

FAMILY LAW PROPERTY SETTLEMENT IN RELATION TO MARRIAGE Where the parties were married for three years Where there are no children of the marriage Where the wife seeks 50 per cent of the matrimonial pool Where the husband seeks that he retain the main assets of the pool and pay the wife a small sum Where the wife earned significantly more than the husband throughout the marriage and provided the main financial support to the household Where the asset pool is modest and made up of two assets bought into the marriage by the husband Where the wife made little or no contribution to the main assets Where the contributions of the husband were found to exceed those of the wife, being 70 per cent compared to 30 per cent by the wife Where the wife is 23 years older than the husband Where the wife has suffered a very serious and debilitating illness and has compromised mental health Where the husband has not given proper financial disclosure Where an adjustment of 5 per cent to the wife is justified by reference to considerations arising from s 79(4)(e) Where an order is made for the wife to receive a payment reflecting 35 per cent of value of the asset pool. Family Law Act 1975 (Cth) ss 79, 75 Family Law Rules 2004 (Cth) Aleksovski & Aleksovski (1996) FLC 92-705 Bevan & Bevan [2013] FamCAFC 116; (2013) FLC 93-545 Biloft & Biloft [1995] FamCA 45; (1995) FLC 92-614 Cerini & Cerini [1998] FamCA 143 Stanford v Stanford [2012] HCA 52; (2012) 247 CLR 108 APPLICANT: Ms Paladini RESPONDENT: Mr Paladini INTERVENER: B Trust T/As C Law Firm FILENUMBER: SYC 1179 of 2009 DATE DELIVERED: 17 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Loughnan J HEARING DATE: 29 30 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Steggall RESPONDENT: In Person COUNSEL FOR THE INTERVENER: Mr O'Brien SOLICITOR FOR THE INTERVENER: C Law Firm ORDERS (1) The parties shall forthwith do all things and sign all documents necessary to authorise the disbursement of the funds held on trust for the husband by C Law Firm as follows: (a) The sum of \$54,525 to the wife or as she may direct in writing; and (b) The balance to the husband. (2) The husband and the wife are each otherwise declared to be the sole legal and beneficial owner of all real and personal property including but not limited to superannuation, insurance policies, savings, chattels and personal effects currently in the possession or control of each of them respectively. (3) In the event

either party refuses or neglects to execute any deed or instrument necessary to give effect to these Orders, the Registrar of the Court be and is hereby appointed pursuant to s 106A of the Act to execute such deed or instrument in the name of either party and to do all other acts and things necessary to give validity and operation to the said deed or instrument. IT IS NOTED that publication of this judgment by this Court under the pseudonym Paladini & Paladini and Anor has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER: SYC 1197 of 2009 Ms Paladini Applicant And Mr Paladini Respondent REASONS FOR JUDGMENT INTRODUCTION These are proceedings in relation to property settlement where the applicant wife seeks a payment representing 50 per cent of the value of the matrimonial assets and the respondent husband seeks an order that he retain the main assets and pay the wife a small sum. The parties' relationship spanned less than four years and there are no children of the marriage. Although there was an intervener in the proceedings, the issues relevant to that intervener were finalised by orders made on the first day of the trial. Where I refer in these reasons to the parties, I mean the wife and husband.

APPLICATIONS

The wife sought orders in terms of a Minute included in her Case Outline document dated 26 September 2014 as follows: (reproduced as original) That the Intervener's application be dismissed. That the Intervener transfer to the Wife 50% of the net asset pool as defined by the Wife in the Balance Sheet annexed hereto and marked A. That the Husband pay the Wife's costs of the proceedings. The orders sought by the husband were set out in a document submitted on the second morning of the trial^[1]. The document is discursive and includes commentary as well as sentences that could be described as orders sought. Among a list of grievances, I understand the document to say that the husband would like an order restraining the wife from commencing any proceedings against him or members of his family. At the foot of the first page is a wording that seems to be an alternate property settlement proposal, whereby each party retains what they have. In the course of final submissions I understood the husband to propose that the parties retain what they have and responsibility for what they owe and that there be a payment to the wife from the funds held on trust, amounting to 25 per cent of that fund. I calculated that to represent about

\$22,649. DOCUMENTS READ The parties relied on the following documents: Documents relied on by the applicant wife: Affidavit of the wife filed 21 August 2014; and Financial Statement of the wife filed 2 May 2014. Documents relied on by the respondent husband: Affidavit of the husband filed 21 August 2014; Affidavit of Ms G filed 20 March 2014; and Financial Statement of the husband filed 1 April 2014. THE HEARING The case was listed for final hearing over two days commencing on 29 September 2014. When the hearing commenced the husband said that he had not received the wife's affidavit. He conceded that the email address to which it was sent on 11 September 2014 was his but said that he does not have a computer. In respect of postal service, the wife prepared an affidavit of service evidencing service on the husband by mail to a Brisbane address on 21 August 2014. The husband conceded that to be his address for service but denied receiving the document. There was no challenge to the wife's evidence about service. I am satisfied that the husband was served in accordance with the Family Law Rules 2004 (Cth). It should be noted that the husband conducted the hearing without legal representation. He did not bring all relevant documents to Court; he did not have a document setting out the orders he sought and he said he had not read the relevant provisions of the Family Law Act 1975 (Cth) (the Act). English is not the husband's first language. Notwithstanding the practical and cooperative approach of learned counsel for the wife, it is an understatement to say that the husband was under a considerable disadvantage during the trial. During the trial the husband referred to the difficulties for him in conducting the proceedings. I reminded him that on an earlier date he had rejected the wife's proposal for the release of \$20,000 to each party from funds held on trust and observed that he could have secured legal representation with those funds. In any event he could have formally sought the release of funds for that purpose. The solicitors who acted for the husband in personal injury proceedings intervened in the proceedings, seeking their costs of those proceedings. Before the commencement of oral evidence, the issue of the interveners' claim was settled and orders were made by consent in the following terms: By consent, orders are made in accordance with the document titled Order (Exhibit 2 dated 29 September 2014), as set out thereunder: That [C Law Firm], Solicitors, be permitted to appropriate \$43,298.49 of the funds held in their trust account on account of their costs of acting for

the Respondent. That the Respondent pay [T Firm] \$3,599.20 from the property that the Respondent receives subject to any orders made in these proceedings within seven (7) days of receiving that property. With respect to the Interveners application, each party bear their own costs. Leave is granted to the wife to inspect documents produced to the Court in response to subpoena to [C Law Firm]. Thereupon the interveners counsel was given leave to withdraw. On 30 September 2014 judgment was reserved.

