HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, KIEFEL AND BELL JJ

STANFORD APPELLANT

AND

STANFORD RESPONDENT

Stanford v Stanford
[2012] HCA 52
15 November 2012
P23/2012

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 1 and 2 of the orders of the Full Court of the Family Court of Australia made on 19 January 2012.*

3. *Vary the orders of the Full Court of the Family Court of Australia made on 21 October 2011 by adding a paragraph dismissing the Form 1 Application for Final Orders filed on behalf of the respondent by her case guardian in the Family Court of Western Australia on 17 August 2009.*

On appeal from the Family Court of Australia

Representation

P M Dowding SC with P W Johnston and J R Brady for the appellant (instructed by Carr & Co)

M R Berry with G Athanasiou for the respondent (instructed by Ferrier, Athanasiou & Kakulas)

Interveners

P J Hanks QC with R L Hooker and D M Forrester intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with F B Seaward intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

J G Renwick SC with S Robertson intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

CATCHWORDS

Stanford v Stanford

Family law – Family Court – Jurisdiction – Proceedings to alter property interests – Husband and wife lived apart after wife admitted into full time residential care – Husband continued to live in matrimonial home and provide financially for wife's care – Husband and wife had separate wills in favour of their children from earlier marriages – Wife by case guardian applied for order altering interests in marital property between husband and wife – Wife died before Full Court of Family Court delivered judgment and daughters continued proceeding as wife's legal personal representatives – Whether "matrimonial cause" within definition of *Family Law Act* 1975 (Cth) – Whether there was power to make property settlement order.

Family law – Proceedings to alter property interests – Property settlement order – Death of either party to pending proceedings – Whether it would have been just and equitable to make property settlement order had wife remained alive – Whether still appropriate despite wife's death to make property settlement order.

Constitutional law (Cth) – Powers of Commonwealth Parliament – Whether provision for adjudication of claim for property settlement order continued by legal personal representative is law with respect to marriage under s 51(xxi) or matrimonial causes under s 51(xxii).

Words and phrases – "intact marriage", "involuntary separation", "just and equitable", "moral obligations".

Constitution, s 51(xxi), (xxii).
Family Law Act 1975 (Cth), ss 4(1), 39(2), 43(1), 74-75, 79.

1 FRENCH CJ, HAYNE, KIEFEL AND BELL JJ. Part VIII (ss 71-90) of the *Family Law Act* 1975 (Cth) ("the Act") deals with the property of parties to a marriage, spousal maintenance and maintenance agreements. This appeal concerns s 79, which provides for a court exercising jurisdiction under the Act to make an order altering the interests of parties to a marriage in property to which one or both of those parties is or are entitled[1]. The determinative issues in this appeal from two decisions of the Full Court of the Family Court of Australia[2] (Bryant CJ, May and Moncrieff JJ) can be stated briefly.

2 Under s 79(2) of the Act, a court shall not make a property settlement order unless satisfied that it is "just and equitable" to do so. The parties to a marriage lived apart only once the wife had fallen so ill that she required full time care. The husband continued to provide for his wife and put money aside for her use. The wife, by then disabled and acting by a case guardian, applied for orders dividing between husband and wife the property they owned. Before final orders were made, the wife died and the proceedings were continued[3] by her legal personal representatives. Could a court be satisfied that if the wife had not died it would have been just and equitable[4] and that it was still appropriate[5] to make a property settlement order under s 79?

3 These reasons will demonstrate that it was not shown that, had the wife not died, it would have been just and equitable to make an order with respect to property. It follows that, after her death, it could not be found to be "still appropriate to make an order with respect to property"[6]. To explain these conclusions it is convenient to begin with the facts and the course of proceedings that preceded the appeal to this Court.

---

1 s 79(1)(a), read with the definition of "property" in s 4(1).

2 *Stanford & Stanford* (2011) FLC ¶93-483; *Stanford & Stanford* (2012) FLC ¶93-495.

3 See s 79(8).

4 s 79(2) and (8)(b)(i).

5 s 79(2) and (8)(b)(ii).

