

FAMILY LAW CHILDREN Undefended hearing - With whom a child lives With whom a child spends time With whom a child communicates Allegations of family violence Husband to spend time with the children by agreement with wife FAMILY LAW PROPERTY Undefended hearing Application by wife for a division of property Orders made in circumstances where Court is satisfied that it is just and equitable Family Law Act 1975 (Cth) ss 60B, 60CC Stanford v Stanford [2012] HCA 52, (2012) 293 ALR 70 Bevan & Bevan [2013] FamCAFC 116; (2013) FLC 93-545 Chapman & Chapman [2014] FamCAFC 91 APPLICANT: Ms Kadam RESPONDENT: Mr Saxena FILE NUMBER: MLC 4177 of 2014 DATE DELIVERED: 2 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Benjamin J HEARING DATE: 2 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Pandeli SOLICITOR FOR THE APPLICANT: Barbayannis Lawyers COUNSEL FOR THE RESPONDENT: No appearance SOLICITOR FOR THE RESPONDENT: ORDERS H born July 2008 and R born ... August 2010 (the children) live with the wife. The children spend time with the husband by agreement with the wife. The wife has sole parental responsibility for the children. The wife may apply for passports for each of the children without first obtaining the consent of the husband. The wife may, from time to time, take the children from Australia, for holiday overseas for periods not exceeding six (6) weeks in respect of each holiday, such six (6) week limitation on overseas travel to expire in respect of each child as they each attain the age of thirteen (13) years. Pursuant to s 65DA(2) and s 62B, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders and details of who can assist parties adjust to and comply with an order are set out in the Fact Sheet attached hereto and these particulars are included in these orders. Within sixty (60) days of the date of these orders the husband transfer to the wife at the expense of the wife, all of his right, title and interest in the former matrimonial home situate at and known as I Street, Suburb B (Suburb B). Contemporaneously with the transfer as referred to in paragraph 7 hereof, the wife refinance the mortgage to the Commonwealth Bank of Australia which encumbers Suburb B into her own name, at her expense, and indemnify the husband in respect thereof. The wife be entitled to the entire contents of the safety deposit box at the Commonwealth

Bank of Australia, ... , Melbourne, such safety box being in the name of the husband and the wife. Unless otherwise specified in these orders and save for the purposes of enforcing any monies due under these or any subsequent orders:- 10.1 each party be solely entitled, to the exclusion of the other party, to all property (including choses-in-action) in the name or possession of the party; 10.2 each party forego any claim or claims he or she may have to any superannuation benefits belonging to or earned by the other party; 10.3 insurance policies and share portfolios remain the sole property of the owner named therein; 10.4 each party be solely liable for and indemnify the other against any liability encumbering any item of property to which that party is entitled pursuant to this agreement; 10.5 each party be solely responsible for any liability in their own name; and 10.6 any joint tenancy of the parties in any real or personal estate is hereby expressly severed. Paragraphs 7 to 10 inclusive as stated as referred to above, be in full and final settlement of the wife's claim for property settlement and spousal maintenance pursuant to the provisions of the Family Law Act 1975 (Cth). If either party refuses to sign any document required to give effect to these orders, a Registrar of the court be appointed pursuant to Section 106A of the Family Law Act 1975 (Cth) to execute all deeds and documents in the name of that party and do all acts and things necessary to give validity and operation to all such deeds and documents. IT IS DIRECTED A copy of these orders be forwarded to the husband, by ordinary pre-paid post within twenty one (21) days from the date of this order at the address set out in the most recent affidavit served with the recent amended application. A copy of the transcript of reasons be taken out and placed on the court file. IT IS FURTHER ORDERED Leave be given to the husband to apply in respect of these orders for a further period of twenty one (21) days after the date of service, that being the date of posting. All outstanding applications be dismissed. IT IS CERTIFIED Pursuant to Rule 19.50 of the Family Law Rules 2004 it was reasonable to engage counsel to attend. IT IS NOTED that publication of this judgment by this Court under the pseudonym Kadam & Saxena 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 MELBOURNE FILE NUMBER: MLC 4177 of 2014 Ms Kadam Applicant And Mr Saxena Respondent REASONS FOR JUDGMENT INTRODUCTION This is an application by Ms Kadam (the wife) in relation to