SHORT HISTORY The wife was born in 1952 and at the date of the hearing she was 62 years of age. The husband was born in Italy in 1975 and at the date of the hearing he was 39 years of age. The parties commenced cohabitation in December 2004, married in May 2005 and separated on 27 May 2008. There are no children of the marriage.

BACKGROUND FACTS The wife was married twice before meeting the husband and has three adult children of her second marriage. The parties were introduced by a mutual friend in April 2004 and commenced a relationship in approximately August 2004. At the commencement of the relationship, the wife was working as a legal professional running her own practice. She lived in a rented property in Suburb L with her son A and conducted her practice from home. It is the wife's evidence that for the year ended 30 June 2005 her business was on track to earn gross fees exceeding \$300,000, however the overheads were high. The wife deposed that she did not have any superannuation. She was then supporting two children at university and one at a private school. The wife deposed that at the commencement of the relationship, the husband had moved to Australia from Italy and was on his second holiday visa. He spoke little English and could not read English. It is the wife's evidence and I do not understand it to be controversial, that the terms of his visa prohibited him from working in Australia. In any event the husband had little money. The wife assisted the husband with his visa and residence applications. In mid-2004, the parties travelled to New Zealand in order for the husband to apply for a further visa. The wife deposed that she paid all expenses of the trip including flights, accommodation and the visa application expenses. The husband was granted a working holiday visa that permitted him to stay in Australia for one year and work casually for up to three months at a time. After obtaining his visa, the husband lived rent free with a young Italian couple in Suburb L and worked for three months at a local hospitality business. The wife was not challenged on her evidence

that he earned approximately \$200 a week. The wife deposed that in early December 2004 she rented a unit for the husband in Suburb H and paid all expenses for the unit including the bond, rent of \$290 a week, electricity and furniture expenses. It is the wife's evidence that she could not afford to pay two lots of rent and that cohabitation commenced in late December 2004 when the wife moved in with the husband. At that time the wife's son, A, moved in with his father. The wife said that she routinely paid most household expenses including paying for dinners out and grocery expenses. It is the wife's evidence that she did some of the housework and the husband did the cooking. It is the husband's evidence that he performed all of the cooking, cleaning and other household duties. I understood the husband to reject the wife's evidence that she paid for most of the parties' expenses. The parties were married in May 2005. The wife deposed that she paid all expenses for the wedding and honeymoon. Following the parties' marriage, the husband applied for a Temporary Partner Visa which was granted on 20 September 2005. The wife deposed that she paid all fees associated with the visa application. The husband was granted permanent residency in Australia in November 2007. During the marriage the wife supported the husband's desire to become a professional entertainer. She said that she paid all expenses associated with this venture including lessons, backing tracks, production of brochures, CDs, cards, clothing and shoes. She said that she also created a fan club, wrote and sent out regular newsletters and organised concerts for him to sing at. The wife referred to a concert at a venue in Suburb H, she said that she organised every element of the concert and that over 140 people came. The husband agreed with some but not all of that evidence. In particular he conceded that the wife paid for backing tracks, some advertising and that she established the fan club. In February 2006 the wife was declared bankrupt on her own petition. Shortly before declaring bankruptcy, the wife closed her home practice and commenced work as a consultant with M Firm. She took her files with her and shared fees equally with the firm. The wife lost many clients and gradually her income decreased. The wife said she could no longer afford to meet the husband's entertainment expenses. The wife deposed that she sold her collection of antique items for \$5,000 and this money went to the husband. I understood the husband to dispute that evidence but he was obliged to concede that a little over \$5,000 was paid into his Commonwealth Bank

savings account. In April 2006 the husband flew to Italy for one week to visit his uncle who was unwell. The wife said she organised and paid for the husband's flights. The husband later inherited from his uncle a property situated in the commercial district of City Y, Italy (the Italian property). The wife deposed that the husband told her the property was part of a shop and that the downstairs of the shop was on three titles. She deposed that the husband said he was left one title which was bigger than the other two titles together and that his uncle left money to his father and that his father wanted to buy the uncle's flat from the government but did not have enough money to do so. The wife deposed that she and the husband decided that the rental income from the shop should go to the husband's father to help him buy the flat. The husband disputes this and says that he signed his rights in the property over to his brother on 14 January 2008, before receiving confirmation that he was a beneficiary under his uncle's will. The husband commissioned an evaluation^[2] of the property dated April 2011 which put the property at 43,465.65. That is the agreed value of the property. At the end of 2006 the parties decided to move to Brisbane. On moving to Brisbane, the wife worked at a firm called Q Firm, earning \$45,000 per annum. The husband moved to Brisbane in January 2007 after finishing a casual job in Sydney. The parties moved into a rental property in Suburb S, paying approximately \$375 a week in rent. The wife deposed that while in Brisbane the husband engaged in minimal paid work. He was given a casual position as an entertainer and participated in performances over a period of two weeks. The wife deposed he was paid approximately \$29 per hour for his performances. In July 2007 the husband's father became ill and the husband visited him in Italy. The wife deposed that she sold a mahogany bookcase in order to fund the husband's travel. She gave him \$1,300 for fares and \$1,000 for expenses. Sadly, the husband's father died in December 2007. In January 2008 the husband commenced work at SS Company. The husband was injured at work on 13 March 2008 and attended various medical professionals. The wife deposed that she assisted the husband with all medical care and with legal work resulting from the accident. The husband deposed that the wife did not assist him after the injury. The wife deposed that after a confrontation with her in mid April 2008 and in accordance with her request, the husband left their Brisbane home. The wife changed the locks, resigned from her job