6 s 79(8)(b)(ii).

Facts and course of proceedings

4 The husband and wife married in 1971. It was the second marriage for each. Each had children by his or her first marriage.

5 For 37 years the parties made their matrimonial home in a suburb of Perth in a house registered in the husband's name. (The husband had bought the house with his first wife but, after the end of that marriage, the house was transferred to him.)

6 The husband and wife retired in 1989. In 1995, the husband made a will in which he left the house, subject to a life tenancy in favour of his wife, to the children of his first marriage. In 2005, the wife made a will leaving her estate to the children of her first marriage.

7 In December 2008, the wife suffered a stroke. She was admitted into full time residential care and thereafter could not, and did not, return to live with her husband. She developed dementia. Through all this, the husband continued to provide for her. He put about $40,000 into a bank account to provide for the wife's medical needs or requirements.

8 In August 2009, the wife, by her daughter as case guardian, applied to the Family Court of Western Australia for orders that the matrimonial home be sold and the net proceeds be divided equally between the parties and that the husband's superannuation entitlements and the parties' combined savings be divided equally between them. The application was heard in the Magistrates Court of Western Australia.

9 At first instance, the magistrate (Duncanson M) determined the available assets of the parties and the contributions which each had made and concluded[7] "that the overall percentage based on contributions should be 57.5% to [the husband] and 42.5% to [the wife]". The magistrate ordered the husband to pay his wife $612,931 within 60 days. The magistrate said[8] that:

> "As a result of the division arrived at based on my assessment of the contribution of the parties to this long marriage, the needs of both will

---

7 *S by her Case Guardian R and S by his Case Guardian S* [2010] FCWAM 26 at [132].

8 [2010] FCWAM 26 at [163].

be catered for and I am satisfied therefore that the outcome is one which is just and equitable."

10 The husband appealed to the Full Court of the Family Court of Australia. After the appeal had been heard, but before judgment, the wife died. On 21 October 2011, the Full Court[9] allowed the appeal and set aside the magistrate's decision. The Full Court concluded that the magistrate had erred in a number of respects. For present purposes, it is sufficient to notice that the Full Court observed[10] that the magistrate had not sufficiently considered the effect of her orders on the husband "and the fact that this was an intact marriage" in considering what was "just and equitable". In particular, the Full Court said[11] that it was "difficult to ascertain the reason why the Magistrate came to her conclusion *given the wife did not have a need for a property settlement* as such and that *her reasonable needs could be met in other ways* particularly by maintenance" (emphasis added).

11 The Full Court did not make final orders. It invited the parties to make submissions about whether the Full Court should itself decide what orders should be made in place of those made by the magistrate or whether it should remit the matter for further consideration at first instance. Both parties asked the Full Court to deal with the matter finally.

12 The Full Court then ordered that, on the husband's death, the sum which had been fixed by the magistrate as representing the value of 42.5 per cent of the marital property be paid to the wife's legal personal representatives. The Full Court said[12] that "the many years of marriage [of the parties] and the wife's contributions demand that those moral obligations be discharged by an order for property settlement". The Full Court did not otherwise expressly deal with why, if the wife had not died, it would have been just and equitable to make the orders it did when, as the Full Court had said[13] in its first judgment, the wife "did not have a need for a property settlement as such and ... her reasonable needs could be met in other ways".

---

9 (2011) FLC ¶93-483.

10 (2011) FLC ¶93-483 at 85,990 [112], 85,991 [119].

11 (2011) FLC ¶93-483 at 85,990 [112].

12 (2012) FLC ¶93-495 at 86,313 [52].

13 (2011) FLC ¶93-483 at 85,990 [112].

The husband's arguments

13 The husband advanced two propositions in this Court. First, he submitted that in the circumstances of this case the magistrate and the Full Court did not have power to make the orders that each made. Secondly, he submitted that if they had power to make the orders, they should not have exercised that power.

