

FAMILY LAW PROPERTY SETTLEMENT Where the initial financial position of the husband was vastly stronger than that of the wife and should be acknowledged as a significant contribution by him where the husband was responsible for the financial contributions where the contribution by the wife to the welfare of the husband, his four children and their two children is regarded as highly significant where the husband has made inadequate disclosure where the husband, benefiting from an inheritance and Trust fund, made no contributions to the wife or their children where the inference arises that the husband, given his attitude to disclosure, allowed the property to run down deliberately for the purpose of these proceedings where, with particular reference to care and control of the children, an adjustment is made in favour of the wife wife entitled to 60 percent of the assets Husband entitled to 40 per cent of the assets no superannuation splitting order sought. Family Law Act 1975 (Cth) ss 75, 79, 106A Black v Kelner (1992) 15 Fam LR 343 Pierce v Pierce [1998] FamCA 74; (1999) FLC 92-844 Stanford v Stanford [2012] HCA 52; (2012) 247 CLR 108 APPLICANT Mr Matthews RESPONDENT: Ms Matthews FILE NUMBER: (P)NCC 962 of 2008 DATE DELIVERED: 2 October 2014 PLACE DELIVERED: Newcastle PLACE HEARD: Brisbane JUDGMENT OF: Cleary J HEARING DATES: 3, 4 and 10 July 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Vassili SOLICITOR FOR THE APPLICANT: Michael Vassili Barristers & Solicitors RESPONDENT: In person ORDERS (1) That the husband shall pay to the wife the sum of \$341,824 within 60 days of the date of these orders. (2) That in the event that the husband does not comply with Order 1, then both parties shall take all necessary steps and execute all necessary documents to cause the property situate at R Road, R in the State of New South Wales, being the whole of the land comprised in title reference ... (the R property) to be sold by private treaty at the earliest possible date at a price to be agreed on by the parties and failing such agreement, to be determined by the proper officer of the Real Estate Institute or his nominee and that the proceeds of the said sale be dispersed as follows: (a) payment of agents commission, advertising expenses and reasonable legal costs of sale; (b) payment of NAB loan account (mortgage account number ...991) of any monies due and owing; (c) the net proceeds to be divided as to 85 per cent to the wife; 15 per cent to the husband. (3) That in the event that the property fails to be sold by private treaty within a period of

90 days of the date hereof, then each party shall take all necessary steps and execute all necessary documents to cause the said property to be sold by auction at the earliest possible date at a reserve to be agreed upon between the parties and failing such agreement to be determined by the proper officer of the Real Estate Institute or his nominee and that the proceeds of the sale be disbursed as outlined in Order 2(a), (b) and (c) herein. (4) That on or before completion of the sale of the property the husband will provide vacant possession of all residential properties on the land, remove all items not included in the sale and ensure that the property is left in a clean and tidy condition. (5) That the husband shall retain the balance of all plant and equipment on the property and all livestock, including cattle, pigs and horses located on the property, to the exclusion of the wife and the wife shall have no claim over that plant, equipment and livestock. (6) Each party shall otherwise retain the items of personalty currently in his and her possession including but not limited to interests in superannuation, bank accounts and motor vehicles. (7) That in the event the husband or wife refuses or neglects to execute any deed or instrument necessary to give effect to these Orders, then a Registrar of the Family Court Newcastle be appointed pursuant to s 106A of the Family Law Act to execute such deed or instrument in the name of the husband or wife and to do all acts and things necessary to give validity and operation to the said deed or instrument and such Registrar shall be satisfied upon affidavit evidence of the party alleging the refusal or neglect that a party is in breach of these Orders. The party in default is ordered to pay all reasonable solicitor/client costs incurred by the party not in default for the purpose of enforcing this Order, to be taxed if not agreed. IT IS NOTED that publication of this judgment by this Court under the pseudonym Matthews & Matthews 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 NEWCASTLE  
FILE NUMBER: (P)NCC962 of 2008 Mr Matthews Applicant And Ms Matthews Respondent

REASONS FOR JUDGMENT INTRODUCTION This is a dispute over the adjustment of interests in matrimonial property. The applicant is the wife (40); the respondent is the husband (52). The parties began living together in 2001 and married in 2002. They have two children aged 10 and almost nine. The parties have reached agreement on the parenting arrangements for them. They live with their

mother and spendtime with their father. Therewere several short periods of estrangement before final separation in March2010. Theonly significant asset is a rural property, run as a farm (the farmproperty). The husband had purchased the propertyin 1999 and was livingand working there when the wife moved to live with him in late 2001. Afterseparation the husband remained living and working on the property. The wifeand children moved to live in a local city. Bothparties have formed new relationships. Bothparties wish to acquire the property as a result of these proceedings.