and flew back to Sydney in the following week. The wife deposed that the husband called her when she returned to Sydney and asked her to come back to Brisbane. The wife says she agreed to return on the condition that the husband paid the rent and provided her with the address of the Italian property. The wife says that the husband did both things and that she returned to Brisbane, where the parties briefly resumed their relationship. The parties separated for the last time, on 27 May 2008. The separation date is not addressed in the husband's affidavit but I note that the date is asserted in the wife's Initiating Application and in his Amended Response filed 23 February 2011, the husband formally confirmed [3] that he does not dispute any facts alleged in the wife's Application. The wife returned to live in Sydney on 5 June 2008. She deposed that she had no money, minimal furniture, nowhere to live and was unable to work as she was in a state of shock. The wife received a sickness benefit before obtaining part time work. The wife was subsequently diagnosed with Post Traumatic Stress and commenced receiving a disability pension. On 27 August 2008 C Law Firm were retained to represent the husband in a personal injuries claim arising out of his workplace accident. The wife commenced these proceedings in the Federal Magistrates Court (as the Federal Circuit Court was then known) on 3 March 2009, when she filed her Initiating Application. She sought orders for property settlement (the transfer of the Italian property and 50 per cent of the balance of the husband's assets). She also sought interim orders aimed at preventing the husband leaving Australia. On 15 July 2009 interim orders were made restraining the husband from dealing with the property in Italy, in any way. The parties were divorced on 3 October 2009. After separation the husband commenced a relationship with Ms X. He continues to live with her, in accommodation owned by her and her parents in Brisbane. The husband and Ms X have a child. In 2012 the wife commenced studying a masters degree at a university in Sydney. In September 2012 the wife was diagnosed with early breast cancer and underwent two operations followed by chemotherapy and radiotherapy. On 16 July 2013 C Law Firm received on behalf of the respondent, a letter of offer to settle his personal injury proceedings for the sum of \$163,750. The respondent accepted the offer on 19 July 2013. Sadly, in August 2013 the wife's mother died. The wife deposed that she anticipates receiving a small inheritance from her estate. On 17 March 2014 C Law Firm negotiated a contribution from the

second defendant in the respondents personal injury proceedings in the sum of \$36,000. On 27 May 2014 C Law Firm issued the respondent an invoice for \$83,298.46 in respect of the legal work associated with the personal injury proceedings, which was inclusive of professional fees, disbursements and GST. On 8 May 2014 the Court made an order allowing the intervener to appropriate \$40,000 of the moneys it held on trust for the respondent, on account of the fees owing. The wife deposed that she currently pays \$300 per week in rent, she has no significant assets and a Higher Education Loan Program (HELP) liability to the Australian Taxation Office for university fees of approximately \$34,000. The husband alleged that the wife owns various assets that are in storage, and was concealing an interest in superannuation. The husband lives with his partner, Ms X, and has no income. CREDIT The husband sought to make something of an earlier representation of the wife, that she owed \$20,000 to her trustee in bankruptcy. It is the wife's evidence that she believed that notwithstanding she was made bankrupt, she continued to owe \$20,000 to her trustee in bankruptcy. She said that she has been disabused of that notion and now does not claim to owe such a debt. No adverse credit findings are available on that evidence. The husband disputed that he benefited from the sale of the wife's antique items but the proceeds of sale went into his saving account. It is likely that the husband set out to mislead the Court on that issue. Notwithstanding those circumstances, it is not possible to simply prefer the evidence of one party over that of the other on all disputed issues.

ISSUES There were issues between the parties about the assets and liabilities to be included in the balance sheet used to identify the net pool of assets. In particular the husband contended for, and the wife opposed, the inclusion of a number of assets and several liabilities in the balance sheet. The wife contended that the contributions were equal and the husband argued that the wife made no contributions. Albeit justified in different ways and in different amounts, each of the parties ultimately proposed an adjustment to the wife.

THE LAW The Approach In Proceedings Under Section 79 In the context of these proceedings s 79 of the Act relevantly provides: FAMILY LAW ACT 1975 - SECTION 79 Alteration of property interests (1) In property settlement proceedings, the court may make such order as it considers appropriate: (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them - altering the interests of the parties to the

marriage in the property; or including: (c) an order for a settlement of property in substitution for any interest in the property; and (d) an order requiring: (i) either or both of the parties to the marriage; ... to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines. (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. (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account: (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and (d) the effect of any proposed order upon the earning capacity of either party to the marriage; and (e) the matters referred to in subsection 75(2) so far as they are relevant; and (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and (g) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage. The orders formally sought by the husband raise the issue of whether any order should be made altering the parties' interests in property. The husband's case was something of a moving feast but his proposals included the option of there being no adjustment of property. Following a decision of the High Court in *Stanford v*

Stanford [2012] HCA 52; (2012) 247 CLR 108, consideration has been given as a preliminary issue, to whether it would be just and equitable to make any order for settlement of property. In that case and in a subsequent decision of the Full Court of this Court in *Bevan & Bevan* [2013] FamCAFC 116; [2013] FLC 93-545 it was found that it was not just and equitable to make any order altering the parties' interests in property. However, it was found in those cases that the circumstances giving rise to such a finding, as a preliminary issue, are rare. The consideration as a preliminary issue of whether it would be just and equitable to make an order is often readily addressed. Here, the marriage was short, the main assets were brought in through the husband and they remain in his name. However, I am satisfied that valuable contributions were made by the wife. By his final submissions, the husband appeared to acknowledge that it would not be just and equitable for the wife to receive nothing from the funds held on trust. I agree. In my view, it would be just and equitable that the parties have relief under s 79. I turn to the task of identifying just and equitable orders altering the interests of the parties in property. I will set out the reasoning process in the following way: Make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing; Identify and assess the contributions of the parties within the meaning of ss 79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties; Identify and assess the relevant matters referred to in ss 79(4)(d), (e), (f) and (g), (the other factors) including, because of s 79(4)(e), the matters referred to in s 75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties; and Consider the effect of those findings and determinations and resolve what order is just and equitable in all the circumstances of the case.