14 The magistrate and the Full Court were said not to have had power because of two circumstances. It was said that this was an "intact marriage" and that, upon the wife's death, the only persons to benefit if a property settlement order were made would be her children of a different marriage. These circumstances were said to require the conclusions that jurisdiction under the Act (given by s 39(2) read with the definition of "matrimonial cause" in s 4(1)) and the power to make a property settlement order (in s 79) were not engaged. This understanding of the Act was said to be supported by constitutional considerations about the scope of legislative power with respect to "marriage" and "matrimonial causes" in s 51(xxi) and (xxii).

15 These reasons will demonstrate that the husband's proposition about power should be rejected. These reasons will further demonstrate, however, that it was not shown to be just and equitable to make any property settlement order in this case. The appeal must therefore be allowed.

16 It is convenient to begin examination of these matters by saying something more about the relevant provisions of the Act. Before dealing with the property settlement provisions that ultimately are central to this case, it is necessary to refer first to the provisions relied on as founding the jurisdiction to make the impugned orders, and second to those provisions of Pt VIII of the Act which deal with spousal maintenance.

Jurisdiction in matrimonial causes

17 Section 39(2) of the Act provides that, subject to some qualifications that are not presently relevant[14], a matrimonial cause may be instituted under the Act in a court of summary jurisdiction of a State or Territory. One form of matrimonial cause identified in the definition of that term in s 4(1) of the Act is[15]

---

14 Proceedings for a decree of nullity of marriage or proceedings for a declaration as to the validity of a marriage, a divorce or the annulment of a marriage, whether by decree or otherwise, are expressly excluded.

15 Paragraph (ca)(i) of the definition of "matrimonial cause".

"proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings ... arising out of the marital relationship". As will later be explained, the husband's submission that the proceedings in this case did not meet that description because the marriage was "intact" should be rejected. The proceedings instituted on behalf of the wife and heard in the Magistrates Court were a matrimonial cause of the kind identified.

Spousal maintenance provisions

18 Part VIII of the Act provides for a court to make an order for the provision of maintenance by one party to a marriage to the other party where that other party is unable to support himself or herself adequately. In particular, a court has[16] the power to make "such order as it considers proper for the provision of maintenance", taking into account only the matters set out in s 75(2).

19 These provisions were mentioned only briefly in argument. Presumably, they were considered to be peripheral to the central area of dispute between the parties in this Court. Although, in the originating process, the wife (by her case guardian) had sought a "[p]roperty and/or maintenance" order, argument in this Court proceeded on the basis that the wife had not pressed a claim for a maintenance order. In any event, the husband had offered to provide whatever maintenance was required to meet the wife's needs, and the Full Court found[17] (and it was not disputed in this Court) that, on the evidence before the magistrate, all of the wife's needs were being met adequately. On the facts of the present case the maintenance provisions can thus be put to one side. But as will later be explained, it is important to keep these maintenance provisions in mind when considering the property settlement provisions on which argument in this Court focused.

Property settlement provisions

20 Section 79 of the Act provides for the alteration of property interests of the parties to a marriage. That section must be read in the light of the definition of "property" set out in s 4(1) of the Act. So far as presently relevant, "property":

---

16 ss 74(1) and 75(1).

17 (2011) FLC ¶93-483 at 85,988-85,989 [103], 85,990 [112].

"(a) in relation to the parties to a marriage or either of them—means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".

21 For present purposes, not all the provisions of s 79 need be noticed. Section 79(1) provides (again so far as presently relevant):

"In property settlement proceedings, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or

...

including:

(c) an order for a settlement of property in substitution for any interest in the property".

22 Section 79(2) is one of two provisions of central importance to the determination of the present appeal. It provides that:

"The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."

Section 79(4) identifies seven matters that a court must take into account in "considering what order (if any) should be made under this section in property settlement proceedings". Paragraphs (a), (b) and (c) each refer to various forms of contribution made by parties to a marriage; par (d) refers to the effect of any order on either party's earning capacity; par (e) requires consideration of the matters to be taken into account under s 75(2) of the Act in relation to spousal maintenance "so far as they are relevant"; and pars (f) and (g) refer to orders already made under the Act and child support. Not all of these matters were said to be relevant in this case.