parenting and property proceedings in relation to her marriage to Mr Saxena (the husband). The orders that the wife seeks are contained in her amended application filed 8 September 2014 with the exception of the costs order which the wife does not pursue. The material upon which the wife relies is that contained in her amended application filed 8 September 2014, the affidavit of a valuer, Mr C, filed 5 September 2014, an affidavit by the wife filed the same day and her financial statement filed the same day. In addition, the wife gave evidence today that the material contained in her application was accurate. She gave evidence of contribution including her larger contribution than that of her husband in terms of savings of about \$10,000 at the time the parties commenced cohabitation, her role as homemaker and parent in circumstances where most of the work was left to her and very little of the work was left to the husband. The wife gave evidence that she has, despite the history of the matter, encouraged the children to have a relationship with the husband but will only do so in a circumstance that is safe for the children. She has worked both as a housewife, mother and homemaker during the course of their marriage and has also undertaken significant paid employment working up to some four days before the birth of their first child and going back to work very soon after the birth of their second child. The wife has calculated through inquiries that she has made that she has earned some \$350,000 during the course of the marriage. The wife deposed in her affidavit that the husband has sent significant amounts of money overseas to India and she believes that this money is being held there for him or held on his behalf. She is able to track down some \$48,000 of those funds travelling overseas through a subpoena to Western Union but believes far greater sums have been sent over there during the course of her marriage and are over there in his control. I raised with the wife whether she was proposing to move to India and she said she is quite happy to live here but wants to be able to travel there from time to time, and I am very conscious of the provisions of the Family Law Act 1975 (Cth) (the Act) which prevent her from doing so. I am going to give the wife permission to do so but limited to trips of six weeks or less without the consent of the husband until each of the children attain the age of 13 years. After that time the travel will be open to whatever decisions she makes as having primary parental responsibility for the children. There is evidence in the material of family violence which I have had

regard to and I will not repeat those other than to note it for the purpose of the orders that I am making. The wife does not wish to notify the husband of any proposed trip overseas as she has fears, and given the circumstances, understandable fears of her wellbeing in India if they are aware that she is over there. BACKGROUND It is of value to look at the history of the proceedings. They were commenced on 16 May of this year and there is evidence of the service of the application and financial statement upon the husband. It was returnable for a case assessment conference at this Court on 8 July 2014. The husband has not in any way engaged in the proceedings and has sent a letter to the wife indicating he wants no involvement in it and is quite happy with whatever arrangements she seeks to make. That, of course, does not bind me. In terms of parenting, the wife seeks orders that:- (a) she has sole parental responsibility for the two children aged six and four; (b) that the children live with her, that she have permission to obtain a passport and implicitly permission to travel overseas to India; and (c) that the children spend time with the husband as agreed by the wife or as otherwise ordered by a Court exercising jurisdiction under the Act. THE LAW IN RELATION TO CHILDREN There was no issue that the Court had both the jurisdiction and power to make parenting orders pursuant to the provisions of the Act. These proceedings were commenced after the 2012 amendments commenced on 7 June 2012 and as a consequence the amendments to the definition of family violence in s 4(1) of the Act, and to ss 60B and 60CC that took effect on that date apply. When determining parenting orders the approach is governed by Part VII of the Act. The objects of Part VII of the Act and the principles underlying them are set out in s 60B. Subject to the presumption of equal parenting under s 61DA and any parenting plans (there are none in this case) a court exercising jurisdiction under that Act may make such parenting orders as it considered appropriate. The child's best interests are the paramount consideration in deciding what parenting orders should be made, and in determining those interests the Court must consider the factors set out in s 60CC of the Act, which in turn provides primary and other considerations, namely:-