THE PROPERTY OF THE PARTIES In determining what order is appropriate, it is necessary to make a finding as to the property of the parties. That involves identifying assets, liabilities and financial resources and their values. The husband did not join in the pre-trial process of settling a joint balance sheet. In the course of the trial and during submissions various contentions were advanced by the parties as follows:

Assets	Owner	Description	Wife's value	Husband's value
H	Italian property	agreed 43,465.65. (At the exchange rate of .6862 on 29 September)	\$63,343	\$63,343
H	Trust			

moneys held by C Law Firm (\$133,894 - \$43,298.49) \$90,595.51 \$90,595.51 W Household contents \$5,000 NK H Household contents \$5,000 NK W Car 0 \$5,000 W Italian paintings 0 NK W 5 art sculptures 0 NK Total \$163,938.51 \$158,938.51 Liabilities Owner Description Wifes value Husbands value H Board and lodgings Mr and Mrs X 0 \$68,870 H Legal fees John R Quinn 0 \$2,354.50 H Legal fees O Firm 0 \$7,197.18 H Loan from Mr P (and others) 0 \$13,292 H T Firm 0 \$3,599.20 Total Nil \$95,312.88 Superannuation Owner Description Wifes value Husbands value W NK H Australian Super accumulation \$1,845.55 \$1,845.55 Total \$1,845.55 \$1,845.55

Asto the issues about the balance sheet: Item 2 The Italian property The evidence about the Italian property is confusing. It appears that the husband inherited the property from an uncle and that there were arrangements within the husbands extended family, including efforts to facilitate the husbands father buying an interest in a related property and about the husband renouncing the inheritance. At paragraph 12 of his affidavit the husband contends that his uncle owned the property and he died in May 2006. The husband deposed^[4] that he signed all my rights over to my brother in 2008. He does not specify what rights he signed over and says that he did not receive confirmation or proof that he had inherited from his uncle until 13 March 2011. Importantly and definitively, I asked the husband whether he continues to be the registered owner of the property and he agreed. Prior to the trial, the wife indicated that she agreed with the valuation asserted by the husband for the property at 43,465.65. During the trial the wifes counsel provided a sheet of current exchange rates as an aidememoir. On that basis the value is recorded as an agreed figure of \$63,343 (based on the exchange rate of .6862 on 29 September 2014).

Item 2 Trust account The settlement was approximately \$200,000. For the purposes of the trial the balance of the fund stood at \$133,894. In the course of final submissions the husband expressed a concern that the balance of the account might be about \$20,000 less than it appeared, saying that he had been told that he would receive of the order of a net \$70,000 from the fund. Learned counsel for the wife contacted the solicitors over a luncheon adjournment was not told of any change to the figure in evidence in the form of a statement of the trust account that formed part of the bundle of documents tendered by the solicitors that made up exhibit 1. That statement put the balance of the funds at \$133,894. Pursuant to an order

made by consent on the first day of the trial the parties authorised the solicitors holding the funds to draw \$43,298.49 in respect of the balance of their fees. That would leave \$90,595.51 in the account. I find that after the legal costs have been withdrawn, the balance of the fund will be \$90,595.51. Items 3 & 4 Household contents Notwithstanding that the figures were proposed in her case, the submission on behalf of the wife is that these items should be omitted. The wife's version of the joint balance sheet had both items at \$5,000 but it was submitted that there is no admissible evidence supporting those values. The husband did not agree with the wife's proposed figure for household contents and did not advance any evidence of valuation. The husband complained that the wife had caused household contents to be stored at her mother's property in rural New South Wales. I suspect that he was also referring to other items of personalty, such as art works. He relied on a document executed by the wife's brother^[5] in respect of his contention about the value of personalty in the wife's possession or control. During his cross-examination of the wife the husband put a series of questions that seemed to be aimed at the proposition how could there be no valuable personalty (as the wife contends) when it cost you \$11,000 to move it and it required storage in [rural New South Wales], both in your mother's shed and in a storage facility. The wife's response was to the effect that the \$11,000 plus, she borrowed from her mother was applied not only to her removal expenses when she moved from Brisbane but also to her living expenses and that a further \$3,000 went to pay for a course aimed at preparing her to teach English as a second language. There the topic was left. I cannot make findings, based on that evidence, that there are valuable items of personalty; let alone what they are or what they are worth. I will not include provision for household contents in the balance sheet. Item 5 Car It is the husband's submission that an allowance should be made in the balance sheet for a motor vehicle, owned by the wife that has subsequently been sold. He contended, without any complaint advanced on behalf of the wife, that the vehicle had been sold by the wife for \$5,000. In some cases, an allowance is made in the balance sheet drawn up for the purposes of s 79 proceedings, for assets that no longer exist. As I understand the state of the authorities on this issue, there are no circumstances whereby add-backs must be included, nor are add-backs proscribed in all situations. However, they have been found to be the exception rather than

the rule...Cerini & Cerini [1998] FamCA 143. There is no evidence to suggest that the \$5,000 is represented by any existing asset. Life goes on after separation and the necessary priority is to identify the assets that exist at the time of the hearing. There would not normally be an add-back for funds applied to living expenses. I will not make provision in the balance sheet for the proceeds of sale of the motor vehicle.

Item 6 Italian Paintings The husband put to the wife in cross-examination that during the marriage she had decorated her work premises with original paintings. The wife said that she placed prints on the walls, including a print of a Picasso painting but said that she did not have any original paintings. There is no evidence to identify the paintings to which the husband seeks to refer or their value. I will not include this item in the balance sheet. It is inherently unlikely that the wife, who came into the marriage as a single mother, living in rented premises, owned or was subsequently able to afford, original works by Picasso or any other great artist.