23 Section 79(8) is the second provision of central importance to the determination of the present appeal. It applies where a party to the marriage dies before property settlement proceedings are completed. It provides that:

"(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the

substitution of the legal personal representative as a party to the proceedings;

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

(ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the marriage or either of them; or

...

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party."

24 Section 79(8)(b) thus requires a court considering an application for a property settlement order which is continued by or against the legal personal representative of a deceased party to determine first, whether it would have made an order with respect to property if the deceased party had not died and second, whether, despite the death, it is still appropriate to make an order. Both of those inquiries require consideration of s 79(2) and its direction that the court *not* make an order unless "satisfied that, in all the circumstances, it is just and equitable" to do so. It follows that, in cases where s 79(8) applies, a court must consider whether, had the party not died, it would have been just and equitable to make an order and whether, the party having died, it is *still* just and equitable to make an order.

Power to make a property settlement order

25 Because it was the focus of the husband's submissions in this Court, it is convenient to deal first with the husband's proposition that the magistrate and the Full Court did not have power to make a property settlement order in this case. It will be recalled that the husband pointed to two circumstances in support of this proposition: that the marriage was "intact" before the wife's death, and that upon her death the only persons to benefit from a property settlement order were the wife's children from a previous marriage. For the reasons that follow, the

husband's arguments about the legal significance of these circumstances, and the proposition about lack of power that they were said to support, should be rejected.

26 First, the husband submitted that s 79, when read with s 43(1), did not permit the making of a property settlement order when, as here, the marriage between the parties was "intact". Section 43(1) states the principles that a court exercising jurisdiction under the Act must apply in exercising that jurisdiction. Those principles include[18] "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". This provision was said to reflect a long-standing assumption by the Parliament that a property settlement order should not be made in subsisting, or "intact", marriages. It followed, so the husband submitted, that s 79 should not be read "to extend beyond alteration of the interest in the property of one of the parties to the marriage *in the context of the breakdown of the relationship*" (emphasis in original).

27 This submission must be rejected. Section 43(1) identifies a number of principles that a court shall "have regard to". The statement of one among several guiding principles for the exercise of jurisdiction is not apt to limit the conferral of jurisdiction in the way that the husband urged. Particularly is that so when the power in s 79 is understood in the way explained later in these reasons. So understood, s 79 has an operation that is entirely consistent with s 43(1).

28 Secondly, the husband submitted that there was no "matrimonial cause" to found the magistrate's and the Full Court's jurisdiction in this case. Alternatively, if there was a "matrimonial cause" when the proceedings began, there was no longer a matrimonial cause after the wife's death and the wife's legal personal representatives were no longer continuing the proceedings that had been instituted.

29 This argument (in both its primary and its alternative form) must also be rejected. Once proceedings were issued in the Family Court of Western Australia, there was in this case a dispute about marital property. Because the wife was disabled, she sued by her case guardian, who was one of her daughters from her earlier marriage. Under the wife's will, her daughters would inherit her estate. But neither the interposition of a case guardian nor the interposition of this particular case guardian denies that a property settlement order was sought and its making was opposed by the husband. There was thus a proceeding,

---

18 s 43(1)(a).

arising out of a marital relationship, between the parties to the marriage with respect to the marital property and so a "matrimonial cause" within the definition of that term in s 4(1) of the Act. And when the wife died, the claim that was continued by her legal personal representatives was the claim that had been instituted on behalf of the wife, not some new or different claim. It remained a claim arising out of the marital relationship of the parties.

30 This last point is important. It denies the argument that the claim that was being continued was a claim by the beneficiaries of the wife's estate and not a "matrimonial cause" as defined in the Act. The point is made good by observing that, because the wife had died and her claim was being continued by her legal personal representatives, s 79(8)(b) required the court determining the claim to consider whether it *would have made* an order with respect to property if the wife had not died *and* whether it was *still* appropriate to make an order with respect to property. The combination of inquiries required by the Act demonstrates that the proceedings retained the character they had when instituted. This Court held in *Fisher v Fisher*[19] that s 79(8) operates in just this way. It continues proceedings that would otherwise have abated upon the death of a party.

