Overview of Contributions

Deputy Chief Justice McClelland

Family Law Practitioners Association of Queensland

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INTRODUCTION

Section 79(1) the *Family Law Act 1975* (Cth) ("the Act") empowers the Family Court, in property proceedings, to "make such order as it considers appropriate". Section 79(2) provides that the Court shall not make an order altering the interests of the parties to the matrimonial property, unless it is satisfied that "in all the circumstances, it is just and equitable to make the order".

That issue is to be determined having regard to "a range of potential competing considerations",[1] including the parties' contentions regarding their contributions, assessed in accordance with the legislative guide set out in s 79(4). The plurality in *Stanford*, rejected the notion that s 79(2) forms a threshold issue[2] before undertaking an assessment of considerations in accordance with s 79(4).

Section 79(4) is divided into two limbs. The first limb is in respect to those matters set out in paragraphs (a) to (c), which deal with what are commonly known as the "contribution" factors. Contributions can, in turn, be direct or indirect, financial or non-financial contributions to the matrimonial property. The second limb is in respect to those matters set out in paragraphs (d) to (g), which primarily relate to the future needs of the parties, but can include, by reference to s 75(2)(o), any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

[1] *Stanford v Stanford* (2012) 247 CLR 108 at [36].
[2] *Hearne & Hearne* [2015] FamCAFC 178 at [72].

This presentation will focus upon the first limb of s 79(4).

No presumption of equality

In *Mallet v Mallet* (1984) 156 CLR 605, Gibbs CJ stated that, under the Act, there is no presumption that the "contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal" or that "equality of division should be the normal starting point for the exercise of the Court's discretion".[3] Gibbs J further stated that "the respective values of the contributions made by the parties must depend entirely on the facts of the case".[4]

Judicial and academic commentary consistently notes that the assessment of each party's contributions involves the exercise of a broad judicial discretion, where "on the same evidence two different minds might reach widely different decisions".[5] We are, therefore, in this area, essentially looking at principles that guide in exercising that "generous ambit"[6] of discretion.

Guidance rather than binding rules

The Full Court of the Family Court and, indeed, the High Court, has given guidance in the exercise of that very broad discretion. That guidance should not, however, be seen as disturbing the "largely unfettered" discretion set out in s 79(4) of the Act. In an often cited passage from *Mallet*, Gibbs J said:

> *... It is understandable that practitioners, desirous of finding rules, or even formulae, which may assist them in advising their clients as to the possible outcome of litigation, should treat the remarks of the court in such cases as expressing binding principles, and that judges, seeking certainty, or consistency, should sometimes do so. Decisions in*

[3] At [610].
[4] Ibid.
[5] Brennan J in *Norbis v Norbis* (1986) 161 CLR 513 held (at 540).
[6] Ibid.

> *particular cases of that kind can, however, do no more than provide a guide; they cannot put fetters on the discretionary power which the Parliament has left largely unfettered. It is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case.*[7]

Applying that principle in a practical sense in *Hoffman & Hoffman* [2014] FamCAFC 92, the Full Court said at [32] to [33]:

> *That is, statements of principle by this Court can, by a process of analysis, repetition and application give rise to "...principles which have yielded just and equitable results in the generality of cases to which those principles have been applied" (Norbis at 537, per Brennan J).*
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> *Those guidelines, when established, "guide the exercise of a discretion"; they do not replace it. That is because, even if established as guidelines, they must "[preserve], so far as it is possible to do so, the capacity ... to do justice according to the needs of the individual case..." (Norbis at 520, per Mason and Deane JJ).*

Essentially in this paper I am endeavouring to identify those principles.

Holistic task

In Petruski & Balewa [2013] FamCAFC 15, the Full Court said at [49]:

> *The task of assessing contributions under s 79 of the Act is an holistic one; what is required is to evaluate the extent of the contributions of all types made by each of the parties in the context of their particular relationship: Dickons & Dickons [2012] FamCAFC 154 (Dickons). As was also said by the Full Court in Lovine & Connor [2012] FamCAFC 168 at [40] and [41] (Lovine) such an evaluation "inevitably involves value judgments and matters of impression", and accordingly it cannot be treated as "a mathematical exercise".*[8]

[7] At [3].
[8] See also *Hearne* at [105] and the cases cited therein.