**CIRCUMSTANCES AT COHABITATION** Theparties began their relationship towards the end of 2001. To the extent thatthere had been a dispute about that, the husbandconceded in his oral evidencethe wifes version of events. Atthe time of commencement of cohabitation, the husband was 39, a widower withfour children, three of whom lived with him. Theywere the three sons of hisfirst marriage, then aged 10, nine and six. Their mother, his first wife, haddied some years previously. His youngest child, then aged five, was thedaughter of a prior de facto relationship. She lived with her mother and spenttimein school holidays with her father during his marriage to the applicantwife. Thewife was working as a technician and salesperson in a local city when she movedto live with the husband and his children. Shewas single, had no children andwas aged 27. Husband injured in accident prior to marriage - Trustestablished InJanuary 1994, almost eight years prior to cohabitation, the husband was involvedin a motor vehicle accident. He suffered multipleinjuries. He was then livingwith his first wife. InDecember 1994 the husband separated from his first wife. In1995 he commenced proceedings and was ultimately awarded \$2 million indamages. InSeptember 1998, the M Trust (The Trust) was established to receivethe balance of his personal injury judgment monies. The trustee of that trustwas Perpetual Trustee Limited (the Trust Company). Someof those funds were used in November 1999 for the purchase of the farm property.The purchase price of \$425,000, stamp duty andlegal fees were paid from theTrust. In2001 a payment by way of de facto property settlement of \$40,000 was paid fromthe trust. Subsequentimprovements to the R property, including the installation of a swimming pooland building of a car port, were funded bythe Trust. Regularpayments of approximately \$2,200 per fortnight were paid by the Trust tosupplement farm income. Ad hoc payments were alsomade for such things asschool fees, rates, tax and household

bills. In 2009 the Trust advised the parties that the fortnightly payments could not be sustained.<sup>[1]</sup> The parties made a submission for the payments to continue acknowledging that the Trust would run out in four to six years. In April 2010, the month after separation, the Trust was valued at \$233,616.<sup>[2]</sup> In November 2011 the husband received the last fortnightly payment from the Trust. In June 2013 the final payment of \$5,211 was made to the husband leaving the Trust with a nil balance.

### HISTORY OF THE LITIGATION OVER PROPERTY

On 3 September 2012 the wife filed an Initiating Application in the Federal Magistrates Court (as it then was) seeking final orders which would have the effect of liquidating the assets, including the R property, and dispersing the funds in a ratio of 70/30 in her favour. Interim orders were also sought for an accounting of livestock, machinery and a restraint on selling same. It is apparent in retrospect that the husband was profoundly offended by this application and became determined not to cooperate with the process. The matter unfolded in the following way. On 9 November 2012 the wife filed an Application in a Case seeking orders to restrain the husband from dealing with the R property, the breeding stock on the property and the equipment and tools owned by a business run by the parties. On 19 November 2012 orders were made in the Federal Magistrates Court for a conciliation conference, with directions for progression of the matter. On 16 December 2012 the husband filed his Response proposing final orders as follows: transfer to the wife of two horses, a motor vehicle, the bulldozer and a truck; with the wife to transfer to the husband her right to any other property. On 14 March 2013 the conciliation conference, due to take place in four days time, was rescheduled to a date in July 2013. At that time it was noted that the parties were significantly apart on the value of the rural property, but had a joint intention to see the property sold with discussion about the percentage division of proceeds. The matter was unresolved. On 25 July 2013 the proceedings were transferred to this Court. On 7 August 2013 orders were made by a Registrar for the provision by the husband of documents, particularly loan statements in relation to the liability secured on the rural property, and distributions from the Trust. Directions were made for the appointment of a valuer. On 2 October 2013 further directions were made by a Registrar. On 13 November 2013 further orders were made by a Registrar, with particular reference to the delivery by the husband of documents relating to the Trust, bank statements from the businesses and