31 Thirdly, it was said that because the wife had died and those who would gain from the making of an order in favour of the wife were not children of the marriage but children from the wife's earlier marriage, the application was "not a proceeding arising from the marital relationship, nor one involving divorce or a matrimonial cause, in their constitutional sense". Accordingly, so the submission went, to construe s 79 as permitting a property settlement order to be made in this case would be to imperil the section's validity.

32 As already explained, the claim which was made by the wife, and continued by her legal personal representatives after her death, was a claim which arose out of the marital relationship between the husband and wife. This Court held in *Fisher v Fisher*[20] that a law providing for the making and adjudication of a claim of that kind is a law with respect to marriage. The husband's argument is not consistent with that decision and he did not submit that the Court should depart from it. Because s 79, applied in accordance with its terms, did not permit the making of the orders which the husband challenged in

---

19 (1986) 161 CLR 438 at 449 per Gibbs CJ (Wilson J agreeing), 452 per Mason and Deane JJ, 457-458 per Brennan J, 461-462 per Dawson J; [1986] HCA 61.

20 (1986) 161 CLR 438.

this Court, it is neither necessary nor desirable to explore further any question about the limits of constitutional power.

33 It is desirable, however, to say something more about the first factual circumstance fixed upon by the husband: that the parties' marriage was "intact".

34 The expressions "intact marriage" and "breakdown" of the relationship or marriage were evidently used in the husband's submissions as expressions of opposing meaning. But beyond that opposition, the content of neither was spelled out. In particular, the marriage in this case was described as "intact" even though the husband and wife lived apart with no prospect of resuming cohabitation and even though the wife's dementia would inevitably affect the mutuality of the marital bonds between them. The expression "intact marriage" appeared to be used in a way that gave definitive significance to the fact that the separation of the parties was not voluntary, but the legal significance of this fact for the husband's proposition about lack of power was not identified. Nor was its legal significance explored for the husband's second argument about the exercise of power by the magistrate and by the Full Court (if, contrary to the husband's principal argument, they had power to make a property settlement order in this case). Yet it is in this second context that the involuntary nature of their separation is significant. To explain why that is so, it is necessary to examine the operation of s 79.

The operation of s 79

35 It will be recalled that s 79(2) provides that "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. The requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order.

36 The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition[21]. It is not possible to chart its metes and bounds. And while the power given by s 79 is not "to be

---

21 See *Mallet v Mallet* (1984) 156 CLR 605 at 608 per Gibbs CJ; [1984] HCA 21.

exercised in accordance with fixed rules"[22], nevertheless, three fundamental propositions must not be obscured.

37 First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to "*altering* the interests of the parties to the marriage in the property" (emphasis added). The question posed by s 79(2) is thus whether, having regard to those *existing* interests, the court is satisfied that it is just and equitable to make a property settlement order.

38 Second, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In *Wirth v Wirth*, Dixon CJ observed[23] that a power[24] to make such order with respect to property and costs "as [the judge] thinks fit", in any question between husband and wife as to the title to or possession of property, is a power which "rests upon the law and not upon judicial discretion". And as four members of this Court observed about proceedings for maintenance and property settlement orders in *R v Watson; Ex parte Armstrong*[25]:

> "The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down".

39 Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping

---

22 *Mallet v Mallet* (1984) 156 CLR 605 at 608 per Gibbs CJ.

23 (1956) 98 CLR 228 at 231-232; [1956] HCA 71.

24 Given by *The Married Women's Property Acts* 1890-1952 (Q), s 21, a provision which corresponded with s 17 of the *Married Women's Property Act* 1882 (Imp).

25 (1976) 136 CLR 248 at 257 per Barwick CJ, Gibbs, Stephen and Mason JJ; [1976] HCA 39.

in mind that "[c]ommunity of ownership arising from marriage has no place in the common law"[26]. Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses"[27]. The question presented by s 79 is whether those rights and interests should be altered.

40 Third, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down"[28]. To conclude that making an order is "just and equitable" *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.