Primary considerations (2) The primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family

violence. Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b). (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b). Additional considerations (3) Additional considerations are: (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views; (b) the nature of the relationship of the child with: (i) each of the child's parents; and (ii) other persons (including any grandparent or other relative of the child); (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity: (i) to participate in making decisions about major long-term issues in relation to the child; and (ii) to spend time with the child; and (iii) to communicate with the child; (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child; (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living; (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis; (f) the capacity of: (i) each of the child's parents; and (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs; (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant; (h) if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right; (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; (j) any family violence involving the child or a member of the child's family; (k) if a family violence order applies, or has applied, to the child or

a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following: (i) the nature of the order; (ii) the circumstances in which the order was made; (iii) any evidence admitted in proceedings for the order; (iv) any findings made by the court in, or in proceedings for, the order; (v) any other relevant matter; (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; (m) any other fact or circumstance that the court thinks is relevant. I have regard to the provisions of s 60B and the factors set out in s 60CC. This is a matter where there are serious allegations of family violence and given the history provided by the wife in both her written and oral evidence it is clear she has taken, and continues to take, careful steps to protect the children from those aspects of family violence as much as she can, although given the history that is at some levels, perhaps, easier said than done. The wife is not closed to the idea of the children spending time with the husband provided it is safe and meets their needs. She gave evidence of endeavouring and putting in place arrangements for the children to speak with the husband. I am satisfied there is some benefit in the children having a continuing meaningful relationship with the husband provided it is in safe circumstances for both the wife and the two children and I will be leaving it to her to put those in place. The wife's application is silent in relation to the question of parental responsibility but it is implicit, and clearly implicit, from the evidence including that of the wife seeking to travel overseas and to have passports for the children, that she seeks sole parental responsibility for them and I will treat it as such and make that order. There is evidence of the wishes of the children which are understandably ambivalent. They do not want to see the husband but they want to know the husband is safe. They worry about the wife. I have had regard to that evidence. The wife is the primary carer of the children and has been their primary carer since birth. They have a relationship with the husband but that is troubled which I have referred to earlier. Since separation the wife has taken all steps to care for the children and has endeavoured to enable them to spend time with the husband provided it is safe and communicate with the husband provided it is safe. There is no evidence before me that the husband is paying any child support. The wife relies upon her income and some government benefits to which she has alluded. The wife has fulfilled her role in

terms of her obligations to maintain the children and the husband has not done so, particularly given the monies that he has sent overseas over the years. There are no suggestions as to any change in the children's circumstances. There is practical difficulty and expense in terms of time because it will have to be initially, I would have thought, supervised and supervised by someone other than the wife and in some safe circumstance. The children are four and six and have parents of Indian background and the wife is anxious, I think is the right word, to ensure that that background is maintained provided it is safe for them. The wife has shown a strong attitude to the responsibility of parenthood. The husband has not accepted that responsibility at all since separation and, perhaps, in a very minimal way during the course of the marriage. There is evidence of family violence and there is a family violence order to which I have had regard. The order that I will make will be a final order. In terms of overseas travel, I intend to permit the wife to travel overseas for holidays of no more than six weeks until each of the children are 13 years. I also give the wife permission to apply for passports for the children as and when they need them.

PROPERTY In terms of property, the pool of property was set out in the wife's affidavit. It comprises an interest in a home at Suburb B with equity of about \$150,000 give or take a small sum. That property is in the joint names of the husband and wife and is subject to a mortgage. The wife asks that any orders I make involve the transfer of the house to her and she will arrange for the bank to discharge the mortgage and take out another mortgage. The other property to which the wife alludes is the money totalling at least \$48,000 that the husband sent overseas, and other monies. The husband has not engaged in the proceedings so it is not clear how much money was involved or where that money is except that it is in India. I take it that there is a sum of at least that amount in India and the full details of which the husband has not disclosed to the Court despite his obligations to do so. I take into account the law relating to his obligations to disclose in coming to the conclusions that I have come to. The wife owns a Toyota motor vehicle. There is some evidence that its value is about \$15,000. The husband has a Holden motor vehicle. There are savings of about \$500. Each of the parties has superannuation. The husband has superannuation of \$47,673. The wife has superannuation of about \$34,600. The wife has credit card liabilities of about \$1100 and a HECS liability of \$15,640. She borrowed \$8000 from

