FAMILY LAW PROPERTYSETTLEMENT IN RELATION TO MARRIAGE Where the parties cohabited forapproximately ten years Where there are two children of the marriage Where the wifes financial contributions and her contributions tothecare of the children post separation are greater than the husbands Where the children remain in the care of the wife Where thecontributions of the wife are found to be 60 per cent and the contributions ofthe husband are 30 per cent Where there is an adjustment made in favourof the wife for 75(2) factors of 5 per cent. FAMILY LAW PROPERTY SETTLEMENT IN RELATION TO MARRIAGE Legal fees Where thehusband seeks that the paid legalfees of both parties and liabilities relatingto the legal fees be included in the asset pool as an add backWhere the funds expended by the wife on legal fees were sourced from herpost separation income Where the wifes incomewas generated byher professional practice Where the husband asserted that he contributedto the practice during the marriage Where the husband was not theco-owner or operator of the practice Where the income produced by thepractice postseparation was not referable to the parties joint efforts Where the legal fees and related liabilities were not includedin theasset pool but were taken into account under s 75 (2). Family Law Act 1975 (Cth) ss 75, 79 FamilyLaw Rules 2004 (Cth) Rule 15.49 Chorn & Hopkins [2004] FamCA 633; (2004) FLC93-204 Eufrosin & Eufrosin [2014] FamCAFC 191 Rosati &Rosati [1998] FamCA 38; (1998) FLC 92-804 Stanford v Stanford [2012] HCA 52; (2012) 247 CLR108 Williams & Williams [2007] FamCA 313 APPLICANT: Ms Bazzi-Cirino RESPONDENT: Mr Cirino FILENUMBER: SYC 2528 of 2012 DATE DELIVERED: 27 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Rees J HEARING DATE: 13, 14, 15 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Macpherson SOLICITOR FOR THE APPLICANT: Morton Family Lawyers COUNSEL FOR THE RESPONDENT: Mr Richards SOLICITOR FOR THE RESPONDENT: Mills Oakley Lawyers ORDERS ITIS ORDERED (1) That within three months of the date of these Orders Ms Bazzi-Cirino(the wife) pay to Mr Cirino (the husband)the sum of$163,000. (2) That simultaneously with the payment in Order 1, the parties do all actsnecessary to transfer to the wife the right title andinterest in the propertyat L Street, Suburb G (the L property) being the land in FolioIdentifier .... (3) That from the date of these Orders the wife shall be solely responsible forall

outgoings, including but not limited to mortgagepayments, in relation tothe L property and shall indemnify the husband and hold him safe in respect ofall such liabilities. (4) That the wife shall, if so requested by the husband in writing, cause anymortgage secured over the L property to be discharged. (5) That in the event that the wife has not made the payment in Order 1 by thedue date, the parties shall do all acts required tosell the L propertyand fromthe proceeds of sale to pay, in the following order andpriority: (a) Dischargeof mortgage; (b) Costs ofsale; (c) The sum of$163,000 together with interest from the due date until the date of payment atthe rate prescribed by the Family Law Rules to the husband; and (d) The balanceto the wife. (6) That the parties do all acts necessary to transfer to the husband the righttitle and interest in the property at H Street, SuburbD (the Dproperty) being the land in Folio Identifier .... (7) That from the date of these Orders the husband shall be solely responsiblefor all outgoings, including but not limited to mortgagepayments, in relationto the D property and shall indemnify the wife and hold her safe in respect ofall such liabilities. (8) That the husband shall, if so requested by the wife in writing, cause anymortgage secured over the D property to be discharged. (9) That within 30 days from the date of these Orders, the wife prepare twolists containing those items of the contents of the Lproperty that are notincluded in the list of items valued by the Single Expert and shall provide suchlists to the husband. (10) The husband shall nominate, within seven days of receiving the lists, whichlist he chooses and he shall be solely entitledto those items which the wifewill make available for collection within seven days. (11) That, other than as provided in these Orders, each party shall be solelyentitled to any item of real or personal property inhis or her possession atthe date of these Orders. (12) That other than as provided in these Orders, each party shall be solelyresponsible for the repayment of any liability for whichhe or she is legallyresponsible at the date of these Orders. IT IS NOTEDthat publication of this judgment by this Court under the pseudonymBazzi-Cirino & Cirino has been approved by the Chief Justice pursuantto s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER:SYC 2528/2012 MsBazzi-Cirino Applicant And Mr Cirino Respondent REASONS FOR JUDGMENT MsBazzi-Cirino (the wife) and Mr Cirino (the husband)commenced co-habitation in 2001 and married in2002. They separated on 7 August2010. There are two children