41 Adherence to these fundamental propositions in exercising the power in s 79 gives due recognition to "the need to preserve and protect the institution of marriage" identified in s 43(1)(a) as a principle to be applied by courts in exercising jurisdiction under the Act. If the parties have made a financial agreement about the property of one or both of the parties that is binding under Pt VIIIA of the Act, then, subject to that Part, a court cannot[29] make a property settlement order under s 79. But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with Pt VIIIA, how their property interests should be arranged between them during the continuance of their marriage, the application of these principles accommodates that fact. And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some *different* arrangement of their property interests in their individual or commonly held assets while the marriage continues, the

---

26 *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 per Windeyer J; [1963] HCA 49.

27 *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 per Windeyer J. See also *Wirth v Wirth* (1956) 98 CLR 228 at 231-232 per Dixon CJ.

28 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257.

29 s 71A.

application of these principles again accommodates that fact. These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.

42 In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common *use* of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).

43 By contrast, the bare fact of separation, when involuntary, does not show that it is just and equitable to make a property settlement order. It does not permit a court to disregard the rights and interests of the parties in their respective property and to make whatever order may seem to it to be fair and just[30].

44 When, as in this case, the separation of the parties is not voluntary, the bare fact of separation does not demonstrate that the husband and wife have any reason to alter the property interests that lie behind whatever common use they may have made of assets when they were able to and did live together. Common

---

30 *Wirth v Wirth* (1956) 98 CLR 228 at 231-232 per Dixon CJ; *Hepworth v Hepworth* (1963) 110 CLR 309 at 317-318 per Windeyer J.

use of some assets may very well continue, as it did here when the husband made provision for the wife's care and accommodation. Past arrangements that the parties have made about their property interests on the assumption, expressed or implicit, that those arrangements were sufficient and appropriate during the continuance of their marriage are not necessarily falsified. If both parties are competent, it can still be assumed that any necessary or desirable adjustment can be made to their property interests consensually. And if one of the parties has become incompetent it is not to be assumed that the other party lacks the will and ability to make those necessary or desirable adjustments.

45 Contrary to the submissions of the husband in this Court, there may be circumstances other than a voluntary separation of the parties marking the breakdown of their marital relationship in which a court may be satisfied that it is just and equitable to make a property settlement order. For example, demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order. It may be that there are circumstances other than need.

46 As has already been emphasised, nothing in these reasons should be understood as attempting to chart the metes and bounds of what is "just and equitable". Nor is anything that is said in these reasons intended to deny the importance of considering any countervailing factors which may bear upon what, in all the circumstances of the particular case, is just and equitable. In particular, as the Full Court pointed out[31] in its first judgment in this matter, the magistrate erred in not taking account of the consequences that would follow *for the husband* if a property settlement order were to be made in the terms which were sought on behalf of the wife. The husband would be required to sell the matrimonial home, in which he was still living, despite the needs of his wife then being met by the provision of full time care, a further provision of money against future contingencies and the possibility, if needed, of making a maintenance order.

Applying s 79 in this case

47 The Full Court was right to conclude, in its first judgment, that the magistrate had erred in making the property settlement order that was made. The Full Court was right to find that the magistrate did not consider factors that bore on whether it was just and equitable to make a property settlement order. The

---

31 (2011) FLC ¶93-483 at 85,990 [112], 85,991 [119].

magistrate did not consider[32] the effect upon the husband of making an order for division of the parties' property that would require the husband to sell the matrimonial home, in which he was continuing to live. The magistrate did not consider[33] whether a maintenance order would sufficiently meet the wife's needs.

48 In its second judgment, the Full Court re-exercised the power given by s 79 of the Act and made a property settlement order. The Full Court said[34] that the "many years of marriage and the wife's contributions *demand* that those *moral* obligations be discharged by an order for property settlement" (emphasis added). It described[35] the outcome produced by its orders as "just and equitable". But otherwise the Full Court made no separate inquiry into whether, had the wife not died, it would have made a property settlement order[36]. That inquiry required it to consider whether, had the wife not died, it would have been just and equitable to make a property settlement order. And because the Full Court did not consider whether it would have made an order if the wife had not died, it did not make any express inquiry into whether it was *still* appropriate to make an order[37].