Item 7 5 Art Sculptures The husband asserts that the wife has some sculptures. He was asked in cross-examination about the particular sculptures and described a sculpture of a hawk. There is no evidence to identify the sculptures or their value. I will not include this item in the balance sheet. The wife's HELP debt The wife gave evidence of a debt to the Commonwealth for her university courses of nearly \$34,000. However, her counsel said the debt was not claimed to be a joint debt nor one to which the husband should contribute. I will not include the debt in the balance sheet used to identify the net matrimonial assets. The wife's legal fees The wife owes \$21,560 in counsel's fees for the hearing. Again, her counsel said the debt was not claimed to be a joint debt nor one to which the husband should contribute at this stage of the proceedings. I will not include the debt in the balance sheet used to identify the net matrimonial assets.

Item 8 Board and lodgings As a very general proposition, debts necessarily incurred for living expenses would normally be included in the balance sheet created for section 79 proceedings. It is the husband's case that he has lived with the X family since May 2008. Although they are not married, he is in a relationship with Ms X and he and Ms X have a child. The husband contends that he owes \$64,870 to the parents of Ms X. The husband relies on a statutory declaration^[6] that was prepared and executed on 11 November 2013, to evidence a debt that he says, has accrued since May 2008 and which is ongoing. The debt was fixed

by that statutory declaration at \$64,870 on 11 November 2013. There are a number of problems with this claim. There is no evidence about how the debt was originally established. It is said to be evidenced by a document created more than five years after the debt is said to have commenced. Although he does not specify what it is, the husband contends that the debt is in fact greater than the claimed \$64,870 because it continues to grow. The debt is referred to in the husband's Financial Statement at paragraph 53 at \$64,870, notwithstanding that Financial Statement was sworn 28 March 2014. It is however, not mentioned in Part F of his Financial Statement where the husband was obliged to set out expenses paid by others for his benefit, nor at Part G where his personal expenses should be set out. The husband conceded in cross-examination that the asserted debt is not mentioned at all in his Financial Statements filed in 2009 and 2011. The fact that the husband only claims the debt as it was asserted to stand at November 2013 was raised with the husband, including in final submissions. He responded to the effect that he could not calculate the current balance. It was pointed out that if that was so, then perhaps there is no debt. There is no credible evidence of how the alleged debt was established nor as to its terms. That gives rise to the concern that the debt is a matter of recent invention and/or that it is not owed or in any event, that it will not be enforced. Even if the debt is established, in those circumstances the Court has discretion to exclude it from the relevant balance sheet[7]. I will not include this as a relevant debt.

Item 9 Legal fees John R Quinn The husband owes John R Quinn & Associates, \$2,354.50 for legal fees associated with these proceedings. The time for consideration of the legal fees of the parties in the subject proceedings, if ever, is within the context of a costs application under s 117 of the Act. To include the parties' liabilities for legal fees in the balance sheet could have the effect of requiring one party to contribute to the legal costs of the other, outside the parameters of a costs application. I will not include the husband's legal costs in the balance sheet. It is appropriate to note that had the husband's liability been included, the wife would be entitled to include in the balance sheet, provision for her legal fees of \$21,560[8].

Item 10 Legal fees O Firm The husband owes O Firm \$7,197.18 for legal fees associated with proceedings in the NSW Supreme Court to which the husband and wife are parties. As I understand it, those proceedings are ongoing. In the ordinary course, the forum

for disputes about the cost of proceedings is the Court in which the proceedings are instituted. I will not include the husband's legal costs in the balance sheet.

Item 11 Loan from Mr P The husband contends that he owes \$13,292 to members of his family. There is evidence of the transmission of funds to the husband [9] but no evidence of the agreement or agreements that established the nature of the transactions, let alone any evidence of the terms of any agreements in respect of the transactions. I will not include the alleged debts in the balance sheet. In this regard there is also the confusing evidence about rental income from the husband's property in Italy. The only evidence about that income is that the parties agreed that it would be allocated to the husband's father. Since his death questions arise about that income. It is certainly not brought to account otherwise in the husband's financial disclosure. One can only speculate but if the husband has a debt to members of his family, perhaps there is a set off or another fund from which that debt could be addressed.

Item 12 T Firm The husband claims that he owes \$3,599.20 to T Firm for work associated with his personal injury claim. In the orders made on 29 September 2014 the husband agreed to take responsibility for that debt. I was told by learned counsel for the wife that thereby the husband agreed that the debt would not be included in the balance sheet. When I raised that matter with the husband I understood him to confirm that proposition. I will not include the debt in the balance sheet.

Item 13 Wives Superannuation It is part of the husband's case that the wife has a superannuation interest or superannuation interests. To be fair I understand his case to be no more than the wife has worked for many years and therefore she must have a valuable superannuation interest. It is the wife's evidence that she had no superannuation interests when the parties met and that she subsequently built up a modest entitlement that she cashed in after separation. At annexure K to her affidavit there are statements from AMP revealing that as at 14 February 2011 she had no superannuation entitlement and noting that she had withdrawn a total of \$3,050.52 since 1 July 2010. There is no evidence that the wife has a superannuation interest.

Item 14 Husband's Superannuation The husband's superannuation interest is agreed at \$1,845.55. I find that the relevant assets and liabilities are as follows:

Assets	Owner	Description	Value
H Italian property,	agreed	43,465.65.	At the exchange rate of .6862 on 29 September) \$63,343
H Trust			