Commencement of relationship

It is not uncommon for parties engaged in family law property proceedings to contest the date of the commencement of their relationship. While the point at which a relationship commenced will clearly have relevance to the nature of the parties' contributions, that relevance can also be overstated. In that context, in *Harriott & Arena* [2016] FamCAFC 69, the Full Court relevantly stated at [48]:

> *... Importantly, it had long been established... that regard should be had to all contributions made to the property, including not only those made prior to the marriage, but also those made prior to the commencement of any pre-marriage cohabitation: Beneke v Beneke (1996) FLC 92-698.*

Similalrly in *L & L* [1994] FamCA 60, their Honours Fogarty, Baker & McCall JJ concluded that "contributions made by parties prior to the marriage, whether they were cohabitating or not, can be treated as contributions under s 79".

INITIAL CONTRIBUTIONS

In *Cabbell & Cabbell* [2009] FamCAFC 2015, their Honours Boland, Thackray and O'Ryan JJ stated:

> *...there is no formula, nor could there be, given the wide discretion exercised under s 79, which prescribes how a court should deal with initial contributions in cases of property adjustment.*

In assessing the significance of an initial contribution, it is frequently the case that parties contend that the Court should have regard to their asserted contributions, without presenting expert evidence to establish the contemporaneous monetary value of such contributions. However, in property

proceedings, the rules of evidence apply and a party's assessment of the value of a particular item of property is no more than inadmissible opinion.

In *AM & MM* [2005] FamCA 443 at [38], the Full Court observed those practical difficulties where a party does not put before the Court any evidence about the value of the pre-cohabitation assets and liabilities and said:

> *In these circumstances it was not necessary for the trial judge to make any findings relating to the value of these properties as at the date of commencement of cohabitation.*

The absence of such evidentiary material does not, however, preclude the Court from making a determination in respect to the parties' initial contributions, in the context of making orders for the just and equitable adjustment of their property consequent to the breakdown of their relationship. In that respect, in *Pierce & Pierce* (1999) FLC 92-844 at 85,881, the Full Court stated:

> *It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution.*

What use has been made of the parties' contributions?

In *Cabbell & Cabell,* the Full Court reiterated the importance of having regard to the use made by the parties of the relevant initial contributions. Their Honours critiqued the fact that the Federal Magistrate "did not adequately analyse and give weight to the husband's initial contributions, nor did he sufficiently trace the use of initial assets and consider the foundation they laid for the parties' substantial wealth at the date of trial".

The Full Court ultimately found that the FM had erred in assessing the parties' overall contributions as equal in circumstances where it was accepted that the husband had made significant financial contributions early in the parties' 25 year marriage, which had facilitated their ability to purchase real property investments. Those assets had significant value at the date of trial. The Full Court found that the husband was able to make those contributions as a result of his equity partnership, which he held prior to the relationship.

The Full Court determined that a 5 per cent adjustment to the husband was appropriate in those circumstances.

Impact of time

In *Wallis & Manning* [2017] FamCAFC 14, the Full Court said at [106]:

> *The length of the marriage can be seen to be of considerable importance in the assessment of contributions. In Waters and Jurek (1995) FLC 92-635, at 82,379 Fogarty J, in the context of s 79(4)(e) of the Act, said:*
>
> > *When the marriage ends, especially where that marriage has been a long one, one cannot separate the parties as individuals from the people they became in the context of the marriage relationship, and the allocation of roles, duties and responsibilities which it entailed.*

Comparatively, in the opposite context, being that of a relatively short relationship, the Full Court has stated that:

> *In cases ... involving short marriages and a substantial imbalance of financial contribution,* ***equality of division is again likely to produce substantial injustice. Its value as a starting point is therefore highly questionable.*** *It really only has value in cases involving long marriages like White (supra), where there are substantial assets and contributions on both sides.*[9]

[9] *Figgins & Figgins* [2002] FamCA 688 at [129].