49 No basis was identified at first instance, on appeal to the Full Court, or in argument in this Court, for concluding that it was just and equitable to make *any* order dividing the parties' property between them. It was not shown that the wife's needs during her life were not being or would not be met. The legal personal representatives of the wife supported the Full Court's reasoning but pointed to no additional consideration as bearing upon this question.

50 In argument in this Court, the legal personal representatives of the wife accepted that the application for a property settlement order had been commenced when the wife was no longer competent and without the wife having expressed any wish to seek the division of marital property. The legal personal representatives also accepted that the "very dominant consideration" in the Full

---

32 (2011) FLC ¶93-483 at 85,990 [112], 85,991 [119].

33 (2011) FLC ¶93-483 at 85,986 [90], 85,990 [112], 85,991 [119].

34 (2012) FLC ¶93-495 at 86,313 [52].

35 (2012) FLC ¶93-495 at 86,314 [62].

36 s 79(8)(b)(i).

37 s 79(8)(b)(ii).

Court's decision to make the orders it did was its conclusion that the wife's contributions during the marriage established the "moral" obligation to which reference has already been made. But they did not submit, and the Full Court did not find, that the contributions to which reference was made affected the existing legal or equitable interests of the parties in property. And they did not submit, and the Full Court did not find, that the magistrate had erred in the findings she made about the parties' existing interests in property.

51 Section 79(4)(a)-(c) required that the contributions which the wife made to the marriage should be taken into account in "considering what order (if any) should be made" under s 79. It may readily be assumed that the length of the parties' marriage directly affected the extent of the contributions the wife had made. But, as already noted, the inquiries required by s 79(4) are separate from the "just and equitable" question presented by s 79(2). The two inquiries are not to be merged. And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was *still* just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should be made by applying the matters listed in s 79(4).

52 Whether it was just and equitable to make a property settlement order in this case was not answered by pointing to moral obligations. Reference to "moral" claims or obligations is at the very least apt to mislead. First, such references appear to invite circular reasoning. On its face, the invocation of moral claims or obligations assumes rather than demonstrates the existence of a legal right to a property settlement order and further assumes that the extent of that claim or obligation can and should be measured by reference to the several matters identified in s 79(4). Second, the term "moral" might be used to refer to a claim or obligation that is based on the kind of contribution described in s 79(4)(b) – "the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage ... to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them". But nothing is gained by describing such a contribution as founding a "moral" claim or obligation. Moreover, if the word "moral" was being used in this context with some wider meaning or application, it is important to recognise that it is used in a way that finds no *legal* foundation in the Act or elsewhere. It is, therefore, a term that may, and in this case did, mislead. The rights of the parties were to be determined according to law, not by reference to other, non-legal considerations. The references by Brennan J in

Fisher v Fisher[38] to moral claims should not be misunderstood as suggesting otherwise.

Conclusions and orders

53 It was not shown that, had the wife not died, it would have been just and equitable to make a property settlement order. It follows that it was not open to the Full Court to find that it was still appropriate to make an order with respect to property.

54 The appeal to this Court should be allowed with costs. Paragraphs 1 and 2 of the orders of the Full Court of the Family Court of Australia made on 19 January 2012 should be set aside. Paragraph 3 of the Full Court's orders, by which the costs of the appeal to that Court were reserved for further consideration, should stand. The orders made by the Full Court on 21 October 2011 allowing the husband's appeal to that Court and setting aside the property settlement order made at first instance should be varied by adding an order dismissing the application for a property settlement order made on the wife's behalf and continued by her legal personal representatives.

---

38 (1986) 161 CLR 438 at 457-458.

55 HEYDON J. A husband and wife married in 1971. The husband had children by an earlier marriage. So did the wife. The husband and wife had no children by their marriage.

56 On 31 December 2008, the wife suffered a severe stroke and was later diagnosed with dementia. There were disputes between her daughters and the husband about which nursing care facility the wife should be placed in. The wife's daughters favoured a facility that required payment of a $300,000 bond or entrance fee. The husband did not.