lists of plant and equipment and livestock from depreciation schedules, with a fall back provision to the wife to issue subpoena in the event those documents were not produced by the husband. There was a notation to those orders that the husband was attending to the 2011/2012 taxation returns and that a draft set of minutes of consent orders were in existence. On 29 November 2013 the wife filed an Application in a Case seeking a payment to her of \$50,000. On 18 December 2013 orders were made by a Registrar for the husband to file a Response to that Application in a Case and other directions. There was a notation to those orders that the wife alleged that the husband had not complied with earlier directions to provide particular documents. On 17 January 2014 the wife filed an Amended Application in a Case seeking an increased payment, that is \$100,000, within 21 days by way of interim property settlement with a fall back provision for sale of livestock and the R property itself. On 21 February 2014 the husband filed a Response seeking only dismissal of the mother's application. On 24 February 2014 orders were made that the husband pay the wife \$100,000. On 18 March 2014 the husband filed a Notice of Appeal from that order. On 20 March 2014 the wife filed an Application in a Case seeking orders that the husband provide: Full disclosure in respect of work performed by him from the date of separation to date; Copies of relevant bank statements; Invoices for works performed by him for third parties; Bank statements and account details for the Trust; An accounting of all pigs sold with a fall-back position that if the husband did not comply, his Response to the Initiating Application be dismissed and the matter proceed undefended. There was an affidavit in support of the Application in a Case by the wife's solicitor setting out in detail the allegations made by the wife of past non-disclosure by the husband. On 26 March 2014 orders were made by consent for provision by the husband of tax invoice books, financial reports, financial statements and taxation returns and for the wife to supply to the husband copies of her taxation returns, tax assessment notices and other documents. There were extensive notes to those consent orders, which were effectively the parties arguing their respective cases through notes. On 17 April 2014 the husband was not present at Court. The matter was given expedited final hearing dates for two days in July 2014; directions were made and notations that: the valuation of plant equipment livestock and motor vehicles was to take place shortly; and the husband had failed to comply with

particular previous orders. On 5 May 2014 the husband filed an Application in a Case seeking a stay of the interim orders made on 24 February 2014. On 9 May 2014 the Application for a stay was dismissed. Costs were awarded to the wife. On 27 May 2014 directions were made for payment of hearing fees. On 5 June 2014 the husband filed an Application in an Appeal to expedite the appeal hearing. That application was granted. On 10 June 2014 the Appeal from the interim orders of February 2014 was heard. On 19 June 2014 orders were made by the Full Court allowing the appeal by consent and defining the particular items which the wife was to receive from the husband. By the conclusion of final hearing, those orders had not been complied with. On 23 June 2014 the wife filed an Application in a Case seeking to rely on a further affidavit. On 26 June 2014 the husband's solicitors filed a Notice of Ceasing to Act. Also on that day the husband filed his affidavit and financial statement, prepared by that firm of solicitors. In my view, the reason for the matter taking almost two years to come to trial relates largely to delay in disclosure and resistance to the process by the husband. Further, despite painstaking cross examination of the husband relying on the documents available, I am not satisfied that the full financial position of the husband was revealed.

Conduct of the trial On 3 July 2014 the two day hearing before me commenced. The husband represented himself and appeared to find the task difficult and confronting. He cross-examined the wife and her witnesses. The hearing did not conclude within the allocated time and was adjourned for an additional day on 10 July 2014; also finishing late on that day. The stated history reveals the extent to which the focus of the parties, but most particularly the husband, was on the litigation itself rather than a resolution of the dispute between the parties. Cross-examination conducted by the husband was a revelation of his failure to understand the court proceedings as a process for resolution of a legitimate application by the wife and his own response. In his case outline, as one of the orders sought, the husband asked for his own former solicitor and the wife's solicitor to be investigated for what they were up to. In my view what the lawyers were up to each in their respective roles was to progress the case to trial though preparation including disclosure and analysis of all relevant documents. I have no reason to doubt that the husband was advised of his obligation to make full financial disclosure to the Court. It is apparent that the advice was not accepted. Documents

were produced, referred to and offered to be produced rightup to conclusion of hearing.

APPROACH TO ALTERATION OF INTERESTS IN PROPERTY Inconsidering applications for alteration of property interests and transfer of property the Court must: (i) Identify the existing legal and equitable interests of the parties in property; [3] (ii) Consider whether it would be just and equitable in the particular circumstances to make an alteration; (iii) If an alteration should be made, to consider the matters contained in s 79(4) and s 75(2) of the Family Law Act 1975 (Cth) (the Act) in coming to an adjustment; and (iv) Analyse and consider whether the adjustment under consideration would be just and equitable. (i) Identify the assets and liabilities of the parties The interests in property assets and liabilities of the parties were identified in a joint Balance Sheet [4] as set out below:

