HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND GORDON JJ

HSIAO APPELLANT

AND

FAZARRI RESPONDENT

Hsiao v Fazarri
[2020] HCA 35
Date of Hearing: 7 August 2020
Date of Judgment: 14 October 2020
M137/2019

ORDER

Appeal dismissed with costs.

On appeal from the Family Court of Australia

Representation

A J Myers QC with M C Hines and S J Moloney for the appellant (instructed by Armstrong Legal)

B W Walker SC with A M Dinelli and N A Wootton for the respondent (instructed by Taussig Cherrie Fildes)

CATCHWORDS

Hsiao v Fazarri

Family law – Property settlements – Where respondent husband made gift to appellant wife of ten per cent interest in residential dwelling ("the property") – Where respondent subsequently signed transfer of land giving appellant further 40 per cent interest in the property – Where parties registered as joint tenants then executed deed of gift providing for payment to appellant's siblings if appellant predeceased respondent while they remained joint tenants – Where parties subsequently married then separated after 23 days – Where each party sought orders under s 79(1) of *Family Law Act 1975* (Cth) altering interests in property of marriage ("property settlement orders") – Where appellant did not appear at trial so matter proceeded as undefended hearing – Whether primary judge failed to take existing legal and equitable interests of parties into account for purposes of s 79(1) of *Family Law Act* – Whether primary judge's approach to deed of gift amounted to failure to take material consideration into account – Whether open to primary judge to determine that making of property settlement orders was just and equitable – Whether open to primary judge to assess that appellant made ten per cent financial contribution to acquisition of the property – Whether Full Court of the Family Court of Australia erred in refusing to exercise discretion conferred by s 93A(2) of *Family Law Act* to receive further evidence on appeal.

Words and phrases – "affirmation", "deed of gift", "demands of justice", "duress", "finality", "financial contribution", "further evidence on appeal", "joint tenants", "just and equitable", "malpractice", "pressure", "property settlement order", "ratification", "unconscionable conduct", "undue influence", "voidable".

Family Law Act 1975 (Cth), ss 75(2), 79, 93A(2), 94(1).
Family Law Rules 2004 (Cth), rr 1.04, 1.08.

1 KIEFEL CJ, BELL AND KEANE JJ. Prior to their marriage, the respondent husband made a gift to the appellant wife of a ten per cent interest in a residential dwelling ("the property"). Around eight months later, while in hospital receiving treatment for a suspected heart attack, the respondent, under pressure from the appellant, signed a transfer of land[1] ("the transfer"), giving her a further 40 per cent interest in the property. A little over two months later, at a time when the respondent was no longer under pressure, the transfer was registered and the parties became proprietors of the property as joint tenants. Shortly thereafter, they executed a deed of gift ("the deed") which provided for the respondent to pay a sum, approximately one half of the value of the property, to the appellant's siblings in the event that she predeceased him while they remained joint tenants.

2 In August 2016, the parties married. The marriage lasted 23 days. Thereafter each party sought orders under s 79(1) of the *Family Law Act 1975* (Cth) ("the Act"), altering their interests in property. The appellant did not appear at the hearing and the matter proceeded as an undefended hearing in the Family Court of Australia (Cronin J).

3 On 19 June 2018, the Court made orders, relevantly: severing the joint tenancy of the property; requiring the appellant to transfer the whole of her interest in the property to the respondent; requiring the respondent to pay the appellant $100,000; and that each party otherwise retain all other property in the possession of the party at the date of the orders. An appeal to the Full Court of the Family Court of Australia (Strickland, Kent and Watts JJ) was dismissed.

4 By special leave granted by Nettle and Gordon JJ on 10 October 2019, the appellant appeals from the orders of the Full Court on eight grounds. The first five grounds variously contend that the Full Court erred in upholding the property settlement order either because it was not open to the primary judge to be satisfied that it was just and equitable to make it[2] or because the primary judge's discretion miscarried by reason of his Honour's failure to take account of the appellant's 50 per cent legal interest in the property.

5 In the written submissions filed on the appellant's behalf, these five grounds were distilled to a single issue, namely whether the gift of the additional 40 per cent interest in the property was voidable for undue influence (or pressure, as the primary judge described it), or whether the gift had become absolute by virtue of the deed ("the first issue"). The Full Court's error was said to be that it accepted the finding that the respondent signed the transfer under pressure without

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1 *Transfer of Land Act 1958* (Vic), s 45(1).

