly as he still cared for and loved his wife. Her condition was worsening and whilst it seemed originally that she could move perhaps to a slightly fancier care facility, her needs were becoming greater and the possibility of a move to another facility was looking less likely.

- On 30 September 2010 Mr Stanford and Mrs Stanford had their financial lives determined by Magistrate Duncanson in Perth. She concluded that ultimately the wife should receive the benefit of at least 42.5% of the parties' assets, being a sum of \$612,931. This meant that Mr Stanford would have to sell his home.

- By this time Mr Stanford's son was living with him and caring for him. He had put aside money into a Trust Account to provide for his wife's care and financial needs.

- Mr Stanford appealed to the Full Court of the Family Court and on 21 October 2011, he had some success. The Full Court heard his appeal and agreed that the Magistrate had got it wrong.

- The Full Court had difficulty understanding why the Magistrate had come to the conclusion that the wife was entitled to a 42.5% share of the asset pool in circumstances where the wife did not have a need for a property settlement as such and her reasonable needs could have been met in other ways, particularly by maintenance.

- Unfortunately though for Mr Stanford, the Full Court did not make any Orders on that day and invited him and his wife to make submissions about whether the Full Court should itself decide what Orders were to be made, or whether the matter should be remitted for further hearing.

- Not long thereafter Mrs Stanford died.
- On 19 January 2012 the Full Court decided to make Orders whereby Mrs Stanford's estate would receive the original sum ordered of \$612,931 upon the earlier of Mr Stanford's death or the sale of the former matrimonial home.

- Poor Mr Stanford in his state of grief was now left with the only option of appealing to the High Court. His appeal was heard and on 15 November 2012 he finally had success. The High Court, that very wise Court, decided that Mr Stanford could keep his home and that in fact there was no need to make any Order at all in favour of Mrs Stanford.

- This left the wicked sisters in a very difficult and expensive position.
- But what does this really tell us?

What did the High Court say?

- French CJ, Hayne, Kiefel and Bell JJ
- The High Court held that there was no basis to conclude that it was just and equitable to make an order altering interests in the marital property between the Stanfords.
- Under the [Family Law Act](#), if a party dies before the conclusion of proceedings, a court may make a property settlement order if it would have made an order had the party been alive and if it is still appropriate despite the party's death to make an order

What did the High Court say?

- The Court held that there was no basis to conclude that it would have been just and equitable to make a property settlement order had the wife been alive.
- The majority in the HC focused their attention on s79(8) of the Family Law Act.

S79(8) FLA

Alteration of property interests

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

S79(8) FLA

The Court considered there to be a 2 step process as Mrs Stanford had died-

1. Had she not died, would the Court have made an order with respect to Property; and
2. Despite her death, is it still appropriate to make the order

S79(2) FLA

The Court also noted that s79(8) is not read in isolation and a consideration of s79(2), namely-

s79(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order

Therefore the proper enquiry remains- had she not died would it have been just and equitable to make an Order and does it remain just and equitable to make that Order given her death.

The Husband's case

Interestingly, this was not the argument of the Husband at the appeal. He argued that the appeal should be allowed because-

1. The Court did not have the 'power' to make a property order in an 'intact' marriage; and
2. There was no matrimonial cause to enable the application to proceed.

The HC rejected both of these arguments.

The Crux of the HC reasoning

The Court in essence said it is essential to look at the operation of s79 of the Act.

‘In every case in which a property settlement order under s79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order”. (paragraph 35)

The Crux of the HC reasoning

There are 3 important propositions that 'must not be obscured'-

First- you must consider if it is just and equitable to make a property order by identifying, according to common law and equitable principles the *existing* legal and equitable interests of the parties in the property.

The Crux of the HC reasoning

There are 3 important propositions that 'must not be obscured'-

Second- the power conferred by s79 of the Act is broad and not to be exercised according to an 'unguided judicial discretion'.

You don't start from an assumption that the parties rights/interests in the marital property are or should be different from those that already exist.

The Crux of the HC reasoning

There are 3 important propositions that 'must not be obscured'-

Third- The question of whether to make a property order is not answered by consideration of the factors in s79(4).

You must consider s79(2) separately

So- does this create a '5 step test'?

Starting and finishing with a consideration of the 'justice and equity'?

The Crux of the HC reasoning

Arguably yes-

First you must consider if it is just and equitable to make an order at all

Then work your way through the first 3 of our traditional '4 steps' to return to the final step and consider whether the order that you are about to make is in fact just and equitable in all the circumstances

The Crux of the HC reasoning

SO the new 'threshold test' of justice and equity?

The HC says-

"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."
para 42

The Crux of the HC reasoning

The Court looked specifically at the facts in Stanford- there was an intact marriage save that the parties were physically separated due to the Wife's poor health.

The Court said-

“By contrast, the bare fact of separation, when involuntary, does not show that it is just and equitable to make a property settlement order. It does not permit a court to disregard the rights and interests of the parties in their respective property and to make whatever order may seem to it to be fair and just.” para 43

The court did however note that in some circumstances physical separation may be enough to warrant the making of an order, particularly if one parties needs cannot be met (as in this case) by a maintenance order.

The Crux of the HC reasoning

The Majority agreed with the Full Court that where the Magistrate had erred was-

1. In failing to consider the impact on the husband of the Order that she was proposing to make (ie that it would require the sale of his home) therefore failing to properly consider the justice and equity; and
2. That a maintenance order could have sufficiently met the wife's needs

Where the Full Court got it wrong!

However, where the HC said the Full Court got it wrong is that they failed to consider s79(2) (is it just and equitable to make an order at all)

AND

S79(8)- If the wife was alive would they make an order, and if so is it still just and equitable to make that order now.

Where the Full Court got it wrong!

*"In its second judgment, the Full Court re-exercised the power given by s 79 of the Act and made a property settlement order. The Full Court said that the **"many years of marriage and the wife's contributions demand that those moral obligations be discharged by an order for property settlement"***

It described the outcome produced by its orders as "just and equitable".

But otherwise the Full Court made no separate inquiry into whether, had the wife not died, it would have made a property settlement order." para 48

"Whether it was just and equitable to make a property settlement order in this case was not answered by pointing to moral obligations." para 52

The HC said

IT was not shown that had the wife not died it would have been just and equitable to make a property settlement order, therefore the Court could not have made the order.

The wife's application (continued by her case guardians was dismissed).

The reasoning of Heydon J

Is simpler but comes to the same conclusion. He found that there were 2 reasons why it was not just and equitable to have made an Order even if the wife was alive as-

1. The wife's needs were met. (after these proceedings commenced her condition worsened and as such she no longer needed a bond to get into a better care facility)
2. There was no need for an immediate order for property division where it would require the husband to leave his home of 48 years.

What are the Courts doing with this reasoning

Discussion of-

Watson & Ling [2013] FamCA 57 (12 February 2013)
(Justice Murphy)

Sebastian & Sebastian (No. 5) [2013] FamCA 191 (28 March 2013)
(Justice Young)