of their marriage, A born in 2003 (now aged 11) andN born in 2005(now aged nine) (the children). COMPETING APPLICATIONS Thewife seeks a distribution in her favour of 70 per cent of the assets includingan adjustment in her favour for s 75(2) factors of 5 per cent. Thehusband concedes that the wifes contribution is greater and should berecognised by an apportionment of 55 per cent ofthe assets and submits thatthere should be no adjustment for s 75(2) factors. BACKGROUND Someof the history of the parties financial relationship is uncontroversial. Atthe time of the trial the wife was aged 51 years. She is a health professionaland owns her own practice. Atthe time of the trial the husband was aged 42 years and was in fulltimeemployment earning about $100,000 per year. Whenthe parties commenced co-habitation the wife owned the property at J Street,Suburb G (the G property) from whichshe operated her professionalpractice and in which she also resided. She had a new motor vehicle with minimalequity and savingsof some $63,368. She had an interest in superannuation of$24,000 approximately. Atthe commencement of co-habitation the husband was working in the business ownedby his family (CM) in which he wasa director but not ashareholder. He had lent $96,000 to CM and had savings of approximately $19,000.However, it is not controversialthat of the $96,000 which was invested in CM,$56,000 was never returned to him or realised and was ultimately lost. Thereforetheamount which the husband contributed is limited to the $40,000 which hewithdrew from the business at the time the parties purchasedtheir first homeand his savings of $19,000. Atthe commencement of their relationship the parties lived in the property ownedby the wife at Suburb G and the wife paid all ofthe outgoings in relation tothat property. Inabout May of 2002 the parties jointly purchased the property at H Street, SuburbD (the D property). In order tofinance the deposit the wifecontributed $43,000 from her savings and the husband contributed $40,000 whichhe withdrew from hiscredit loan account with CM. In2004 the parties purchased vacant land at L Street, Suburb G (the Lproperty). The purchase of the land was financedby borrowings in theamount of $300,000 and the property owned by the wife at Suburb G was collateralsecurity for the borrowings.In 2004 and 2005, the parties constructed a home onthe land. The husband stopped work and actively supervised and worked on theconstruction. During the period of 15 months when the husband was not in paidemployment, he had no income and the

family had noincome other than the incomeof the wife. Other than for the period of 15 months, when the house was beingbuilt, the husband hasbeen in paid employment. Itis not disputed that the wifes income has substantially exceeded that ofthe husband in the later years of the marriage. Itis not disputed that during the period when the parties lived together each ofthem contributed the whole of their earnings tothe enterprise of theirfamily. Theparties separated on 7 August 2010. The wife and the children remained living inthe L property. Since separation the childrenhave been primarily cared for bythe wife although they spend half of their school holidays, Thursday afternoonsand alternate weekendswith the husband. Fromabout November 2013, the husband has been assessed to pay a total of $10 permonth in child support, presumably because of thefact that he has an obligationto support another child who was born shortly after the parties separated. Atthe time of hearing the husband was earning approximately $100,000 per annum andthe wife was earning approximately $222,000 perannum. VALUATIONISSUES Theparties agreed upon the appointment of a single expert, Mr S, to value thewifes professional practice. The report of MrS was filed under cover ofan affidavit sworn by Mr S on 27 August 2014. Thehusband, in the course of the preparation of the matter for trial, sought leaveto rely upon an adversarial expert, Mr B. Thehusband had previously filed anaffidavit of Mr B, sworn on 27 August 2013, which annexed a copy of hisvaluation report for thewifes practice dated 21 August 2013.Directions were made for Mr B and Mr S to confer and a Joint Statement, dated 11September2014, was prepared by them following the conference. Itwas initially the husbands case that it was necessary to call anadversarial expert because there was a difference in themethodology which wasapplied by Mr S and by Mr B. Oncethe Joint Statement of the experts was available, it became clear that there wasno variation in methodology and, before me,Counsel for the husband, in seekingto rely upon the evidence of Mr B, relied upon the fact that the real issuebetween the expertswas the reasonable remuneration which should be allowed forthe wife. It was submitted on behalf of the husband that the differencein theremunerations adopted by Mr S on the one hand and Mr B on the other gaverise to the discrepancy in the two valuations. NeitherMr S nor Mr B is a remuneration expert. Counselfor the husband relied upon the provisions of rule 15.49 and particularly rule15.49(2)(b) of the Family Law Rules 2004 (Cth). It was contended

on behalf ofthe husband that Mr B knew of matters not known to Mr S. The matters which, itwas submitted,were known to Mr B consisted of material gained by Mr B fromdiscussions with other people on the issue of reasonable remunerationfor thewife. Those were not matters in relation to which Mr B could give admissibleevidence. Ido not accept the submission made on behalf of the husband that the provisionsof rule 15.49(2)(b) are satisfied other than by material which is admissible inevidence. Accordingly,I determined that the affidavit of Mr B would not be admitted intoevidence. Atthe commencement of the hearing, Counsel for the husband sought to rely on afurther report of Mr B annexed to an affidavit whichhad been sworn and filed on10 October 2014 (on the Friday prior to the commencement of the hearing onMonday) and which, it wasagreed, had been provided to the solicitors for thewife at 6.45 pm on that day. This was not the report which had been madeavailableto Mr S at the time of the conference between Mr S and Mr B and,in any event, its admission was flawed on the same basis as wasthat of MrBs earlier report. The husband was not permitted to rely upon the lateraffidavit of Mr B. Onthe second day of the hearing, after the cross-examination of the parties andtheir witnesses had been completed, Counsel for thehusband sought to rely uponan affidavit by a single expert, Mr E, who had been instructed to prepare aretrospective valuation ofthe L property as at the date of co-habitation. MrEs valuation had not been filed and no reference was made to it in thecase outline document prepared in the husbands case. Counselfor the husband submitted that it was necessary for the report to be admittedinto evidence and for Mr E to be cross-examinedbecause Mr E had valued theproperty on the assumption that its condition at the time of purchase wassimilar to its present condition,whereas it was the uncontroversial evidence ofboth of the parties that substantial work had been done on the property after itwasacquired. Counsel then submitted that the purpose of cross-examination of MrE was to ask Mr E to put a lower value on the property. Therewas no evidence before the Court about the state of the property at the date ofco-habitation, although there was extensiveevidence from the husband about thework that he had done during the time the parties lived together to improve theproperty. Whatevermay have been the assumptions that were proposed to be put toMr E, they could not be put unless the wife had had an opportunityto commentupon them and to either accept