2 *Family Law Act 1975* (Cth), s 79(2).

considering whether the effect of the pressure was spent by the execution of the deed.

6 At the hearing in this Court, there was a shift in the way the argument was put on the first issue. Contrary to the suggestion that the primary judge treated the gift of the 40 per cent interest as having been set aside for undue influence, it was accepted that his Honour approached the determination on the footing that the appellant was a joint tenant of the property. The significance of the deed was not that it affirmed the joint tenancy but rather that it evidenced the parties' intentions with respect to the very events that had occurred. Their agreement – that should they separate or divorce the appellant's interest in the property should be reflected in a payment to her by the respondent of a sum equivalent to half of its value – was a material consideration which the primary judge had failed to take into account.

7 As will appear, the argument is based on a misconstruction of the deed. The appellant's challenge under her first five grounds reduces to the contention that it was not open to the primary judge to be satisfied that it was just and equitable to make a property settlement order or, if it was, it was not open to find the appellant's financial contribution was no greater than ten per cent. Neither proposition should be accepted.

8 The remaining three grounds contend error in the Full Court's refusal to exercise the discretion conferred by s 93A(2) of the Act to receive further evidence on the appeal ("the second issue"). The further evidence is said to reveal malpractice on the respondent's part arising from his failure to disclose materials that reveal either that his evidence was false or that he practised a fraud on the revenue. As will appear, in circumstances in which the appellant made a deliberate choice not to participate in the trial and not to adduce the further evidence which was available to her, the Full Court was right to decline to receive it on the appeal. For the reasons to be given, the appeal should be dismissed with costs.

The procedural history

9 In this Court, the appellant does not challenge the primary judge's determination to proceed with the hearing in her absence. Nonetheless, in light of her argument on the second issue – that the demands of justice required the Full Court to admit the further evidence and direct a new trial so that she would have the opportunity of putting her case – reference should be made to aspects of the procedural history.

10 In November 2016, the respondent commenced proceedings in the Federal Circuit Court of Australia seeking orders under s 79(1) of the Act to alter the parties' interests in property by transferring the appellant's interest in the property to him. By her amended response to the application, the appellant also sought an

order under s 79(1) of the Act, altering the parties' interests in property by transferring 50 per cent of the respondent's assets to her.

11 On 19 September 2017, the proceedings were transferred to the Family Court. In December 2017, the parties were offered a date for final hearing. The appellant opposed that course. Before the proceedings were transferred, the appellant had applied for interlocutory orders, including that the respondent pay her a sum of $200,000 to be applied towards her legal costs and disbursements of the proceedings. In January 2018, the appellant's application came before the primary judge. His Honour took into account that the appellant had already spent in excess of $200,000 on legal expenses in connection with the proceedings[3]. His Honour was satisfied that there were circumstances justifying a departure from the principle that each party bear its own costs[4]. In the absence of evidence as to the estimated amount of the appellant's costs, his Honour determined that the respondent should pay the appellant $80,000 to enable her to investigate the sufficiency of the respondent's discovery, deal with an outstanding issue of spousal maintenance and, if necessary, consider mediation[5]. His Honour observed that the case was one that needed to be managed and controlled, noting that the appellant could make a further application and justify the need for any additional funds[6].

12 In April 2018, on the application of the respondent and over the opposition of the appellant, the matter was fixed for trial. Directions appointing a timetable for the filing of affidavits were given. These required that the appellant file her evidence by 6 June 2018. She failed to do so. On 7 June 2018, her solicitors filed a notice of ceasing to act.

13 On 14 June 2018, the day before the trial, the appellant applied for orders that the trial be adjourned to a date to be fixed and for the recusal of the primary judge. The appellant appeared for herself and read what the primary judge described as "significant affidavits" that had been prepared in support of the applications[7]. The primary judge described the appellant as "an educated and

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3 *Fazarri & Hsiao* [2018] FamCA 1159 at [12].

4 *Family Law Act*, s 117; *Fazarri & Hsiao* [2018] FamCA 1159 at [29].

5 *Fazarri & Hsiao* [2018] FamCA 1159 at [31], [34].

6 *Fazarri & Hsiao* [2018] FamCA 1159 at [31].