Description	Wifes value	Husbands value
ASSETS		
1 H [R Property] (joint valuation)	\$700,000.00	\$700,000.00
2 H Livestock (joint valuation)	\$28,815.00	\$28,815.00
3 H Plant, Equipment & motor vehicles (joint valuation)	\$172,700.00	\$172,700.00
4 W NAB Acc ...602 as at 28/02/2014	-\$232.02	\$232.02
5 W [C] Credit Union Acc at 31/12/2013	\$75.07	\$75.07
6 H [C] Credit Union Savings Acc ...5S7 at 09/03/2014	\$95.98	\$95.98
7 H [C] Credit Union cheque at 25/03/2014	\$600.80	\$600.80
8 H [C] Credit Union Acc no. ...7S7 Business Access at 25/03/2014	\$236.45	\$236.45
9 H [C] Credit Union Acc no. ...7S7 Business Access at 25/03/2014	\$236.45	\$236.45
10 W Mazda [motor vehicle] Est	\$1,000.00	\$1,000.00
11 H Household contents Est	\$7,000.00	\$1,500.00
12 W Household contents Est	\$1,000.00	\$1,500.00
13 W Cameras & equipment Est	\$1,500.00	\$1,500.00
Total	\$912,791.28	\$912,791.28
ADDBACKS AND WASTAGE		
14 H Livestock	\$216,185.00	\$216,185.00
15 H [R Property]	\$300,000.00	\$300,000.00
16 H Trust Investment	\$220,000.00	\$220,000.00
Total	\$736,180.00	\$736,180.00
LIABILITIES		
17 H NAB Loan Account No. ...991 (Mortgage)	\$300,000.00	\$300,000.00
18 H NAB Vida Credit Card account ending in 178 at 21/03/2014	\$24,259.16	\$24,259.16
19 H Country Energy Unknown		
20 W [Mr and Mrs T] (personal loan) Est	\$4,000.00	\$4,000.00
21 W NAB Credit Card as at 04/02/2014	\$4,874.19	\$4,874.19
22 H NAB Farm Management acc no. ...281 as at 24/03/2014	\$19,443.53	\$19,443.53
23 H [C] Account ...S38 at 25/03/2014	\$8,273.39	\$8,273.39
24 H Utilities and rates	\$27,716.92	\$27,716.92
25 H Unknown		
Total	\$360,850.27	\$360,850.27
SUPERANNUATION		
26 W AMP Accumulation (as at 30/06/2013)	\$2,427.34	\$2,427.34
27 W AMP Accumulation (as at 11/10/2013)	\$840.00	\$840.00
28 W One Path/ Integra Accumulation (as at 30/06/2013)	\$1,911.18	\$1,911.18
29 W ING Ausfund Accumulation (as at 30/06/2013)	\$51.99	\$51.99
Total	\$5,230.51	\$5,230.51
Total value		

of Assets including Wastage and Addbacks \$1,654,201.80 Net value of Assets including Wastage and Addbacks \$1,293,351.60 Total value of Assets excluding Wastage and Addbacks \$918,021.79 Net value of Assets excluding Wastage and Addbacks \$557,171.52 ANALYSIS OF ASSET POOL

Items excluded By Items 14, 15 and 18 the wife identifies three areas under the heading Addbacks and Wastage which I have excluded from the asset pool but are matters to be taken into account in considering contributions and the overall adjustment of interests. Items 21 and 26 are deleted being unknown. Items 22 and 23 for the wife are excluded from the asset pool as personal debts acquired since separation, Item 20 for the husband is excluded from the asset pool as a personal credit card debt acquired since separation. The net interests of each of the parties in the net asset pool are:

(a) The husband: Assets Item 1 [R property] \$700,000.00 Item 2 Livestock \$28,815.00 Item 3 Plant equipment and motor vehicles \$172,200.00 Items 7, 8, 9 Credit Union \$933.00 Item 11 Household contents (husband's est) \$1,500.00 Total \$903,448.00 Liabilities Item 19 NAB Mortgage \$300,000.00 Items 24 & 25 Debt to Bank / Credit Union \$27,716.00 Total \$327,716.00 Net total \$575,732.00 (b) The wife: Assets Items 5, 6 Accounts \$307.00 Item 10 Mazda [motor vehicle] \$1,000.00 Item 12 Household contents \$1,000.00 Item 13 Camera equipment \$1,500.00 Items 27-30 Superannuation \$5,230.00 Total \$9,037.00 Combined net total \$584,769.00 (ii) Would it be just and equitable to make an alteration? At present the husband has the sole legal interest in the most significant asset of the parties the farm property. He lives on the property. He has also retained, sold and used stock and equipment. The husband disposed of assets, including the balance of his Trust Funds. He has had an inheritance whilst living and working on the farm property. He had not, by the conclusion of hearing, complied with interim orders for payment to the wife made in this Court nor the orders subsequently made by the Full Court. There were eight years of marriage and the birth of two children. For four and a half years post separation the wife has had the primary responsibility for the care and financial support of those children whilst living in rented accommodation and working in town. The wife retained minimal assets post separation In my view it is both just and equitable to consider an alteration of interests to reflect past contributions and future needs. (iii) Consideration of matters contained in s 79(4) and s 75(2) in coming to an adjustment