or reject those assumptions. In circumstanceswhere her evidence was concluded it was notappropriate to allow such matters tobe put to Mr E, therefore the husband was not permitted to rely upon MrEs report. THE EVIDENCE Thewife relied on affidavits by herself and her practice manager together with aFinancial Statement sworn 22 September 2014. Thehusband relied on affidavits by himself and Ms R, a book-keeper and anaccountant, who gave evidence about the Capital Gains Tax(CGT)implications if the D property were sold. TheCourt was assisted by evidence from the single expert, MrS. THE BALANCE SHEET Atthe commencement of submissions the parties tendered a Joint Balance Sheet whichis set out below: Ownership Description Wifes value Husbands value ASSETS Joint [L] property (family home) 900,000 900,000 Joint [D] property (rental) 650,000 650,000 Wife [G] property (practice premises) 686,000 686,000 Wife [Professional] Practice (assets less liabilities) 112,500 382,473 Wife IAG Shares 451 @ $6.04 as at 10/10/2014 2,850 2,850 Wife Mazda ... motor vehicle 20,500 20,500 Husband Tools of trade 2,370 2,370 Wife ... photo collection 12,000 12,000 Wife Household contents 5,955 5,955 Husband Household contents 2,500 2,500 Husband Hull Boat 1,000 1,000 Husband [X] Boat 50% interest 50,000 50,000 Wife Jewellery 13,230 13,230 Husband Jewellery 367 367 Children Childrens Trust Funds 26,214 26,214 Total $2,485,486 $ 2,755,459 LIABILITIES Joint NAB mortgage over family home 755,547 755,547 Joint NAB mortgage over D property 381,711 381,711 Wife NAB mortgage over G property 168,532 168,532 Wife NAB Line of Credit 0 25,000 Wife NAB Visa 0 0 Husband Boat Loan 7,380 33,269 Husband CBA Mastercard 18,497 38,407 Wife Esanda Finance 20,851 20,851 Husband Capital Gains Tax Nil 54,039 Husband Personal Loan from Ms V 0 20,000 Husband Personal Loan from Husbands parents 0 5,000 Total $1,352,518 $1,502,356 SUPERANNUATION Member Name of Fund Type of Interest Wifes value Husbands value Husband Australian Super Accumulation 82,792 82,792 Husband Mercer Accumulation 22,192 22,192 Wife HESTA Accumulation 127,370 127,370 Wife AMP Accumulation 4,811 4,811 Total $237,165 $237,165 ADDBACKS Husband Monies already received from wife 10,000 10,0000 Husband Ute proceeds of sale 3,000 0 Wife Paid Legal Fees 0 136,663 Husband Paid Legal Fees 0 72,800 Total $13,000 $219,463 FINANCIAL RESOURCES Ownership Description Wifes value Husbands value Final

Total $1,383,133 $1,709,731 Thematters in dispute will be dealt with using the item numbers on the JointBalance Sheet. Item 9 wifes household contents Althoughthis dispute is not apparent on the Joint Balance Sheet, it was contended onbehalf of the husband that not all of the contentsof the L property wereincluded in the valuation conducted by the single expert. The husband engagedanother valuer who prepareda list of items not valued by the single expert. Thewife, in cross-examination, agreed that those items had not been valued. Therewas no evidence of the number of items missing from the valuation. The husbandsought a distribution in specie of the contents of the L property on thebasis that if the wife retains the whole of the contents she will receive itemsnot includedin the valuation. Thewife accepted that the items not included in the valuation should be dividedbetween the parties. In circumstances where I donot know what items have beenleft out of the valuation, that is a preferable course. Item 4 the value of the Professional Practice MrS valued the practice at $112,500. The husband contended for a higherfigure. MrS in his valuation adopted a commercial salary in 2013 for the wife of $225,441.For the years 2010 to 2012 inclusive he reducedthat amount by 3 per centeach year. The methodology adopted by Mr S is explained in notes to his reportannexed to an affidavitsworn 1 November 2013 where he says, at page27: As the Wife operates the ... Practice as a sole trader there is no allowance inthe profit and loss statement for a salary to thewife for the work that sheperforms. In response to my enquiry as to functional and managerial tasksperformed by the Wife she statedto me that her role comprises the provision ofgeneral [professional] services, general practice management, dealing with[clients]enquiries and complaints, occupational health and safetymanagement, staff management and the supervision of and assistance to other[professionals] in her employ. The wife has indicated that in her opinion a reasonable commercial salary forthis work would be in the range of approximately $200,000to $240,000 perannum. It is my understanding that locum [professionals] can expect to obtain aremuneration of broadly 40% to 45% of [client] fees. Giventhe [client] feesearned by the Wife in 2011 and 2012 a level of remuneration for the general[professional] component of her workin the range of $175,000 to $200,000 wouldseem appropriate. To this should be added a loading to account for the othercomponentsof her role as noted above. In my view an