moneys held by C Law Firm (\$133,894 - \$43,298.49) \$90,595.51 H Superannuation \$1,845.55 Total \$155,784.06 Net assets Therelevant assets have a value of \$155,784.06 of which \$1,845.55 is in the form ofsuperannuation. There are no relevant liabilities. Financial Resources Thewife has an expectation arising from the death of her mother. Her mother diedin August 2013. There is no authoritative evidenceabout the likely benefit tothe wife. It is her evidence that her mothers estate is valued at about\$180,000. The wife saysshe is one of six children and that there is achallenge to her mothers will by a former partner. Thehusband is in a relationship with Ms X. There is evidence that she is on thetitle of real estate in Queensland with her parents. There is no evidence as tothe significance of that potential resource. For example, there is no evidenceof the value of the propertyor of the extent to which it may be encumbered, letalone any other evidence about the financial circumstances of Ms X. Thestate of the evidence does not permit any significance being attached to those matters. CONTRIBUTIONS Theobligations placed on the Court by s 79 call for an assessment of the respectivecontributions by and on behalf of the husband and wife. Ina sense there is an issue about the way in which contributions should betreated. It is the husbands contention (as opposedto his evidence) thatthe wife made no contributions at all. The submission made in the wifescase is that the contributionsshould be seen as equal. Thepool of assets is modest and although the wife made little or no contribution tothe main assets, on balance the best course isto apply the provisions of s79(4) globally. Section 79(4)(a) Contributions Thefocus of this provision is financial contributions madedirectly or indirectly by or on behalf of a partyto the marriage to theacquisition, conservation or improvement of any of the propertyof the parties to the marriageor either of them, whether or notthat propertyhas ceased to be the propertyof the parties to the marriageor either of them. Theparties had little property at the commencement of their relationship. Whatthere was, in terms of furniture and other personaltywas that of the wife. Forthe purposes of these proceedings, those assets have no remaining value but thatdoes not detract fromthe contribution made and it was the sole contribution ofthe wife. It is the wifes evidence that she had no superannuationinterests at the commencement of the relationship. Other than the two remainingitems of property, there is no evidence that theparties acquired anysignificant assets

during the marriage. The wife acquired a modest superannuation interest during the marriage and accessed that interest after separation in 2010-2011 and applied it to her own purposes. The two substantial assets are the husband's Italian property and the remainder of the husband's personal injuries settlement held in the trust account of C Law Firm. Neither of the parties made any contribution to the Italian property as it was inherited by the husband. In accordance with the time-honoured approach it must be seen as an asset brought to the marriage by the husband and therefore, his contribution. There was no direct or indirect financial contribution to the property by the wife. Similarly, the personal injuries award arose from a workplace injury suffered by the husband and should be largely, if not exclusively seen as his contribution^[10]. The personal injuries payment resulted from a settlement and therefore there are no identified components of an award such as for pain and suffering; loss of past income; loss of future income or any identified allowance for care provided to the husband. The wife made no direct financial contribution to that settlement. There is no evidence to suggest that in the two months between the date of the injury and the final separation of the parties, the wife made any significant indirect financial contribution to the settlement. The accident occurred in March 2008 and the parties separated on 27 May 2008. As the wife deposed, she required the husband to leave their Brisbane accommodation in mid-April and from soon after that until a date later in April or in May of 2008 (a date not identified in the evidence), the wife was in Sydney. The wife says that the husband brought the rent up to date, as a condition of her returning to live in Brisbane. I note the evidence^[11] of the husband's receipt of workers compensation payments from 14 March 2008 to 21 April 2008 and he had two days work in early May. The overwhelming financial contribution to assets was made by the husband. Section 79(4)(b) Contributions This provision deals with direct and indirect non-financial contributions to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them (other than those made in the form of parent and homemaker contributions). The husband alone contributed to his superannuation. Again the only significant assets are the Italian property and the personal injuries settlement. There was no direct or indirect non-financial contribution by the wife to the Italian property. As to the personal injuries award, it is the wife's evidence that she filled in forms for

the husband and assisted him attending doctors, the Hospital and that she arranged for physiotherapy. She arranged for the husband to see lawyers, took him to see trade union officials and wrote numerous letters to the husband's former employer. There is no evidence that those arrangements were in support of the personal injuries claim. Indeed the timing would suggest that they were more to do with initial treatment and an application for workers compensation. Finally, I may be wrong but far from supporting the husband's personal injuries claim, I understood from something said during the trial, that the wife considered the claim to be fraudulent. As I say, I could be wrong about that. As to physical support, the wife's evidence leaves little scope for this argument. She would have it that the husband's injuries were minor. It is the wife's evidence that the husband suffered bruised ribs and stayed home for three or four days and gradually recovered. The wife deposed that she continued to do everything at home as well as work to support us. Again, the only opportunity for the wife to make those contributions was in the period from 14 March 2008 until she evicted the husband from their home in April 2008 and then from the (unidentified) date in April or May 2008 when she returned from Sydney until 27 May 2008. It is possible that the wife made some direct and indirect non-financial contributions to the award but, if so, they were modest.

Section 79(4)(c) Contributions This provision deals with contributions to the family including contributions in the form of homemaker contributions and contributions to children of the marriage. There are no children of the marriage. It is agreed that the husband made homemaker contributions. The wife concedes that he did the cooking and although she contends that she did some housework, she does not assert that she did it all. On the other hand, the husband does not concede that the wife performed any household duties. Neither of the parties was challenged in cross-examination about their evidence on this issue. It is inherently unlikely that the wife performed no household duties during the marriage. The parties both earned income from personal exertion during the marriage. Normally, income from wages would be relevant to s 79(4)(a) but here there is no identified link, whether direct or indirect, between the application of that income and the acquisition, conservation or improvement of any past or present property of the parties. The evidence suggests that the parties' income was largely, if not exclusively applied to their living expenses, expenses associated with the

husbands visa applications, the costs associated with husbands travel to Italy and the costs associated with the husbands entertainment career. On that basis the appropriate place to recognise the contributions made with the parties income is under this provision. Learned counsel for the wife identified two sources for evidence about the income of the parties during the period of their relationship. In respect of the wife, she cited income tax returns[12] for the relevant years. In relation to the husband she cited the husbands income statement[13] attached to his compensation application. The form completed by the husband only called for his income over the three years preceding the injury. The husband has not given other specific evidence about his income nor has he introduced his income tax returns into evidence. I recall that in the course of his oral evidence he may have said something to the effect that from time to time he had other casual employment. The thrust of the argument made on behalf of the wife was that it would have been in the husbands interests to fully identify his past earnings in support of his compensation claim. I accept that, as a matter of logic. There would be no obvious reason for the husband to understate his income in that statement, quite the contrary. In any event I am not permitted to make assumptions about matters that could have readily been addressed in evidence and were not. There are minor differences in my calculations of the husbands income to the calculations advanced on behalf of the wife. If my calculations are correct then it is possible that in summarising the evidence about the parties incomes the wifes counsel may have relied on the wifes taxable income but, in some instances, on the husbands after tax income. I do not suggest that counsel was trying to mislead the Court. By my calculations, the before-tax income of the parties over the years of their relationship, revealed in the evidence, was as follows:

Year ending 30 June	Wifes income	Husbands income
2005	\$65,709	Not Known
2006	\$30,281	\$17,399
2007	\$26,021	\$27,128
2008	\$47,202	\$17,517
Total	\$169,213.00	\$62,044.00

Although it is not clearly identified anywhere, the husband had some income in the first year of the parties relationship. The wife conceded that fact. The husband was the holder of holiday visas until October 2004. It was the wifes evidence that notwithstanding the restrictions imposed on holders of holiday visas, the husband did some work for Mr J while subject to such a visa. In October 2004 the husband secured a working holiday visa,

permitting casual work in three month blocks. For three months from October 2004 the husband worked in a hospitality business. The wife deposed to the husband working a few hours a day and earning about \$200 per week. Thereafter, the wife contends that he only worked intermittently. Suffice it to say that the wife's income during the parties' relationship was greater than that of the husband. The parties are not in complete agreement about who paid for which expenses. It is agreed that the wife paid for some items relating to the husband's work as an entertainer. However, the husband disputed the contention that the wife paid for clothing identified in an invoice dated 16 February of an unidentified year from Casa Adamo at a cost of \$1,780[14]. I do not recall him asserting that he paid for that clothing but that is the implication in his case. Given the imbalance in the parties' income it is more probable than not that the wife paid for those clothes. I note that in the statement from the husband's Commonwealth Bank savings account for the period 15 December 2005 to 13 March 2006[15] the only significant credits are endorsed DB Antiques. That corroborates the wife's evidence that she sold her collection of antique items to support the husband's entertainment career. All manner of allegations are made one party against the other in these proceedings but I do not recall any allegation to the effect that either party made significant diversions of their income from the purposes of the marriage. While the wife's income was greater than that of the husband, both parties earned income from personal exertion during the marriage. It is an agreed fact that the wife made arrangements to support the husband's career as an entertainer. It transpired that those efforts were not repaid in the formation of a successful entertainment career but they assisted the husband in any event. Similarly, the physical and financial contributions towards the husband's status in Australia were exclusively to his long-term benefit. The same applies to the husband's travel to Italy. Of course it is not required that the relevant contributions are only those that bear financial fruit. The husband is likely to have performed more of the homemaker contributions, than the wife, if only because she was more engaged in paid employment than him. The wife's income was greater than that of the husband and, apart from normal living expenses, the husband had greater individual benefit from the application of that income. The wife's contributions of this type were greater than those of the husband. Conclusion on Contribution Cases such as this present a particular challenge

in identifying and explaining a finding on contribution. There is no consensus as to the permissible range of findings and the range of dispute between the parties is so extensive as to be unhelpful. More than that, I am reasonably confident in recording that the contribution finding pressed on the Court by each of the parties is outside the legitimate range of discretion on the issue. Each case is unique and in my view there is nothing to be learnt from the outcome of other cases, the facts of which might be said to be analogous to circumstances before me. That said, neither of the parties referred to similar fact cases. This was a short marriage, where there are no children and where the only significant property comprises two assets that were brought into the marriage by the husband and to which the wife made little or no contribution. It follows that the contributions of the husband substantially exceeded the contributions of the wife. There is no doubt that the wife provided the more financial support to the household than the husband but he made the greater contribution overall. Without the Italian property and the personal injury settlement it is possible that the husband would be found to have made substantial, if not equal contributions to those of the wife. The parties both had paid employment, with the wife earning more and working more consistently than the husband but with the husband performing more of the homemaker role. That suggests that a significant margin is required to acknowledge the two assets contributed by the husband. Taking those matters into account, I am satisfied that the parties' contributions would be properly recognised with a finding that they were made in the proportions 70 per cent by the husband and on his behalf, compared to 30 per cent by the wife. What might otherwise be seen as a generous allowance to the wife is justified by her contributions to the husband's career, his status in Australia and his family travel.

THE OTHER MATTERS IN SECTION 79 Once contributions have been assessed, the other factors in s 79(4) need to be considered. The relevant matters are: The wife is 62 years of age and the husband is 39 years of age. In September 2012 the wife was diagnosed with early breast cancer and underwent two operations followed by chemotherapy and radiotherapy. The wife deposes that she was subsequently diagnosed to have Post Traumatic Stress Disorder and is on a disability support pension. The wife's cancer is in remission. The wife has undergone psychological treatment. From August 2010 to February 2011 she saw Ms R and since 22 May 2012

has seen Clinical Psychologist Ms Z. Ms Z says that the wife's symptoms of depression and Traumatic Stress Disorder have reduced with treatment but she opines that the wife will need ongoing support in order to maintain stable mood and to prevent a relapse. The husband suffered a workplace injury in March 2008. There is no evidence about this current state of health. The wife's income is \$440 per week in the form of the disability support pension. According to her Financial Statement she lives alone, receives no benefit from any other person and her only expenditure is \$300 per week on rent. It makes no sense that she has no other expenditure but that is her evidence. The evidence about the wife's assets and liabilities is set out earlier in these reasons. I note in particular that she declares no personal or consumer debt. The wife does not anticipate that she will be able to return to full time work. I assume from the nature of her further studies (postgraduate studies in law) that the wife hopes to return to legal work in some form. However, the wife is 62 years of age and therefore, at an age when many would anticipate retiring from the paid workforce. In the wife's case she has experienced significantly compromised physical and psychological health. It was not suggested to the wife during cross-examination, nor in the course of the husband's submission that she has a significant degree of unexercised earning capacity. The husband's Financial Statement asserts that he has no income and no outgoings. It is his sworn evidence that there are no other income earners in his household[16] and as is referred to above, it is his evidence that he does not benefit from payments made by others. The evidence about his assets and liabilities is addressed above. A division of the assets in accordance with the finding about contributions will leave the husband with more assets than the wife. There is no evidence about the husband's earning capacity. There is no evidence about the relevant standard of living. The husband makes assertions about the wife having some overseas travel since separation. There is no evidence about the extent or cost of that travel, let alone how it was funded. The husband travelled to Italy during the marriage. The only agreed creditors are the Commonwealth through the HELP scheme and lawyers who acted for the parties in relation to these and other proceedings. As I understand it, repayments under the HELP scheme are triggered by taxable income at a certain minimum level. It is possible that the wife will not return to the threshold level of income. Suffice it to say that the greater