her daughters trust fund to which she had applied to reduce another credit card debt and which she quite properly acknowledges as a debt to her child, and I believe she's paying it back at the sum of \$200 per month or the like. THE LAW IN RELATION TO PROPERTY The law regarding the treatment of property has been clarified following the High Court decision in *Stanford v Stanford*.^[1] Prior to that decision the preferred approach was the four step process as reflected by the Full Court in cases such as *Hickey v Hickey* and the Attorney General for the Commonwealth of Australia (Intervener) [2003] FamCA 395; (2003) FLC 93-143. Following *Stanford v Stanford* (supra) the approach is that a Court must firstly be satisfied that before making any order it is just and equitable^[2] to do so. Then consider what orders, if any, should be made having regard to s 79(4) of the Act. This approach was later adopted in *Bevan & Bevan*,^[3] where Bryant CJ and Thackray J noted that the *Stanford and Stanford* (supra) decision:- ... serves to refocus attention on the obligation not to make an order adjusting property interests unless it is just and equitable to do so.^[4] In *Chapman & Chapman*^[5] the Full Court considered the independence of ss 79(2) and 79(4) and confirmed that *Bevan v Bevan* (supra) correctly stated the law in relation to the Courts consideration of s 79(2), whether the making of an order is just and equitable. At paragraph 19 of their joint reasons Strickland and Murphy JJ said:- Section 79 demands a consideration, separately, of all of its requirements without conflation. However, their Honours disagreed with any intention of plurality in *Bevan v Bevan* (supra), in that the Court must consider the matters in s 79(4) when addressing s 79(2) of the Act in terms of what order is to be made. To clarify, Bryant CJ said in a separate judgment:- Whatever differences may exist as to the meaning of [84] and [85] of *Bevan*, I am in agreement with Strickland and Murphy JJ that it is not a requirement to take account of the matters in s 79(4) when considering the question of whether it is just and equitable to make any order under s 79(2). But as long as they are seen as separate and not conflated, the factors in s 79(4) have the potential to inform the decision under s 79(2) ... The approach I will adopt in determining a division of property will be:- identify in the context of the ordinary legal principles the existing legal and equitable interests and property of the parties and I have, in fact, done so. I will consider the contributions made by each of the parties in relation to that property. I will then look at

the other factors and determine, first of all, whether I ought to make an order having regard to the direction given to this Court by the High Court in *Stanford* (supra) and, if so, what adjustment, if any, I should make. The former matrimonial home is in joint names, the cars of the parties are in their respective names and the bank accounts are in their joint names as far as I am aware. The superannuation funds are in each of the parties' respective names. The liability to the bank is in the joint names, although that will change given the orders I propose to make. The credit card is the liability of the wife, as is the liability for the loan from the daughters' trust and her HECS liability. The wife does not seek an adjustment of superannuation and I have been conscious of this in terms of the determination I have made that the superannuation of the husband is larger than the superannuation of the wife. In terms of contribution I refer to that which I alluded to earlier, that is, the wife came in with a greater initial contribution. The husband has made less contributions overall than the wife given her non-financial contributions and her role in the financial contributions she has made over the period of the marriage which was from December 2003 to October 2013. In terms of future needs there is no issue as to the health of either party. They are both relatively young. The husband is aged 35. The wife is aged 31. Each has qualifications including the husband as a healthcare worker. The wife works with Company D and receives a modest income. The wife has the sole care of the two children which will be an enormous economic and emotional burden for her; though as she is not saying that she shirks from that, I have taken it into account. The property settlement that she seeks is essentially that she retain the home subject to the mortgage, each party retain their superannuation, they retain the property in their possession, she retains the money in the joint bank accounts of about five or six hundred dollars and that she will be responsible for the liabilities. It is on the high side but given the circumstances to which I have alluded and which is contained in the affidavits I determine that first of all, it is just and equitable to make an order; secondly, that the order sought by the wife in terms of the property is in all the circumstances just and equitable, and I will make those orders. I certify that the preceding thirty five (35) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Benjamin delivered on 2 October 2014. Associate:

Date: 2 October 2014 [1] [2012] HCA 52, (2012) 293 ALR 70. [2] Section 79(2). [3] [2013] FamCAFC

116; (2013) FLC93-545. [4] Ibid at para65. [5] [2014] FamCAFC 91. AustLII:Copyright

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