additional loading of$30,000 would be appropriate given the hours she states are committedto all theresponsibilities attaching to the role. Incross-examination, Mr S was asked for the documents upon which he based hisconclusion about the fees generated by the wife in2011 and 2012. Mr S wasshown a bundle of documents and asked to concede that the bundle contained allof the documents that hadbeen provided to him. Mr S said that he hadreceived all of the documents in the bundle but that he also had a strongrecollectionof being provided with a document which set out the fees which thewife had generated. Unfortunately,Mr S said that all of the documents which had been provided to him had beenscanned and saved electronically and theoriginals destroyed. He was unable toretrieve the documents stored electronically. Thus, Mr S was not able to providea copy ofthe document upon which he said he relied. Acall was made to the solicitors for the wife to provide any document forwardedto Mr S setting out the fees generated by the wife.It was conceded that no suchdocument had been forwarded to Mr S. Thus,there was no evidentiary foundation for Mr Ss opinion about thereasonable level of remuneration for the wife. MrS conceded in cross-examination that, in performing the exercise of calculatingreasonable remuneration for the wife, the appropriatelevel was 40 per centof fees and that, further, the calculation should have referred to fees net ofspecified expenses. Thewife gave evidence that, in calculating a reasonable remuneration for anemployed professional, the base was fees generated lessthe specifiedexpenses. Itwas put to the wife in cross-examination that the specified expenses representedabout 10 per cent of the gross fees of an individualprofessional. She disagreedand said that in some procedures the cost was as high as 25 per cent. The wifeagreed with the propositionthat specified fees would constitute not less than10 per cent and up to 25 per cent of fees. Incross-examination of Mr S, Counsel for the husband put the figure of 10 per centas a reasonable estimate of specified fees. MrS disagreed. Mr S said that theactual amount of specified fees for the practice was ascertainable from thebalance sheet and was6 per cent of fees. MrS agreed that, if the wifes actual fees earned were known, then hiscalculation could be adjusted to include the relevantfigure arrived at (thatis, fees less specified costs multiplied by 40 per cent) to produce the figurefor the wifes reasonableremuneration for her professional services. Mr Ssaid that this was merely a mathematical

calculation. Therewas no challenge to the additional loading of $30,000 for administration. Exhibit9 in the proceedings was a print out of the wifes fees for the year ended30 June 2013. She received $388,594. Counselfor the husband contended that the proper deduction for specified fees should be10 per cent, reducing the amount for thepurpose of the calculation to $349,735.In circumstances where Mr S had calculated the actual specified fees to be 6 percent offees, I prefer his evidence to the estimates of the wife or thehusband. I am satisfied that the value of the business can be calculated by substitutingthe wifes actual fees, less 6 per cent, forthe figure inMr Ss valuation. That exercise has been done by Counsel for thehusband and the calculation is reproduced below. Commercial Remuneration of Wife 2013 Practice Management Total Remuneration Fees Generated by Wife in 2013 388594 Less ... Costs being 6 % of Fees 23315.64 6% Fees Generated less ... Costs 365278.36 40% of Fees Generated Less ... Costs 40% 146111.344 30000 176111.344 Adjustments to Valuation 2010 2011 2012 2013 Commercial Salary(as found by Mr S) 206125 212,500 218,875.00 225441 Commercial Salary as Found adjusted by 3% from 2013 3% 160732.0687 165703.1636 170828.0037 176111.344 Adjustment of Commercial Salary Found 45392.93134 46,797 48,047.00 49329.656 Adjusted EBIT(by Mr S) 31391 18744 23831 -13879 Adjusted EBIT as Found 76783.93134 65,541 71,878.00 35450.656 Simple Average (2011 to 2013) 57,623 Simple Averaged(2010 to 2012) 71,401 Weighted Average(2011 to 2013)(1,2,3) 52608.13285 Weighted Average(2010 to 2012)(1,2,3) 70583.26553 Capitalisation Rate X 4 282333.0621 Capitalisation Rate X 5 352916.3276 Mean 317624.6949 Counselfor the wife agreed that, if the methodology were adopted, then the calculationsby the Counsel for the husband are correct. Itherefore find that the value of the professional practice is$317,625. Item 19 Wifes line of credit The$50,000 line of credit was used to pay $25,000 in legal fees and the balance wasused in the practice. At hearing, the balanceowed was $43,262. Because,as is explained later in these reasons, paid legal fees will not be included asan asset in the balance sheet, the portionof the loan which was referrable tolegal fees will be disregarded and the line of credit allowed as a liabilityonly for the remainderof $18,262. Item 21 husbands boat loan Athearing the boat loan was $33,269 of which it was agreed that about $25,000 hadbeen used to pay legal fees. The husband gave