the payment to each party the better they will be able to repay their debts. The wife contributed to the husband's income although she contends that his income was minimal. Sadly, neither party has revealed a current earning capacity. I have referred to the evidence about contributions to property above. As to the duration of the marriage and the extent to which it has affected the earning capacity of the parties: there is no evidence about the husband's earning capacity at the start or the finish of the marriage. It is likely that the marriage adversely affected the wife's earning capacity although there must also have been some impact from her poor health since separation. The husband failed to give any evidence about the financial circumstances relating to his cohabitation with Ms X. Although he adduced no evidence about it, it is possible that there are circumstances in respect of the Italian property that would be relevant. As I have mentioned above, there is evidence that at some time there was income received from the property. If there continues to be such income and it is available to the husband then he has failed to disclose that fact. On the other hand, if there is something about the property that restricts or limits the husband's capacity to deal with it then that would be relevant. Given that possibility and in any event, there are likely to be advantages to the wife in receiving her settlement exclusively in the form of cash from the settlement funds, rather than by orders in respect of the Italian property.

CONCLUSION It is submitted on behalf of the wife that there should be an adjustment of between 3 per cent and 5 per cent in her favour based on the difference in age between the parties, the wife's poor health and the fact that it would be unjust if no allowance were made. The husband volunteered at one point that there should be a payment to the wife calculated at 25 per cent of the value of the fund held by C Law Firm. That would be about \$22,648. I accept that in each case those submissions were based on the arguments made about the balance sheet and about contributions. Given that fact, it would be permissible to contemplate a larger adjustment than the adjustment proposed in the wife's case. The relevant matters arising from the remaining elements of s 79, which include the s 75(2) factors referred to above are: A division based on contributions alone will leave the husband in better financial circumstances than the wife. In dollar terms he will be over \$62,000 better off; The husband is over 20 years younger than the wife; The wife has suffered a very serious and debilitating illness and has compromised mental health; and

The husband has not given proper financial disclosure and in particular, has not disclosed the financial incidents of his relationship with Ms X. There is a modest pool of assets. In the context of that pool, an allowance of 5 percent would represent \$7,789.20 and would make a disparity between the parties of twice that sum. In my view that is the proper allowance to the wife. Just and Equitable

The relevant assets have a value of \$155,784.06 of which \$1,845.55 is in the form of superannuation. If the assets are divided in the proportions 65 per cent to the husband and 35 per cent to the wife then the husband will have assets worth about \$101,259.64 and the wife will have about \$54,524.42. The parties apparently agree that any adjustment between them will be made out of the funds held on trust. Despite the wording of the orders formally sought by her, I understand that the wife no longer considers it to be practicable for her to take any interest in the Italian property or for the Court to make an enforceable order for its disposition. Therefore the operative order will deal with the division of the fund held in the controlled money's account. The pool of assets identified by me is as follows:

Owner	Description	Value
H	Italian property, agreed	43,465.65
(At the exchange rate of .6862 on 29 September)		
		\$63,343
H	Trust money's held by C Law Firm (\$133,894 - \$43,298.49)	\$90,595.51
H	Superannuation	\$1,845.55
Total		\$155,784.06

In order to achieve a settlement of 35 per cent of the assets, the wife should receive \$54,524.42 from the invested funds. I will round that up to \$54,525. The wife will owe her counsel's fees and HELP debt. That will leave the husband with \$36,070.51 from the settlement money's, the Italian property and his superannuation. He will owe money's to his lawyers. It should not go without saying that the financial cost of these proceedings, not to mention the stress and delay incurred by the parties, are out of all proportion to the modest pool of assets in dispute. These were proceedings that the parties should have compromised long ago. That said, in the circumstances I am satisfied that orders that achieve the proposed division are just and equitable.

CONCLUSION UNDER SECTION 79 This was a marriage that spanned four years. The parties both made contributions but the assets are of modest value. The main assets were contributed by the husband. An adjustment in favour of the wife is justified by reference to considerations arising from s 79(4)(e). In my view the orders proposed will reflect a just and equitable division of their property.

OTHER ISSUES The husband appeared to be greatly aggrieved about the general conduct

of the wife since separation, which he characterised as defaming him and seeking to do him damage, as well as her conduct in other proceedings between the parties. In that regard the husband sought several orders seeking to address those grievances. I understand that the husband and wife are engaged in other proceedings about those matters. In any event, to the extent that the matters raised by the husband in exhibit 9 are in the form of orders sought about issues that are within the jurisdiction of this Court, he has not made a case for relief. I certify that the preceding one hundred and fifty one (151) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Loughnan delivered on 17 October 2014. Associate: Date: 17 October 2014 [1] Exhibit 9. [2] Annexure P to the husband's affidavit [3] Paragraph 19 [4] Paragraph 12 of the husband's affidavit [5] Annexure B to the husband's affidavit [6] Annexure M to the husband's affidavit [7] See *Biltoft & Biltoft* [1995] FamCA 45; (1995) FLC 92-614 in relation to uncertain or questionable debts [8] Invoice for counsels fees - Exhibit 6 [9] See copies of Western Union Money Transfer documents which are part of annexure M to the husband's affidavit [10] See reference in *Aleksovski & Aleksovski* (1996) FLC 92-705 at 83,437 that a damages verdict arising from a personal injury claim, whenever received, is a contribution by the party who suffered the injury. [11] Exhibit 3 [12] Exhibit 4 [13] Exhibit 3 [14] Annexure C to the wife's affidavit [15] Annexure D to the wife's affidavit [16] Part E of the husband's Financial Statement AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/880.html>