57 On 21 July 2009, the wife was placed in a high care facility which did not require payment of a bond. The facility's fees were paid out of the wife's veterans' pension from the Department of Veterans' Affairs. On 23 July 2009, the husband opened a trust account of which his wife was sole beneficiary and paid $42,186.36 into it. The purpose was to provide additional funds for the wife in relation to medical, accommodation and other expenses.

58 On 17 August 2009, the wife filed an application in property settlement proceedings under s 79 of the *Family Law Act* 1975 (Cth) ("the Act"). Her application was made by a daughter of her first marriage as case guardian. The application was for orders dividing the property of herself and her husband in their matrimonial home, his superannuation entitlements and their combined savings.

59 Section 79(2) of the Act provided: "The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."

60 The Magistrates Court of Western Australia ordered the husband to pay his wife $612,931. After the husband's appeal to the Full Court of the Family Court of Australia had been heard, but before it was decided, the wife died. In those circumstances s 79(8)(b) of the Act applied. It gave the Court power to make "such order as it considers appropriate with respect to [the] property" on two conditions. The conditions were created by s 79(8)(b)(i) and (ii) respectively. The condition created by s 79(8)(b)(i) was that the Court is of the opinion that it "would have made an order with respect to property if the deceased party had not died". In consequence of s 79(8)(b)(i), one question for the Full Court was whether under s 79(2) it would have been just and equitable to have made an order with respect to property if the wife had not died. The legal personal representatives of the wife bore the burden of proof on that question.

61 There are two main reasons why it would not have been just and equitable to have made an order with respect to property if the wife had not died. It is sufficient to state those reasons largely in the language used by the Full Court (Bryant CJ, May and Moncrieff JJ) in its first judgment.

62 The first reason is that the wife's needs were met. The background to the first reason is that at the time when the application was instituted it was thought that provision of a capital sum for the wife would be "necessary or … at least be useful in securing suitable accommodation for her in an aged care facility."[39] At the time judgment was delivered this was no longer the case. By then, "the wife's condition [fell into] the category of 'high care' [and] she [was thus] entitled to be cared for in an aged care facility without the need for a bond."[40] Hence the wife's "reasonable needs could be met in other ways particularly by maintenance."[41] In short, the provision of care funded by her pension and by the trust fund that the husband had created was sufficient to meet the wife's needs. If her needs ceased to be met in those ways, maintenance orders against the husband could be applied for and made.

63 The second reason is[42]:

> "Other than the forced separation of the parties by virtue of the wife being in a nursing home, the husband wished to remain in the home which had been the parties' home for in excess of 35 years, until such time as he could not reasonably remain there. … In our view there are many aspects of this application which do not require an immediate order finally altering the interests of the parties in their property and particularly so where it would require the husband to leave his home of 48 years in which he is still residing."

64 The legal personal representatives of the wife argued that it was just and equitable for the Magistrate to have made her order. That was because the legal entitlements of the parties did not reflect their contributions to the marriage. That factor might be relevant, even decisive, in circumstances different from those of this case as they stood during the hearings while the wife was alive. But it was not sufficient to render it just and equitable to make the order at the time it was made.

65 For those reasons the wife failed to demonstrate that the condition stated in s 79(8)(b)(i) was satisfied.

---

39 *Stanford & Stanford* (2011) FLC ¶93-483 at 85,986 [85].

40 *Stanford & Stanford* (2011) FLC ¶93-483 at 85,986 [82].

41 *Stanford & Stanford* (2011) FLC ¶93-483 at 85,990 [112].

42 *Stanford & Stanford* (2011) FLC ¶93-483 at 85,990 [112].

66 Therefore the condition stated in s 79(8)(b)(ii) does not arise. It is not necessary to consider it or the husband's argument that there was no power to make any property settlement order in this case.

67 The appeal should be allowed with costs. Orders 1 and 2 of the Full Court of the Family Court of Australia made on 19 January 2012 should be set aside. The Form 1 Application of the respondent filed on 17 August 2009 should be dismissed.