evidencethat the amount of theloan was increased after separation so that he could pay legal fees. For thereasons expressed below, thedebt will be included without the amount referableto legal fees, being the amount owed at separation, of $7,380. Item 22 Husbands Mastercard debt Atseparation the amount owing on the husbands Mastercard was $18,497. Theamount owed at the date of the hearing was $38,407.It was not suggested in thehusbands case that the additional amount was spent on the purposes of thefamily but rather thatit had been spent on living expenses in circumstanceswhere the husbands expenses were said to exceed his income. Incross-examination, Counsel for the wife put to the husband a number oftransactions from his Mastercard statements. Those transactionsincludedrestaurant charges, introduction services, marina fees for his boat and expenseswhich the husband said were incurred onbehalf of his employer and laterrefunded. Thetransaction also included costs for holidays which the husband took when he wasrequired to travel overseas in the course of hisemployment. It was his evidencethat if he was required to attend meetings for, say, three days, he would thentake two or threedays holiday on each trip. The amounts were not insignificant.For example, the husband was asked about airfares of $2,000 and $948,a hotelbill of $650 in Singapore, and other hotel bills in China. Thehusband gave evidence that the expenses which were incurred on behalf of hisemployer were refunded to him but the refunds werenot paid into his Mastercardaccount but into his savings account. The money refunded was not then paid toreduce the credit carddebt. Inthose circumstances, it is not appropriate to include the current balance of thehusbands Mastercard debt as a liabilityof the parties but the amount atseparation will be included. Item 24 Capital Gains Tax(CGT) Thehusband seeks the transfer to him of the D property which has an agreed value of$650,000. The D property was originally purchasedas an investment and wastenanted throughout the time the parties lived together. Afterseparation, in about June 2013, the husband moved into the property and it hasbeen his home since then. Thehusband relied upon a calculation of CGT by an accountant Ms R. It was herunchallenged evidence that, if the D property weresold at the time of thehearing for the agreed value of $650,000, assuming that the husbandsmarginal rate of tax remainsunchanged, then CGT of $54,039 would bepayable. Noallowance is made in Ms Rs calculation for the fact that the D

propertyhas been the husbands home since mid 2013. Noallowance is made in the calculation for the effect on the CGT calculation ifthe husband remains in the D property and does notsell it for a substantialperiod of time. InRosati & Rosati [1998] FamCA 38; (1998) FLC 92-804 the Full Court laid down the properapproach to be taken to CGT in the following terms at 85,043: (1) Whether the incidence of capital gains tax should be taken into account invaluing a particular asset varies according to thecircumstances of the case,including the method of valuation applied to the particular asset, thelikelihood or otherwise of thatasset being realised in the foreseeable future,the circumstances of its acquisition and the evidence of the parties as to theirintentions in relation to that asset. (2) If the Court orders the sale of an asset, or is satisfied that a sale of itis inevitable, or would probably occur in the nearfuture, or if the asset isone which was acquired solely as an investment and with a view to its ultimatesale for profit, then,generally, allowance should be made for any capital gainstax payable upon such a sale in determining the value of that asset forthepurpose of the proceedings. (3) If none of the circumstances referred to in (2) applies to a particularasset, but the Court is satisfied that there is a significantrisk thatthe asset will have to be sold in the short to mid term, then the Court, whilstnot making allowance for the capital gains taxpayable on such a sale indetermining the value of the asset, may take that risk into account as arelevant s 75(2) factor, the weight to be attributed to that factor varyingaccording to the degreeof the risk and the length of the period within whichthe sale may occur. (4) There may be special circumstances in aparticular case which, despite the absence of any certainty or even likelihoodof a saleof an asset in the foreseeable future, make it appropriate to take theincidence of capital gains tax into account in valuing thatasset. In such acase, it may be appropriate to take the capital gains tax into account at itsfull rate, or at some discounted rate,having regard to the degree of risk of asale occurring and/or the length of time which is likely to elapse before thatoccurs. TheD property was acquired as an investment by the parties but its characterchanged when the husband commenced to occupy it as hishome. The husbandstrial affidavit was sworn in September 2014, when he had been living in theproperty for about 15 months. Thereis no evidence that the husband intends to sell the D property. There is noevidence upon which it could be determined thatthe husband will sell theproperty at some future