Earlier authorities speak of the "erosion" of initial contributions over time. For instance, in *Money & Money* (1994) FLC 92-485 at 81,054, Fogarty J stated:

> *That an initial contribution by one party may be "eroded" to a greater or lesser extent by the late contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party.*

That observation of his Honour was adopted by the Full Court in *Bremner & Bremner* (1995) FLC 92-560.

However, in *Pierce*, the Full Court was at pains "to point out that it is not a matter of "erosion" of "initial contribution", but of the weight to be attached to such a contribution".[10]

The current view is reflected in *Quaresmini & Quaresmini* [1999] FamCA 1314 at [39], where the Full Court stated that:

> *There is no principle that the length of the marriage leads to a likelihood that other contributions will outweigh or weigh equally with 'a particular contribution'. It is a matter of assessing the contributions of all relevant kinds in each case to arrive at an outcome which is both appropriate and just and equitable. In some cases particular contributions may be outweighed or equalled by other ones. In other cases particular contributions may be so disproportionate to other contributions as to merit special recognition.*[11]

In other words, there is not a time-based or diminishing scale of return associated with initial contributions. As stated in *Dickons & Dickons* [2012] FamCAFC 154, the trial judge must:

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[10] *Agius & Agius* [2010] FamCAFC 143 at [82] and see also *Hearne* at [103].
[11] See also *Wallis & Manning* [2017] FamCAFC 14 at [116].

> *… ensure that the "myriad of other contributions" [Williams & Williams [2007] FamCA 313 at [26]] and the duration over which, and circumstances in which, the miscellany of other s79(4) contributions were made is not accorded a subsidiary role. The essential s 79(4) task is for "trial Judges [to] weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation".*[12]

In doing so, however, the Court will have regard to "stated and unstated assumptions"[13] upon which a lengthy marriage may operate and "the roles within that marriage which those assumptions directed and which they each performed".[14]

In terms of the practical application of those principles, in the recent case of *Jabour & Jabour* [2019] FamCAFC 78 at [136], the Full Court found that the evidence in that case established that:

> *Whatever was the value of the property at the commencement of the relationship its significance has been largely lost given the myriad of the contributions by each of the parties to their various business ventures, through their employment and care of the family over a long relationship, including the contributions made to the retention of the property which we have discussed above. There is no doubt that they both worked hard and over many years they both contributed to the full extent of their capacity within the roles each took within the marriage. As was said in Wallis at [20] it is important that this miscellany of other s 79(4) factors is not accorded a subsidiary role in the assessment of contributions.*

[12] Citing *Aleksovski v Aleksovski* (1996) FLC 92-705 at, respectively, 83,437 and 83,443 quoted in *Dickons v Dickons* (2012) 50 Fam LR 244 at [20]; See also to similar effect *Kowalski and Kowalski* (1993) FLC 92-342 at 79,630; *Way and Way* (1996) FLC 92-702.
[13] *Stanford v Stanford* (2012) 247 CLR 108 at 122 (French CJ, Hayne, Kiefel and Bell JJ).
[14] *Hurst* at [24] referring to *Mallet v Mallet* (1984) 156 CLR 605.

Why has the asset increased in value?

It will generally be the case that initial contributions in the form or real property will increase in value over the course of the parties' relationship. It is necessary to determine the reason for that increase in value. That task can be difficult because it is not always possible to quantify initial contributions or their impact on the present property pool. As an example, in *Bulleen & Bulleen* [2010] FamCA 187, Cronin J said, in respect to the facts of that case:

> *The best that can be said is that there is an identifiable contribution by the husband which is greater than that of the wife. Further, I can find that the husband's contribution added some impetus if it was not the catalyst for, the growth of the parties' assets to the extent that they are as wealthy as they are today … it is impossible on the evidence before me to do much more than identify the initial contributions in a very nebulous way. I could not be satisfied as the impact of the initial contributions on what now exists.*

In that case, which involved a property pool of about $151 million, the husband was awarded $10 million more than the wife in acknowledgement of his initial contributions. That amounted to a 3.3 per cent adjustment in his favour.

