

# *Stanford* - Is it the case that everyone thinks it is?



case

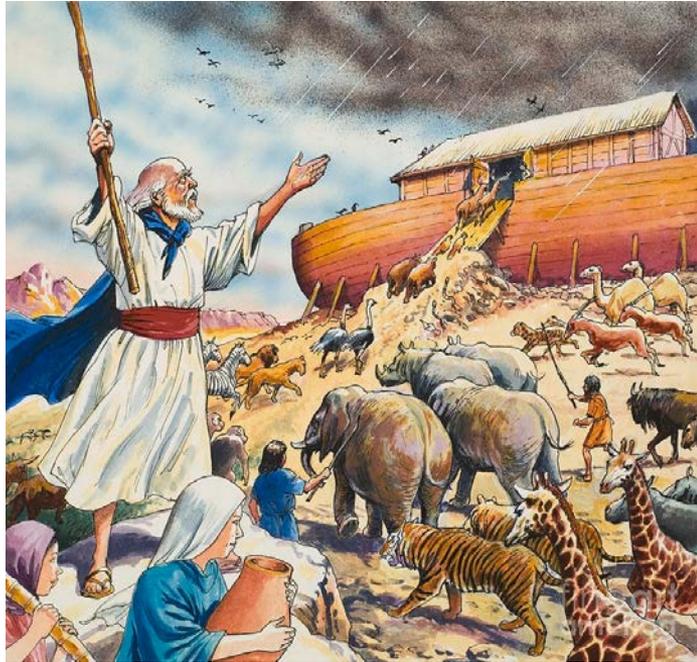
Justice Colin Forrest  
Family Court of Australia

FLPA Qld Retreat May 2018



FAMILY COURT  
OF AUSTRALIA

*“Build it and they will come”*



# *Stanford v Stanford* (2012) 247 CLR 108 (Cth)

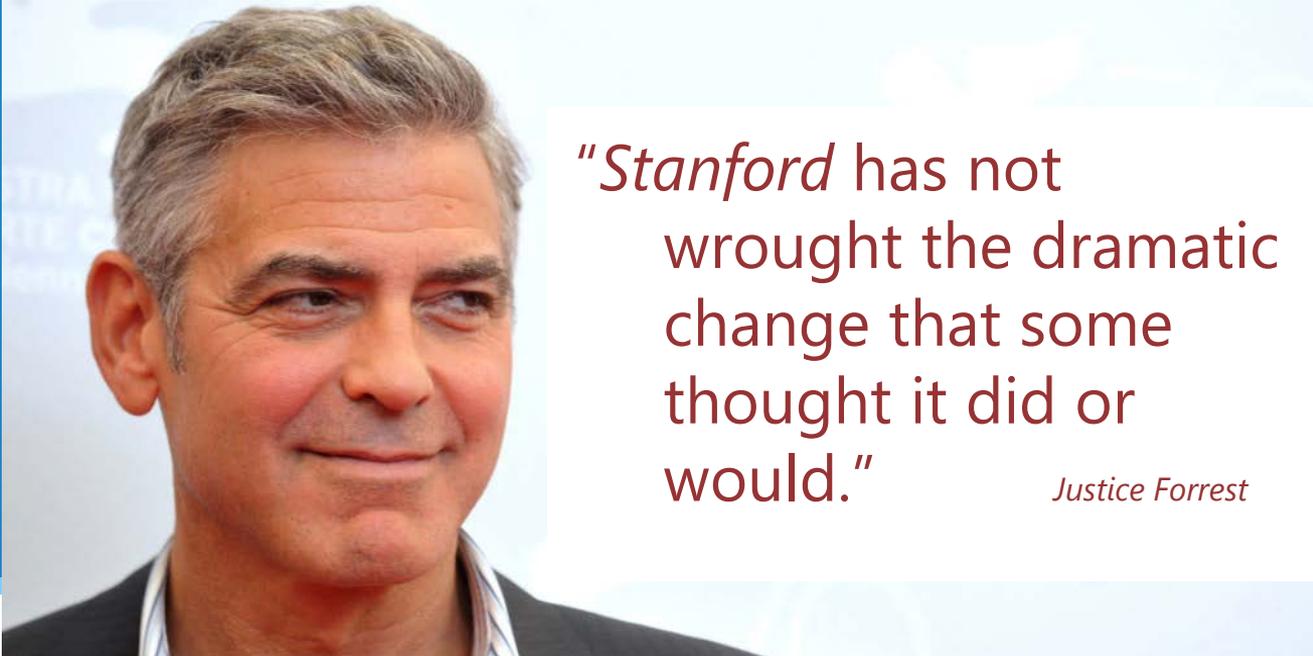
- ▷ Stanford highlighted the primacy of the statutory prohibition

*Family Law Act 1975* (Cth) s 79(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.