time and, if so, when. Itcannot be assumed that, if the D property were sold after a substantial periodof occupation by the husband, any CGT would be payable.There is no evidencethat would allow a calculation of an appropriately discounted rate. I cannotfind that the D property is likelyto be sold in the foreseeable future. Inall of those circumstances, it is not appropriate to include a liability for CGTin the balance sheet. Items 25 and 26 Husbands personal loans The$25,000 borrowed by the husband from Ms V and from his parents was used by himto pay legal fees. As outlined later in these reasons,because the legal fees ofthe husband will not be taken into account in the final balance sheet, theseloans will likewise not beincluded in the calculation of the net asset pool butwill be considered in determining whether there should be any adjustmentpursuantto s 75(2). Items 31 and 32 money received by husband Itis not disputed that the husband has received and spent the proceeds of the saleof a utility vehicle and that the sum of $10,000was paid to him by the wifewhen he represented to her that he needed money to fund living costs. Consistentlywith the approach to legal fees dealt with later in these reasons, it isappropriate that those monies be dealt within the consideration of s75(2)adjustments rather than by creating a notional pool or addback. Items 33 and 34 Paid legal fees Thewife has paid legal fees of $136,663. The payments came from three sources. Somepayments were made from the wifes income. $25,000was paid from a line of credit in the sum of $50,000. The balance was used forthe practice. Somepayments came from money referred to during the hearing as thechildrens accounts. The wife had maintainedaccounts Astrustee for each child since their births. She paid at least $50 per weekinto the accounts and, in addition,deposited money received for the childcarerebate, medical benefit rebates and the like. It was agreed that those accountswere tobe treated as the wifes property. She treated the money as herown and used it, either for the childrens expenses orher own, as shechose. Atseparation the balance of As account was $23,751 and of Nsaccount, $18,958. After separation, the husband had noaccess to thoseaccounts. Thewife, from time to time, withdrew money from the childrens accounts andpaid those sums to her lawyers. She asserted thatshe repaid all the money byincreasing the weekly payment into the childrens accounts until the wholeamount had been refunded.The wife was unable to demonstrate, from thestatements of the accounts, that she had repaid all the amounts she

withdrew. Thereis no evidence of the amounts the wife withdrew from the childrensaccounts and used to pay legal fees and there is noevidence of the amounts sherepaid to those accounts. However,the wife in her affidavit deposed to the total withdrawals from Asaccount being $12,541 and from Ns accountbeing $13,334. The withdrawalstotalled $25,875. In the same period, the wife said paid expenses for thechildren from those accountsfor school fees, tutoring, occupational therapy andthe like, totalling $25,875. That evidence was not challenged. Inthose circumstances, it is not possible to conclude that the wife used moneyfrom the childrens accounts to pay legal feeswhich she did not refund tothe accounts. Thereforethe identifiable sources for the payment of the wifes legal fees are herearnings from the practice and the lineof credit. Thehusband has paid $72,800, of which $50,000 was borrowed. He identifies $25,000drawn from the boat loan and a further $25,000borrowed from his sister andparents. Itwas the wifes case that legal fees paid by both parties should not beincluded on the balance sheet and the loans they hadeach taken out shouldsimilarly be disregarded. Thehusbands case was that the legal fees should be added back and the loansincluded as liabilities. InChorn & Hopkins [2004] FamCA 633; (2004) FLC 93-204, the Full Court, after confirmingprevious authorities on this issue, stated at 79,322-3 that: 56. In summary, we consider that the above mentioned decisions of the Full Courtestablish that, while the treatment of funds usedto pay legal costs remainsultimately a matter for the discretion of the trial judge, in determining how toexercise that discretion,regard should be had to the source of the funds. 57. If the funds used existed at separation, and are such that both parties canbe seen as having an interest in them (on account,for example, ofcontributions), then such funds should be added back as a notional asset of theparty, who has had the benefit ofthem. 58. If funds used to pay legal fees have been generated by a partypost-separation from his or her own endeavours or received inhis or her ownright (for example, by way of gift or inheritance), they would generally not beadded back as a notional asset; norwould any borrowing undertaken by a partypost-separation to pay legal fees be taken into account as a liability in thecalculationof the net property of the parties. Funds generated from assets orbusinesses to which the other party had made a significant contributionor hasan actual legal entitlement may need to be looked at differently from otherpost-separation income or

acquisitions. Inthe present case, the business from which the funds were generatedis the wifes professional practice. Itis not in dispute that the husband made a contribution to the practice (asdistinct from the premises) during co-habitation inthat he gave some assistancein early years with book-keeping and assisted in setting up the accountingsystem and did minor repairsto equipment. However,this was not a business where the husband and the wife worked together as ownersand operators of the business so that theincome produced by the business afterseparation, although retained by one of them, was directly referable to theirjoint effortsin running the business. Neitheris it the case that the husband was a co-owner, shareholder or partner in thepractice. The husband at all times was otherwisein employment or very activelyengaged in the construction of the L property. InEufrosin & Eufrosin [2014] FamCAFC 191, the Full Court, dealing witha lottery win by the wife where the husband contended that the source of fundsfor the purchase ofthe ticket was a business that had been primarily run by himbefore separation, said at paragraph 11: As this Court in Zyk made clear, the source of funds should notdetermine the issue of how a lottery win should be treated for s79 purposes.What is relevant, in our view, is the nature of the partiesrelationship at the time the lottery ticket was purchased. Inour view, theauthorities just cited, together with what was said by the High Court inStanford regarding the common use of property, issufficient to dispose of the husbands contention that her Honour erredinfailing to find that he contributed to the wifes lottery win. At the timethe wife purchased the ticket, regardless ofthe source of the funds, thejoint endeavour that had been the parties marriage haddissolved; there was nolonger a common use of property. Rather,the parties were applying funds for their respective individual purposes. Atthe time when the wife used funds generated from her practice to pay her legalfees, there was no common use of property and theparties were each using theirincome for their individual purposes. Thepreferable course is to disregard the paid legal fees and the loans taken outfor the purpose of legal fees but to take into account,in considering anyadjustment pursuant to s75(2), the fact that liabilities referable to legal feeshave to be repaid. Thisapproach is more likely to accord with the emphasis of the High Court inStanford & Stanford [2012] HCA 52; (2012) 247 CLR 108 on the identificationof the legal and equitable interests of the parties in the property at the dateof hearing