Initial contributions In 2001 the respective financial positions of the parties was as follows. The wife had a car, some furnishings, minimal savings and about \$2,500 in creditcard debt. The husband had the R property, a herd of commercial cattle, some registered studcattle, farm vehicles, tools and farm supplies, funds in the Trust (probably about \$1million), minimal savings and debts on an overdraft account and creditcards. Clearly the initial financial position of the husband was vastly stronger than that of the wife. Further, his farm property provided a home for both parties and their children, as each was born, and as such, should be acknowledged as a significant contribution by him.[5] (iv) Contributions during the marriage During the marriage the parties both made a variety of contributions; financial, non-financial and towards the welfare of the family. The wife Consensually, the wife reduced her hours of paid work, and then after marriage, left her job. She had been earning about \$21,000 per annum. She did so at the request of the husband mainly to care for his four children. Her fulltime presence at home had a secondary benefit of freeing up the husband to do paid work off farm. However willingly and affectionately undertaken, the care of the children was no small task. The mother of the three boys had died in 1996 by suicide. She had been the driver of the vehicle in the accident in 1994 from which the husband received his injuries. They separated within a year of that accident. At the date of her death the boys were aged five, four and a one year old. The second boy is disabled by cerebral palsy. He was diagnosed with epilepsy in 2009. In March 1996 the husband formed a new household when he began living with his de facto partner, she being pregnant at the date of their commencing cohabitation. Three months later the child was born and three weeks after her birth the boys mother died. The three boys then came to live with their father, his de facto partner and the new baby. In January 2001 the husband and his de facto partner separated, she moving away with their daughter then aged about four and a half years. Accordingly, later in that year when the wife came into the lives of the three boys, by then aged 10, nine and six, she was their third mother figure. They had suffered multiple disruptions to their lives and must have benefited from the loving care and attention provided by their young step-mother over the following eight plus years. Copies of letters, messages, Mothers Day cards and school related documents put into evidence by the wife support that conclusion.[6] The fourth child of the

husband came for school holidays throughout the relationship and was cared for and supervised by the wife along with the other children. The maintenance of the relationship of the four siblings with each other was an important matter. In 2004 and 2005 the parties two children were born. The wife provided most of their care and supervision and has continued to do so since separation. In regard to this contribution by the wife to the welfare of the husband, his four children plus their own two children as highly significant. There was no acknowledgment by the husband of the special efforts of the wife in respect of the six children, but her role as primary carer was not disputed. Other contributions

The wife took care of the financial running of the farm and was responsible for the majority of book-keeping and bill paying. She was the point of reference for the accountant. The wife prepared and delivered meals for farm workers who lived and/or worked on the farm. The wife supported further education for the husband, helping him with assignments and research and taking up extra work on the farm and with the children while he studied. At times the wife, together with the farm hand, managed day to day operations of the farm when the husband worked away from the farm. The wife was the instigator of the development of a breeding program to increase the value of the stud cattle. Her father, who also had a breeding business, provided advice and guidance to the parties. The wife undertook the majority of gardening and yard work. She maintained the fruit trees. The husband

There were three sources of income during the period of the marriage. Firstly, from the cattle stud; secondly, from a business hiring out farm equipment; and thirdly, from payments made from the Trust. The husband was responsible for the financial contributions. He worked hard on and off the farm and ran the business. He was also the beneficiary, at his request, of Trust payments which supported the family when the other two sources of income were unprofitable. In 2009 at the instigation of the wife, the parties sought advice from the Rural Financial Counselling Service of NSW. At various times the farm was affected by drought and flood. The financial position of the farm property deteriorated sharply after separation. The stud breeding program

In 2003/04 the husband borrowed \$250,000 from a Credit Union to invest in the development of the genetic breeding program. The development of stud cattle by a genetic breeding program ultimately failed and the parties lost money. The parties agree about that outcome but identify different causes. It is difficult to