In making a similar finding regarding the weight to be attributed to an initial contribution and its subsequent growth, in *Casper & Casper* [2009] FamCA 989, Fowler J stated:

> *True it is that the property has, in part, by the application of labour and capital, increased in value, but it is also true and notorious that over the period of time since 1995 there has been a substantial devaluation of money. I think it is appropriate to recognise that* ***the intrinsic value of the property has increased in part by the effluxion of time*** *and the effect that has had in increasing the dollar value of the property. That recognition puts into better perspective, as a proportion of the current value of the property, the value of the contribution of the husband in real terms.* [Emphasis added].

Initial contributions, and any increase in their value, will be of particular significance in the context of short to medium term relationships. In *Moreton & Moreton* [2008] FamCA 1170, Murphy J considered a situation where the property, initially contributed by the husband, made up almost the entirety of the property pool, of the 10.5 year relationship. His Honour made a 22.5 per cent adjustment to the husband, despite recognising that the increase in value of that property had essentially been due to market forces, rather than by the actions of either party.

Impact of good fortune

In *Jarbour & Jabour*, the Full Court considered a situation where property owned by the husband prior to the parties relationship was "fortuitously rezoned", resulting in a substantial increase in value. Their Honours referred, with approval, to the decision of *McCall J in Zappacosta v Zappacosta* (1976) FLC 90-089, where it was found that the rapidly accelerated value of a property due to rezoning was a mere windfall, to which neither party had a greater or lesser claim. Applying that reasoning, the Full Court held at [86]:

> *... in relation to a sudden increase in the value of an asset unrelated to the efforts of the parties, such as a rezoning by the council or a lottery win, the authorities point to that increase being a contribution by both parties (or neither – it matters not which it is) (Zappacosta at 75,421; Wells at 76,529–76,530; Zyk at 82,515–82,516; and Hurst at [26]).*

Value to be determined at date of trial

In *Williams & Williams* [2007] FamCA 313, Kay, Coleman and Stevenson JJ confirmed that, where an initial financial contribution has been made to the acquisition of certain property, which remains in the asset pool at separation, in

order to determine the weight to be given to that contribution, the Court should have regard to the value of asset at the date of assessment, rather than the amount initially contributed. In that respect, their Honours said:

> *... if the "value" ascribed to an item is limited to the value as at the commencement of the relationship as opposed to the realised value or the current value, then this may not give "adequate recognition" to the "importance of its contribution to the pool of assets ultimately available for distribution towards the parties".*

However, again, context is important. In *Cabbell & Cabbell*, the Full Court stated:

> *We do not suggest that the value of the matrimonial home at the date of trial should be transposed, or recognised at a value of $1,100,000.00 [being its value at trial]* ***as a contribution in that quantum*** *on the husband's behalf. However, the source of its funding on acquisition required not only discussion but weighty consideration in the assessment process.* [Emphasis added].

CONTRIBUTIONS DURING RELATIONSHIP

Nature, form and extent

In *Dickons*, the Full Court confirmed that "regard must be had to the use made of contributions of various types so as to compare the contributions made by each of the parties during the course of, and over the length of, their relationship".

However, in assessing the relative weight to be given to any particular contribution, it is not necessary to find a causal link between that contribution and particular property. In that respect, the Full Court said that the task was to examine "the nature, form and extent of contributions" made by each of the parties, rather than to attempt to identify a causal link to the asserted "value" of a

particular item of property.[15] In that regard, the Full Court in *Dickons* explained its reasoning in the following terms:

> *A financial contribution can be made indirectly by, for example, the use by parties of income or assets for purpose A freeing up the use of other income or assets for purpose B. Moreover, a particular financial contribution might have been used wholly in discretionary expenditure which, but for that contribution, would not have been available to the parties or would have required borrowings or a diminution of capital. Such a contribution can also, in that way, be seen, for example, as an indirect contribution to the conservation of property….*
>
> *Any and all such contributions, whether or not they sound in, or are directly linked to, the property available for distribution, should be considered and assessed together with the nature, form and extent of all other contributions of all types contemplated otherwise by s 79(4).*