rather than thecreation of a notional pool of assets. Itherefore find that the assets and liabilities of the parties are: ASSETS Description Value Joint L roperty (family home) 900,000 Joint D property (rental) 650,000 Wife G property (practice premises) 686,000 Wife Professional Practice 317,625 Wife IAG Shares 451 @ $6.04 as at 10/10/2014 2,850 Wife Mazda ... motor vehicle 20,500 Husband Tools of trade 2,370 Wife ... photo collection 12,000 Wife Household contents 5,955 Husband Household contents 2,500 Husband Hull Boat 1,000 Husband X Boat 50 per cent interest 50,000 Wife Jewellery 13,230 Husband Jewellery 367 Wife Childrens Trust Funds 26,214 TOTAL $2,690,611 LIABILITIES Value Joint NAB mortgage over L property 755,547 Joint NAB mortgage over D property 381,711 Wife NAB mortgage over G property 168,532 Wife NAB Line of Credit 18,262 Husband Boat Loan 7,380 Husband CBA Mastercard 18,497 Wife Esanda Finance 20,851 TOTAL $1,370,780 NET ASSETS $1,319,831 SUPERANNUATION Name of Fund Type of Interest Value Husband Australian Super Accumulation 82,792 Husband Mercer Accumulation 22,192 Wife HESTA Accumulation 127,370 Wife AMP Accumulation 4,811 TOTAL $237,165 SECTION 79(2) Bothparties agree, and I find, that, in circumstances where they can no longerjointly use their jointly acquired assets, it is justand equitable that theassets should be divided between them. CONTRIBUTIONS Atthe commencement of co-habitation the husband had a credit loan account with CMof $96,000. Those funds remained with CM untilthe parties purchased the Dproperty in July 2002 when the husband withdrew $40,000 and contributed thosefunds to the deposit. Theremaining $56,000 was left with CM which ultimately failed and the funds werenever repaid to the husband. Therefore the husbandsinitial contributionis limited to the funds which were made available by him to the marriage beingthe $40,000 referred to aboveand $19,000 in savings. Thehusband deposed to having superannuation entitlements at the commencement ofcohabitation but there is no evidence of the amount. Thewife was the owner of her professional practice and the premises from which itoperated at Suburb G. The wife gave evidence thatshe treated the purchase ofthe practice and the real property as one transaction and that she was unable tosay how much had beenpaid for the real estate and how much was paid for thepractice. Incross-examination she said that the combined purchase price was $485,000 andthat part of the purchase price had been borrowed. Thewifes

evidence in relation to the amount outstanding on the loan at thedate of co-habitation was confused. She said, variously,that it was $230,000 orthat it was $320,000. Theparties both say they commenced their co-habitation in 2001. Neither is moreprecise as to the date. MrS in his valuation of the practice as at 30 June 2001 states that the loanoutstanding was $230,189. He produced no document tosubstantiate thatfigure. Bankstatements tendered show the balance of the loan at 4 August 2001 to be$266,342. Payments of $4,033 were being made and theinterest component,although it varied, was about $1,200 on average. Therefore the loan was beingreduced by about $2,800 per month.It is safe to assume that the balance at 30June 2001 was about $268,000. Since that is the only amount substantiated bydocumentaryevidence I will adopt that amount as the balance outstanding. Thereis no evidence of the value of the real property of the premises of theprofessional practice. Mr S in his valuation notes theacquisition cost of the Gproperty to be $388,350. Thewife paid a total of $485,000. Her equity was in excess of $200,000 but there isno evidence that allows any more exact finding. Inaddition, the wife had savings of $63,368 and superannuation of $24,000. Thewifes initial contributions were substantially greater than those of thehusband. Itis of significance that the practice and Suburb G real estate which were thewifes initial contributions now represent assetsvalued at $1,003,625 ina total net asset pool of $1,319,831. Itis also of significance that when, in 2004, the parties purchased the land onwhich the L property was constructed, they borrowed100 per cent ofthe purchase price and were able to do so because the lender took collateralsecurity over the G property and theprofessionalpractice. InWilliams & Williams [2007] FamCA 313 the Full Court said atparagraph 26: We think that there is force in the proposition that a reference to the value ofan item as at the date of the commencement of cohabitationwithout reference toits value to the parties at the time it was realised or its value to the partiesat the time of trial, if stillintact, may not give adequate recognition to theimportance of its contribution to the pool of assets ultimately available fordistributiontowards the parties. Thus where the pool of assets available fordistribution between the parties consists of say an investmentportfolio or ablock of land or a painting that has risen significantly in value as a result ofmarket forces, it is appropriateto give recognition to its value at the time ofhearing or the time it was realised rather than simply pay