determine when efforts in that regard ceased. The wife asserts that it was a combination of bad luck, poor timing and a failure by the husband to implement the advice given by her father and to stay patient. She would like to acquire the remaining genetic material. The husband asserts that it was poor advice and a lack of transparency around sales by the wife's father. Cross-examination by the husband of his father-in-law revealed that the husband blamed both his wife and his father-in-law for the failure of the breeding program, which had been undertaken by the husband and wife with support, assistance and advice from maternal family members. In 2007/08 more money was borrowed, about \$500,000. The Credit Union loan was refinanced and the balance used for the purchase of equipment for a business which leased equipment and carried out work on local farms. In October 2010, six months after separation, the parties' rural financial counsellor reported on the financial analysis undertaken by him to the Trust Company.[7] He referred to the husband having reached a stage where he was well placed to produce quality stud cattle with little further investment. The counsellor advocated strongly for the release of the balance of the Trust to enable the husband to clear debts and thereafter access drought/flood subsidies and income support. This letter does not support the husband's assertion of obvious lack of profitability of the breeding program by late 2004/05. I formed the conclusion that the husband had been able to commence the stud breeding program with the support and assistance both of his wife, who undertook all of the administrative side of the development of the stud, and his father-in-law, who gave him the practical day to day advice and shared resources with him. However after the marriage broke down, the husband was unwilling or unable to continue alone and subsequently sold off cattle, which could have had a much higher value in the breeding program if it had continued. He retains the genetic material. At the conclusion of the marriage, the financial contributions favoured the husband, but the non-financial contributions of the wife were at least equal to those of the husband and certainly exceeded his in relation to the welfare of the family. An adjustment of interests in favour of the wife to create a ratio of 60/40 in favour of the husband is justified. Post separation there have been four and a half years, post separation, where the wife has had primary responsibility for the care supervision and financial support of the children whilst paying for rented accommodation. The children are now 10 and almost nine years.

She has a partner who shares some expenses. The wife lives on her father's property with the children. The husband has had the benefit of living on the R property which has an overall market rental value of \$650 per week.[8] He has apparently collected rent from a smaller residence on the property. He pays a low level of child support of \$25 per week. The Bank mortgage The husband disclosed in his financial statement estimated \$482 mortgage payments in respect of the loan secured by mortgage. The mortgage debt has not reduced since 2012. The husband had not taken the task of completing this document seriously. The Financial Summary (part B) reflects his attitude. Nil or TBA was the answer to all but one line. The income figures in Part O were all estimates. I could not rely on this document to understand the financial position of the husband, including mortgage payments. The Inheritance In 2012 the husband inherited \$306,000 from a relative. He reduced the bank loan from \$500,000 to \$300,000 and paid off other debts. That was a benefit to both parties. However, I have concluded that the significance of that contribution is overshadowed by other matters. Livestock (Item 14 on Balance Sheet) The husband sold livestock and equipment. He agists cattle and raises and sells pigs. The husband did not advise the wife of the financial details. Exhibits 8 and 9 are schedules of information extracted by cross-examination of the husband. They reflect more income than was disclosed. There was inadequate disclosure of income by the husband but what was disclosed greatly exceeds the income of the wife. However the benefit of that income, to the parties jointly, relates only to the reduction in the mortgage. There were no contributions to the wife or the children, from the two sources of cash funds available to the husband, namely the balance of inheritance and the balance of Trust funds. There was no further reduction of the mortgage by loan repayments. Trust funds (Item 18 on Balance Sheet) Between separation and hearing, \$233,316 of Trust funds was received and dispersed by the husband. Decline in value of farm property (Item 15 on Balance Sheet) The value of the property has apparently diminished from where it sat during the marriage. Financial position statements[9] by the husband to the bank reflected a rise in value of the farm property between 2008 and 2011 to \$1.2 million. The wife says and I accept that there was conversation prior to separation where the husband spoke to her of his pride and pleasure in the achievement of this increase from the purchase price in 1999 of \$450,000. I have not included any

figure in the asset pool to reflect the drop in value to \$700,000. There is no relevant valuation for earlier dates and if there were evidence, it would be required to attribute the reduction to waste as was sought by the wife. However the fall in value is consistent with the observations of the wife's uncle who provided a late affidavit; admitted to evidence on a limited basis and not as a valuation.[10] He is a stock and station agent and was present when stock and equipment valuations were undertaken on the property. During cross-examination by the husband he commented that the property had a good fertiliser history but no longer. It was described as being in a tired and neglected state; weeds had taken over, there had been no regular mulching and weed control. The husband asked the witness why he thought the value had diminished. The answer was decisive: Lack of maintenance. Farming is a seven day a week job. He went on to spell out in detail what needed to be done. I take this evidence into account in concluding that it is less likely that the husband applied his trust funds, inheritance money, or proceeds of sale of stock to routine maintenance on the property. As a result, there remains uncertainty over the use of those funds. Full Court authority supports the proposition that the husband cannot rely on absence of evidence to prevent the making of orders.[11] Further, the inference arises that the husband, given his attitude to disclosure, allowed the farm property to run down deliberately for the purpose of these proceedings. Taking all these matters into account I consider that despite the contribution of part of his inheritance to the reduction of the mortgage, there should be a slight adjustment in favour of the wife. There should be a further adjustment based on the contribution of the wife during this period to create a ratio of 55/45 in favour of the husband. (iii) Relevant s 75(2) factors for adjustment Of the factors in s 75(2) to be taken into consideration pursuant to a 79(4)(e), I note the following relevant matters. (a) Age and state of health The wife is aged 40 and described herself as fit and healthy. The husband is 52. He set out various aspects of his state of health including pain in several parts of his body and a condition, stated to be prolapsed bowel, for which he will undergo gastroscopy on or before March 2015 and may require surgery.[12] In October 2010 the husband had an accident causing a fracture in his spine. He was unable to work for a period of weeks. The husband also referred to memory and cognition problems as a result of the head injuries he suffered. I am unable to determine to what extent,