Isolation of assets

It is not uncommon for a party to argue that the Court should assess contributions on the basis of a two pool approach. That is, by identifying and isolating from one pool specific items of property in respect to which it is contended that the other party made little or no contribution. There is no doubt that such an approach is open to a trial judge: *Norbis v Norbis* (1986) FLC 91-712 at 75,168; *Lenehan & Lenehan* (1987) FLC 91-814 at 76,148. Indeed, in *Lenehan*, the Full Court suggested that there will be cases where taking a two pool approach may be appropriate and failure to do so may constitute error. The treatment of superannuation is a common example where a two pool approach may be taken.

A further example was set out in *D & D* [2003] FamCA 473, where the Full Court determined that the short duration (two years) of the parties' relationship and the clear division of the personal investments they had maintained throughout that time made it more convenient to determine the property distribution on an asset-

[15] *Dickons & Dickons* [2012] FamCAFC 154 at [14].

by-asset basis, rather than by taking a global approach. In that case, while the husband's initial contributions amounted to about 17.5 per cent of the assets at cohabitation, the relative success of his investments, as compared to those of the wife, saw him receive 30 per cent of the property pool available for distribution, at the time of the appeal.

However, if a global approach to assessment is taken, there are risks involved in isolating any particular asset from that global approach. For example, in *Hurst & Hurst* [2018] FamCAFC 146 at [17], the Full Court warned that:

> *Isolating indirect contributions to but one part of the property interests of the parties in the context of a global assessment of contributions risks ignoring significant contributions made by both parties that do not have a nexus with that particular property.*

In arriving at that conclusion, their Honours applied the reasoning confirmed in *Dickons*, to which I have just referred.[16]

Nature of the parties' relationship

Authorities suggest that the task of considering each party's contributions needs to be occur by "reference to the nature and form of the particular marriage partnership manifested by the particular circumstances of this particular marriage".[17] In *Dickons,* the Full Court said that that task may be assisted by asking the question posed by Deane J in *Mallet*, at [640] to [641], being:

a. whether it is a relationship "where the parties have adopted the attitude that their marriage constituted a practical union of both lives and property"; or
b. whether it is, for example, a union where parties lived very separate domestic and financial lives.

[16] *Hurst* at [20].
[17] *Dickons* at [21].

The significance of children

In a paper titled "Issues of Contribution Re-visited" presented at 2009 QLS/FLPA Family Law Residential by then Mr Michael Kent SC, his Honour stated:

> *Clearly enough and unsurprisingly, the single most powerful influence or variable is whether the relationship produces children because of the obvious impact of that in terms of a home making and parenting contribution.*

By reference to a number of cases appended to that paper, his Honour also noted the converse – that in relationships which do not produce any children, even in cases where there is a fairly substantial period of cohabitation, the non-contributing party may ultimately receive a modest adjustment because of the significance of the initial contributions of the other party.

To what extent do contributions made during the course of a relationship "offset" initial contributions?

In *Money*, the majority of the Full Court specifically rejected the proposition that to offset the significance of one party's initial contribution, it was necessary for the contributions of the other party to "exceed" them.[18]

As previously noted, contributions can be both financial and non-financial, direct and indirect. In terms of indirect contributions, including a party's role as a parent and homemaker, in *Mallet*, Wilson J said that such a contribution "must be assessed, not in any merely token way, but in terms of its true worth to the building up of the assets". That view has, I would contend, been taken even further in more recent Full Court decisions.

[18] Per Fogarty at page 81,054, applied in *Bemner & Bremner* [1994] FamCA 116 at [18].