attention to itsinitialvalue at the time of commencement of cohabitation. But in so doing itis equally as important to give recognition to the myriadof other contributionsthat each of the parties has made during the course of their relationship. Duringthe time that the parties lived together, they each applied themselves and theirearnings to the joint enterprises of theirmarriage and their family. Thewife was the greater wage earner. The husband did substantial physical work inrelation to the conservation and improvement ofboth the G property and the Dproperty. The husband devoted 15 months to the construction of the L property asowner/builder. Bothparties agreed that their contributions during that time should be regarded asequal. Theparties separated on 7 August 2010. After that date, the wife and the childrenhad the benefit of the occupation of the L propertybut the wife paid all of theoutgoings. She has also been solely responsible for the outgoings on the Gproperty. UntilJuly 2013, when the husband moved into the D property, the wife also paid theoutgoings on the D property. Consent orders weremade on 11 September 2012 tothe effect that the husband was to occupy the D property and be responsible forthe outgoings. The wifegave notice to the tenants who moved out in aboutDecember 2012. The husband did not move into the D property until July 2013. Itis not necessary to examine the reasons. The effect was that the wife continuedto pay the outgoings on the D property, without thebenefit of rent, until July2013. Sinceseparation in 2010 the wife has been the primary carer for the children. As thehusband pointed out, she cares for them 73 percent of the time. Shehas also been primarily responsible for the financial care of the children. Thehusbands income since separation has been about $100,000 per annum. Althoughhe could not provide any documents substantiating the amount of child support hehad paid, the husband estimated that themost he paid was about $240 per monthin total for both children. Thechildren are in private Catholic schools. They attend after school care and haveprivate tutoring. The wife has been able to usethe money in thechildrens accounts, accumulated during the marriage, to pay some of theirschool fees, tutoring expenses,costs of therapy and the like and she hasaccounted for expenses paid from the childrens accounts totalling$25,875. Theday to day expenses of the children have otherwise been met from her income withthe exception of the child support contributedby the husband. FromNovember 2013, the husband was assessed to pay child

support of $10.17 per monthin total for both children. That remains theassessment. Self-evidently,since November 2013, all of the childrens day to day costs have been metby the wife. Takinginto account the wifes significantly greater initial contributions,including the contributions of the professionalpractice and the G property, theuse of those assets as collateral in the purchase of the land on which the Lproperty was constructed,the greater contributions to the care of the childrenafter separation and the wifes greater financial contributions afterseparation both to the outgoings on real property and to the financial care ofthe children, contributions should assessed in herfavour at 60 percent. SECTION 75(2) Thewife currently earns $222,000 gross per annum and the husband earns $100,000gross. Thewife is 51 years of age and the husband is 42 years of age. Her capacity forfuture employment is less than his. Thehusband has had the use of $10,000 paid to him by the wife and $3,000 from thesale of the utility vehicle. Bothparties have debts relating to money borrowed for legal fees. The wife has torepay $25,000 from the line of credit. The husbandhas to repay $25,000 to hissister and his parents and $25,000 drawn from the boat loan. Takinginto account the money he has received, the difference in their liabilities forlegal fees is about $12,000. Thehusband will have to pay his Mastercard debts incurred after separation. Thatspending, in so far as it relates to his lifestyle,was entirely discretionary.He chose not to apply money refunded to him by his employer to reduce the debtincurred on his employersbehalf. Thehusband does not seek any adjustment in his favour and, in the circumstanceswhich are outlined, no adjustment would be appropriate. Thewife seeks an adjustment in her favour and relies on the husbands lack offinancial support for the children. Nothingin the husbands evidence suggested that there is any likelihood that hiscontribution to the childrens supportwill increase in the foreseeablefuture. Since the third child for whom he pays child support is substantiallyyounger than the partieschildren, it is unlikely that he will ceasesupporting that child before these children reach their majority. Theparties expect that the children will continue to be privately educated. Thehusband agreed that the money the wife had spenton school fees, therapy,tutoring and the like was reasonable. The child N is dyslexic and needsspectacles. In 2013 and 2014 hehas needed speech therapy and occupationaltherapy and the services of an educational psychologist. The child A will

starthigh schoolat O College in 2015. The wife will bear all of these costs. Ahas six more years of high school and N has about nine years of schooling tocome. Thereshould be an adjustment in favour of the wife to take that burden into account.The adjustment will be 5 per cent. Looked atin the context of the net assetpool, the adjustment represents a modest amount when compared with the actualcosts she will incurin 17 years of child care. CONCLUSION Thewife will receive 65 per cent of the non-superannuation net asset pool and thehusband will receive 35 per cent. Thehusband seeks a splitting order in relation to superannuation. He hassuperannuation totalling $104,984. The wife has superannuationtotalling$132,181. Iftheir combined superannuation entitlements were split 65 per cent to the wifeand 35 per cent to the husband, he would be requiredto transfer about $22,000to the wife. Shedoes not seek such an order and I propose to leave the superannuation where itlies. Thehusband will receive the D property. He will then have assets (excludingsuperannuation) with a gross value of $706,237 and willassume liabilities of$407,588 leaving him with net assets of $298,649. 35per cent of the net non-superannuation assets is $461,940. Therefore the wifewill pay to the husband $163,291 which I will roundoff to $163,000. I certify that the preceding one hundred and forty-five (145)paragraphs are a true copy of the reasons for judgment of the HonourableJusticeRees delivered on 27 October 2014. Associate: Date: 27/10/2014 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/920.html