if any, the injuries that the husband suffered in 1994 and 2010 affect his ability to function. The only medical evidence put before me was that of Dr L, the husband's general practitioner. Dr L provided a report which set out the husband's physical injuries from the accident and the ongoing consequences: [13] He is likely to experience exacerbation of his pain with heavy lifting, long periods of sitting and driving heavy vehicles due to the vibrations, or with any heavy physical work. Due to his head injury he is probably only suitable to the farming work he does now as he finds he has trouble with recall and memory and does not function well when under pressure. This likely relates back to his head injury. I think his past injuries thus severely limit his ability to seek employment with any employer. Dr L was cross-examined. She stated that she was unsure of the exact date of the motor vehicle accident suffered by the husband. No criticism was made of Dr L, nor should there have been. The doctor conceded that her report was a prognosis; that she had been asked about capacity for employment and was not a specialist. The husband has not sought referrals and she had not referred him for further testing. You'd have to have an occupational therapist do a current assessment. Dr L also very properly conceded that she had included in her report what she had learned from conversations with the husband during his regular visits to her, and quickly agreed that the Court could not rely on what she had said to determine the actual ability of the husband to work in the future, as opposed to being employed in the future: If I was the one who was to make that decision, I would require testing. The husband referred, during the course of the hearing, to raising funds by the sale of cattle to pay specialists who would conduct such assessments on him for these proceedings, but ultimately no such evidence was put before the Court. The husband purchased the R property after the motor vehicle accident and has worked on it since. He expressed a strong wish during the course of these proceedings, and by his orders sought, to continue to do so. I therefore conclude in the absence of medical evidence otherwise, that the husband has the capacity to continue to work as a farmer in the way he does now. (b) Income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment The income of the husband is not less than \$1,050 per week and may be more. The disclosure in his financial statement was inadequate. He has the

mental capacity to continue with gainful employment. There is some physical restriction from accidents in 1994 and 2010. The husband has continued to run the property as a farm from 1999, when it was purchased, to date. The wife has the physical and mental capacity for gainful employment. She was a sales person before she met the husband and gave up work. She is a visual artist and has relevant equipment. She occasionally sells her work through a business owned and run by her new partner; that business may be able to be developed in the future when the children are older. (c) Care and control of a child under the age of 18 years The wife has the care and control of the parties two children, aged 10 and almost nine. They spend time with their father at weekends and holidays, but the mother is responsible for their education, supervision and extra-curricular activities, not only in terms of time, but also financially. The father's four children from previous relationships are all now adults. (d) Commitments of each of the parties that are necessary to enable the party to support himself, herself or a child Not applicable. (e) Responsibility of either party to support any other person The father has a partner with three children who have come to live with him on the R property. He has not disclosed any income earned by that new partner; nor any child support paid to her by the father of those children. I do not take his financial commitments in that regard, if there are any, into account. (f) Eligibility for a pension allowance or benefit In 2011 Dr L wrote a letter in support of an application by the husband for a medical support pension, expressing the view that he was likely to significantly improve over the next two years. The husband has not been referred to any specialist. Accordingly, I have no specialist evidence on the husband's capacity to do physical work and also to do the administrative side of farming, requiring organisational skills. I have no reason to doubt that the husband has had the physical problem with his knee and back that were described by his general practitioner, but I am unable to discern the impact of the head injury, including a cerebral haemorrhage 20 years ago, or the spinal injury four years ago. (g) Standard of living that in all the circumstances is reasonable The parties spent their marriage on the R property, living a rural lifestyle with their children. There was stability of accommodation, which the husband has maintained. The wife has obtained rental accommodation and would prefer to purchase a property for herself and the children to live in. (h) The duration of the