No presumption of equality, but presumption of equal value of respective roles

Earlier cases, including decisions of the High Court, suggested that, in the exercise of a trial judge's discretion, it was appropriate to it give greater weight to contributions that had a direct economic impact on the property of the relationship. For instance in in *Mallet* at [625], Mason J said:

> *No doubt a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements and the marriage is of long standing. It will be otherwise when the property in issue consists of assets acquired by one party whose ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where that other party's role does not extend beyond that of homemaker and parent.*

However, subsequent cases of the Family Court have confirmed that, in a work-value sense, work undertaken by a party as a homemaker and parent is to be equally valued to that of a professional with considerable training. In that context, In *Carmel-Fevia & Fevia (No. 3)* [2012] FamCA 631, Cronin J summarised the applicable principle, as he derived it from authority, in the following terms:

> *In Rolfe v Rolfe (1979) FLC 90-629, Evatt CJ said that where one party was earning an income and the other fulfilling responsibility at home, there was no reason to attach greater value to the contribution of one of them to that of the other because that was the way the parties arranged their affairs. Her Honour said that the contribution of each should be given equal value.*

That approach has more recently been confirmed by the Full Court in *Grier & Malphas* [2016] FamCAFC 84. Indeed in that case, the majority, Murphy and Kent JJ, dismissed the relevance of a party having "special skills". That case concerned a situation where there was little in the way of initial contributions,

but, during the course of the relationship, the husband build up a substantial business, which was eventually sold for $9.75 million. The husband argued that he was entitled to a greater distribution as result of the diligent application of a special "skill set" that resulted in the success of the business. However, at the same time, the husband agreed that both parties did their best "in business, parenting and all aspects of [their] relationship". In those circumstances, Murphy and Kent JJ stated at [135] to [136]:

> *What skill or skills a person brings to a relationship which are said to result in the making of money or accumulation of capital is no more or less relevant than the skill set a person brings to a relationship as a homemaker and parent, or as the performer of two roles as a homemaker and parent and income earner. The "skill set" or "potential" of "talent" a party brings to the role or roles which the parties have determined each will undertake in the relationship is, for s 79's purposes, relevant only to how those attributes manifest themselves in what s 79 says must be considered.*
>
> *It is not a party's "skill set" which must be considered, but their contributions. Contributions are the product of many things: talent, industry, selflessness and, indeed, luck, to name a few. It is the contributions (in all senses in which that expression is used in s 79) that fall for consideration and assessment, not the combination of factors that has created the capacity for the making of those contributions."*

In other words, it is not the particular skills that are important, but rather, the task is to evaluate, in each case, the actual contributions made by the parties during the course of their relationship. In that respect, in *Fields & Smith* (2015) FLC 93-638, the Full Court said:

> *... the words of s 79 do not provide endorsement for any category of contribution related to any class of property (for example, high wealth) being, by virtue of that category or class, more valuable or important that another. In each case the contributions made by the parties must be evaluated in the context of the facts particular to that case.*

Similar views are also expressed in *Kane & Kane* (2013) FLC 93-569 and *Fields & Smith* (2015) FLC 93-638.

Special factor contributions

In *McLay & McLay* [1996] FamCA 29, the notion of a "special factor" contribution was explained, as follows:

> *... if the existence of "special factors" or the application of "special skills" to the accumulation of assets is established, that may justify the Court considering that contribution through the performance of the role undertaken "to be above the normal range", entitling a party to recognition of an "extra" or "special" contribution.*

In line with that reasoning, in *SL & EHL* [2005] FamCA 132, the husband argued that "because he was primarily, if not solely, directly responsible for the acquisition of the parties' wealth, and in doing so he exhibited skill, acumen and or determination (whether deemed 'special' or not), [his] contributions outweighed those of the wife".

However, Warnick J found that the income earned by the husband was not markedly better than that earned by other similarly qualified and experienced accountants and did not evidence any "extraordinary professional qualities or capacities". Further, while the husband's real estate investments had resulted in the accumulation of considerable wealth, the fact that the real estate market had been returning good growth generally and there was no evidence that the growth achieved by the husband "outperformed" any other field of investment during that period. On those bases, it was determined that the husband had not made a 'special' contribution.

In *Kane & Kane* [2013] FamCAFC 205, the Full Court dealt with an appeal from a matter in which the primary judge treated the parties' superannuation as a separate asset to the remaining pool and granted a larger distribution of those funds to the husband, on the basis that his investment of the monies in that fund had been so successful because of the skill, acumen and considerable expertise exhibited by him.