- ▷ Same words appear in s 90SM(3) – since 2008



# My message



*"Stanford has not  
wrought the dramatic  
change that some  
thought it did or  
would."*

*Justice Forrest*

Of course, the law is the law

**BUT** *Stanford* had very peculiar facts

**AND** paragraph 42 itself sets out the general exception.

# A wise word for practitioners

- ▷ Take particular care when advising of potential outcomes in the wake of *Stanford*
- ▷ Be careful about interim applications
- ▷ Make sure evidence about all 79(4) points is in for trial
- ▷ Make sure you are clear on the relief you actually want – is it a s 79(4) based “no order” or a distinct s 79(2) based “no order”?

# The Pre-*Stanford* Position

- ▷ “Four stage process”
  - Identification and valuation of the property of the parties;
  - Identification and evaluation of contributions to the property (including property no longer owned by the parties);
  - Identification and assessment of the various matters in s 79(4)(d) to (g) including, to the extent they were relevant, the matters in s 75(2); and
  - Consideration of matters of justice and equity

# Four stage process

Legislatively mandated?

No.

Means to an end, “merely illuminates the path to the ultimate result”.

# *Stanford* – Three Fundamental Propositions

1. Identify the existing legal and equitable interests of the parties in property;
2. Do not exercise the s 79 power according to an unguided judicial discretion; and
3. Be careful not to conflate the s 79(2) and s 79(4) requirements – no automatic entitlement pursuant to s 79(4)

# *Stanford v Stanford* (2012) 293 ALR 70

1971 – Parties married for their second time and live in home registered in the H's name. Parties have no joint children.

2005 – W made will leaving her children her estate

2009 – One of W's daughters (as her case guardian) applies to Court for property orders

1995 – H made will leaving house to H's children, subject to a life tenancy in favour of W.

2008 – W suffers stroke and is admitted into full time residential care out of parties' home

# *Stanford* – First Instance

- ▷ WA Family Court Magistrate:
  - Division based on contribution
  - 57.5% // 42.5% in H's favour
  - Satisfied outcome was just and equitable

# Stanford – Family Court Appeal

- ▶ Full Court - Family Court of Australia:
  - **W died** after the appeal had been heard and before judgment had been delivered
  - Marriage was **'intact'** when considering what was just and equitable
  - **"Moral obligations"** demand \$612,931 to be paid to the W's personal representatives on the H's death

# *Stanford* – High Court Appeal

- ▶ High Court of Australia:
  - Error to not expressly deal with why, if the W had not died, it would have been just and equitable to make the order it did (s79(8) Family Law Act);
  - Error to make the orders it did based on “moral obligations”
  - Full Court orders set aside and W’s application dismissed

# *Family Law Act 1975 (Cth)*

**s 43(1)(a)** The Family Court shall, in the exercise of its jurisdiction under this Act ... have regard to the need to preserve and protect the institution of marriage.



# Stanford

[42] 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).

The “just and equitable” enquiry is  
**not** a “threshold” issue



# Position in other cases

- ▷ In *Bevan* and in *Chapman* differently constituted Full Courts said no appellate error if possible to ascertain from reasons separate consideration given to separate parts of s 79 **regardless of the order that is done in.**

# Stanford and 'add-backs', liabilities and financial resources

## "Add-backs":

- Possibility? *Stanford* does not rule out add-backs
- Need for creative thinking

## Liabilities:

- Existing debts – not property except to the creditor
- Not included in *Stanford* – first step
- But still part of determining if an order is just and equitable - easy step to move to s 79(4) process

## Financial resources or property under the control of one party:

- Are they *truly controlled*, either at law or as a matter of fact, by one of the parties?
- Again, considering such property in determining orders that are just and equitable is done by reference to s 79(4) matters and control issues rather than strict focus on legal and equitable interests only

# Take away points for practitioners

- ▷ Do not lose heart when someone on the other side tells you "it's a *Stanford* case" or that "add backs" are not allowed after *Stanford* and *Bevan*.
- ▷ Just make sure you understand the differences between a s 79(2) determination and the balance of the discretionary tasks involved in arriving at orders that are truly just and equitable.

# Questions



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