marriage and the extent to which it has affected the earning capacity of either party. The marriage endured for approximately eight and a half years, including a period of cohabitation. The wife gave up her paid employment when she married the husband. She had been contemplating a visual arts business for herself and I accept that she feels deskilled by changes in that field over the last 10 years. The presence of the wife in the family caring for up to six children, four of whom are the husbands by two previous relationships, had the effect of releasing him to do paid work off the farm and income producing work on the property. (i) The need to protect a party who wishes to continue their role as a parent. The parties have agreed on arrangements for the children, which commit the wife to being available to supervise the children before and after school and in holiday times. Both parents wish to continue their role as parents. (j) If either party is cohabitating with another person. The wife is living in accommodation on her father's property, paying rent as she can. She is living with the children only. She may live with her partner in the future. The husband apparently has his new partner living with him on the property. Superannuation/Commonwealth Benefits. The wife has superannuation in four plans with a total value of \$5,230. She receives the Family Tax Benefit and Newstart by way of Government benefits. The husband disclosed no superannuation interests. An adjustment for future needs. The wife is 12 years younger than the husband and has the capacity to work for a longer period. That capacity is restricted by her need to care for and supervise the children around school hours and holiday times over the next nine years. The husband may continue to do farm work as he has done for the last 15 years. He may also continue to do contract work off farm. He can earn income from the property through rental of the other residence, stock agistment and his piggyery. Each of the parties have new partners. The husband's partner, about whom he provided no information other than her name, apparently lives and works on the farm, as do her children. With particular reference to care and control of the children I consider that an adjustment in favour of the wife is appropriate to create a ratio of 60/40 in the wife's favour. (iv) Is the adjustment of interests under consideration just and equitable? Both parties proposed acquisition of the rural property. The wife has not lived on the farm for four and a half years. The wife asserts that she could borrow from her family to pay out the husband's interest in the property. That may be so. There was no



specific evidence on that point, particularly her capacity to repay a loan, sufficient to justify provision for the wife to acquire the property. The husband had owned and worked on the property for at least two years when he began living with the wife. He has remained living and working there after separation. It is appropriate in my view for the husband to be given the opportunity to retain the property by making a cash payment to the wife. To effect this adjustment, the farm property will probably be refinanced to provide for the payment to the wife. Orders are made in the alternative for retention or sale. The outcome may be that the husband retains the farm property with a greatly increased mortgage. In the alternative, the farm property may be sold and consequentially the stock and equipment. That would leave the husband probably renting accommodation, debt free with a fund for contingencies after payment of his credit card debt<sup>[14]</sup> and legal costs in the sum of \$60,655.<sup>[15]</sup> Whichever course is taken by the husband, the wife will have a cash sum to contribute to accommodation for herself and the children after payment of her personal debts.<sup>[16]</sup> She also has outstanding legal costs in the sum of \$107,883.<sup>[17]</sup> It is in my view just and equitable for the husband to have the opportunity to continue to live and work on the farm, or for the property to be sold if the husband feels unable to take on further debt to pay out the equitable interest of the wife. I take into account that both parties recognised in March 2013 that the property would have to be sold. It does seem the most likely outcome. However the husband should have the opportunity to keep the property if he wishes to do so and is able to finance the cash adjustment required. Orders are made accordingly with either a cash sum (\$341,824) representing the identified division of assets less the value of assets retained by the wife, or a percentage of the net proceeds of sale in the ratio of the wife's interest in the equity of the farm property (85 per cent). I certify that the preceding one hundred and sixty-two (162) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cleary delivered on 3 October 2014. Associate: Date: 3 October 2014 [1] Exhibit 15, letter dated 01/10/2009 [2] Exhibit 15, letter from Trust to Rural Financial Counselling Service dated 13/04/2010 [3] *Stanford v Stanford* [2012] HCA 52; (2012) 247 CLR 108 [4] Exhibit 25 [5] *Pierce v Pierce* [1998] FamCA 74; (1999) FLC 92-844 [6] Affidavit of wife filed 06/06/2014, Annexures CM4, CM5 and CM6 [7] Exhibit 15, letter dated 20/10/2010 [8] Exhibit 3 [9] Exhibit 16 [10] Exhibit 4 [11]

Black v Kelner (1992)15 Fam LR 343 [12] Affidavit of husband filed 09/06/2014, par 22 and Annexure B [13] Affidavit of Dr L filed 17/06/2014 Annexure B [14] Item 20, Balance Sheet [15] Exhibit 23 [16] Items 22 & 23 Balance Sheet [17] Exhibit 24 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/842.html>