However, the Full Court found that the trial judge had erred in taking that approach because "excessive weight given to the husband's contribution to the superannuation [had] brought about orders that are not just and equitable in all the circumstances of this case". Their Honours continued:

> *Unfortunately, in our view, the error has come about partly as a consequence of the superannuation having been dealt with by the Court in isolation from the other contributions made by the husband and wife.*

Their Honours referred to the decision of Murphy J in *Smith & Fields* [2012] FamCA 510, where his Honour stated:

> *The real danger lies in the promulgation of a notion that, by establishing "special contribution" or "special skills" ... a result of a particular type, or a particular range, should follow. That is an improper fetter on an "extraordinarily wide" discretion. It smacks of a presumption antithetical to what the section requires.*

The Full Court agreed that "the notion of "special contributions" necessarily predisposes matters to an outcome that may not otherwise be available upon a proper assessment of all the contributions." The Full court stated:

> *... s 79(4) itself does not contain words like "special" or "extraordinary". No doubt in any particular case a judge might find that there is a contribution by one party (being financial or other than a*

> *financial contribution) which outweighs the others but it is essential that such conclusions reflect what the legislation demands.*
>
> *… In giving such emphasis to the husband's skill in respect of one aspect of the parties' financial and non-financial contributions over this long marriage [nearly 30 years], his Honour fell into error and made orders which did not correctly reflect each party's contributions overall.*

Nevertheless, despite those authorities to the effect that the work of a parent and homemaker is to be equally valued with, for instance, the contribution of a business entrepreneur with special skills, that is not the end of the task for the Court. As Mason J said in *Mallet*, to sustain a finding of equality, "the materials before the court will need to show an equality of contribution — that the efforts of the [wife] in her role were the equal of the husband in [his]".[19]

Inheritances and gifts

In *Hurst*, the Full Court noted the statement of the primary judge that:

> *Inheritances and gifts are generally treated as contributions made by or on behalf of the person receiving them unless there is a clear intention that the inheritance or gift was to both parties [Kessey & Kessey (1994) FLC 92-495 at 81,850].*[20]

However, that does not mean that property received by way of an inheritance or gift falls within a special or protected category: *Bonnici & Bonnici* (1992) FLC 92-272. Further, there does not need to be a causal nexus between contributions and an inheritance received in order for that inheritance to be included as property of the marriage: *Miklic & Miklic and Anor* [2010] FamCA 741 at [124].

[19] At [625].
[20] At [14].

Lottery wins

In Zyk & Zyk (1995) FLC 92-644 at 82,515, which was a case concerning a lottery win, the Full Court said:

> *In the ordinary run of marriages, a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue. Where both parties are in receipt of income and where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly.*
>
> *... In the sort of case to which we have referred above, the conclusion would be that the ticket was purchased by joint funds and the contribution of the prize would be seen as a contribution by the parties equally.*

However in *Elford & Elford* (2016) FLC 93-694, which involved a lottery win by the husband of $622,842 about a year after cohabitation, where the parties cohabited for a total of 10 years, the Court took a different approach. They did so in circumstances where the lottery winnings remained intact in the husband's bank account, throughout the relationship. Ultimately, the Full Court upheld the finding, of the Trial Judge that the husband never intended the weekly purchase of lottery tickets to be "a joint matrimonial purpose".

The Trial Judge found that it was both "the nature of the parties' relationship at the time the lottery ticket was purchased" that sets this case apart from so many of the decided "lottery winnings" cases, as well as the manner in which the parties conducted their financial affairs after those winnings were received by the husband. In that respect, the parties kept their finances, including the lottery

winnings, entirely separate. In those circumstances, the lottery winnings were treated as a contribution by the husband alone.

POST-SEPARATION CONTRIBUTIONS

As was noted in *Norman & Norman* [2010] FamCAFC 66 at [38] to [39]:

> *... property acquired by one or both parties after cohabitation has ceased is not immune from the reach of s 79. Indeed, the opposite is the case; "the property of the parties or either or them" includes all property of whatever type, whenever acquired (see Hickey & Hickey (2003) FLC 93-143 at [40]). Further, it is not necessary to prove that any particular form of contribution is connected with any particular part of the property (See Shaw and Shaw (1989) FLC 92-010; Napthali and Natpthali (1989) FLC 92-021).*
>
> *Of course, the nature, form and characteristics of property, and the manner and timing of its acquisition, may have an impact upon the manner in which contributions are assessed and, in an appropriate case, the court might determine to exclude it by reason of those matters.*

The decision in *Farmer & Bramley* (2000) FLC 93-060 concerned a 12-year relationship, where no property of value was held by the parties at separation. However, one and a half years after separation, the husband won a $5 million lottery. The Full Court upheld the decision of the Trial Judge to adjust the lottery winnings such that the wife received $750,000. In doing so, Kay J stated at [65] to [69]:

> *... an assessment of contributions made under s 79(4)(a), (b) and (c) does not have to bear a direct relationship to the assets as they presently exist. The court is asked to determine what is an appropriate and just and equitable order, bearing in mind not only the contributions made directly to the existing assets, but contributions made generally during the course of the relationship between the parties both to the acquisition, conservation and improvement of assets (which may or may not still exist) and to the welfare of the family in the role of homemaker and parent.*

This is not to say that the Court should be blind to the circumstances in which any assets were acquired post separation. Clearly contributions made towards the acquisition of such an asset by one party and the lack of contributions made towards its acquisition by the other party may weigh heavily in the exercise of discretion. However it is quite wrong to say that contributions made under s 79(4)(a), (b) or (c) before an existing asset was acquired could have no bearing on the outcome of the proceedings. ...

There is nothing in the legislation that requires s 79(4) (a) (b) and (c) contributions to be measured only in terms of "what did either party contribute to the assets of which they are presently possessed?"

No concept of negative contributions

In *Bircher & Bircher and Anor* [2016] FamCAFC 123 at [86], referring to *Antmann and Antmann* (1980) FLC 90-908, the Full Court confirmed that there is no room for the concept of a party making a negative contribution to the parties matrimonial property pool in ss 79(4)(a) or (b) of the Act. The Full Court noted, however, that allegations that a party has committed "waste" of the assets of the parties may be a relevant matter to consider under s 75(2)(o) of the Act.[21]

Nevertheless, economic losses, as well as economic gains, incurred in a marriage, should, as a general rule, be shared.

Nevertheless, in *MacGregor & MacGregor* (1996) FLC 92-710, Nicholson CJ, Barblett DCJ & Finn J confirmed that "... it [is] unacceptable … to assess the husband's contributions upon the basis of what he brought into the marriage and ignore any downturns in his business fortunes that may have occurred subsequently".

[21] Reference was made to *Antmann and Antmann* (1980) FLC 90-908 and *Kowaliw and Kowaliw* (1981) FLC (91-092).

Similarly, in *Browne & Green* (1999) FLC 92-873, the husband's initial financial contributions represented approximately 88 per cent of the property pool at the commencement of cohabitation, however, poor investments on his part throughout the parties' relationship resulted in that figure being reduced to about 74 per cent of the pool at separation. However, the Full Court found that the Trial Judge had erred in apportioning all of those losses to the husband, in circumstances where he could not be said to have acted "recklessly, negligently or wantonly" in a *Kowaliw* sense.

CONCLUSION

The task of advising clients of the potential outcome of their case, which necessarily involves an individual trial judge's exercise of a particularly broad discretion, is unquestionably complex and difficult. As noted, in this presentation, there are a number of different elements to making such an assessment, some of which are conflicting.

I think the best advice I can offer is that, in determining what is a just and equitable adjustment of property, it is necessary to not only identify and value that property, but also to identify and provide information about the nature, form and extent of each party's contributions to, not only that property, but their relationship more generally. It is, of course, necessary to marshal and present evidence about these matters.

In that way, practitioners maximise the prospect of achieving a fair outcome for their client, whether it be by way of negotiation or, ultimately, if necessary, litigation.