7 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [12].

intelligent woman who was more than capable of arguing her case"[8]. His Honour noted the absence of any explanation as to why the appellant's solicitors had not prepared the matter for trial or, if they perceived any insufficiency in the respondent's discovery or litigation funding, why they had not pursued those matters[9]. Both applications were refused. Thereupon the appellant stated that she could not attend the hearing on the following day. The primary judge warned the appellant that in such an event the trial might proceed in her absence[10].

14 The appellant did not attend the Court the following day. The primary judge found that there was no acceptable reason for her failure to file evidence or to appear[11]. The matter proceeded as an undefended hearing.

The factual findings

15 In summary, the factual findings were as follows. At the date of the trial, the appellant was aged 44 years and the respondent was aged 58 years. Their intimate relationship began in August 2012 at a time when the respondent was residing with his former wife. In March 2013, following his separation from his former wife, the respondent rented premises. Thereafter, he and the appellant spent nights together at each other's homes. While the parties lived together for intermittent periods they did not form a de facto relationship. Throughout their relationship and short marriage they maintained separate residences.

16 The respondent travelled internationally and the appellant often accompanied him, fulfilling a limited role as a personal assistant. She did not otherwise support the respondent's career and her attendance at social events was rare. The appellant was not engaged in paid employment during the parties' relationship and marriage. During the relationship, the parties unsuccessfully attempted to have a child. The appellant received various benefits from the respondent: access to his bank and credit card facilities; having her expenses paid; being made a beneficiary of a family trust; receiving a contribution of $20,000 to her superannuation fund; and being given a new motor vehicle. In 2015, the appellant took $40,000 from an account controlled by the respondent without his authority.

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8 *Fazarri & Hsiao* [2018] FamCA 446 at [37].

9 *Fazarri & Hsiao* [2018] FamCA 446 at [85].

10 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [8].

11 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [11], [17].

17 At the beginning of their relationship, the respondent had assets of approximately $20,000,000, which were subsequently reduced to around $9,000,000 following a property settlement with his former wife. The appellant had minimal assets, comprising a motor vehicle and some superannuation.

18 In April 2014, the respondent purchased the property for $2,200,000, which was financed from the respondent's own funds and borrowings. The parties had not lived together, in the sense of having a committed relationship, at the time of the purchase of the property. Simultaneously with the settlement of the property the respondent gifted to the appellant a one tenth interest in the property. The parties were registered as the proprietors of the property, as tenants in common, with the respondent holding nine of the ten undivided shares. At the time of its acquisition, the property was not habitable. The respondent subsequently paid for renovations to the property, but at the date of the trial neither party had resided there.

19 On 15 December 2014, while the respondent was in hospital suffering from a suspected heart attack, under pressure from the appellant he signed the transfer. On 27 February 2015, the transfer was registered and the parties became proprietors of the property as joint tenants.

20 In March 2015, the parties executed the deed. On 22 August 2016, they married and on 12 September 2016 they separated. By September of that year, the respondent had expended around $43,000 on renovations to the property. At the date of the trial, the property was valued at $3,070,000.

The deed

21 The deed was entitled "DEED OF GIFT" and after naming the respondent and the appellant as the parties to it, relevantly the deed provided:

> "DEFINITIONS
>
> **The Property**
>
> The property known as [G Street].
>
> [**The appellant's brother**]
>
> [AB]
>
> [**The appellant's sister**]
>
> [AC]

The Gift

The sum of one million Australian dollars ($1,000,000.00)

INTRODUCTION

A. [The respondent] and [the appellant] are currently the registered proprietors of the Property by way of joint tenancy.

B. In the event that [the appellant] predeceases [the respondent], [the respondent] intends to make a gift of one million Australian dollars ($1,000,000.00) to [the appellant's brother] and [the appellant's sister] in equal parts so that they receive $500,000 each.

NOW THIS DEED WITNESSES AS FOLLOWS

1. In the event [the appellant] predeceases [the respondent], and the parties still own the Property as joint tenants, the parties agree and acknowledge that sole ownership of the Property will devolve to [the respondent] as the survivor and the terms of this Deed will apply.

2. In these circumstances, the parties agree that [the respondent] will pay the Gift to [the appellant's brother] and [the appellant's sister] in equal parts of $500,000 each.

3. [The respondent] agrees to make payment of the Gift to [the appellant's brother] and [the appellant's sister] within sixty (60) days of the date of [the appellant's] death.

4. [The respondent] agrees to pay the whole or part of the Gift to such trust or trusts nominated by [the appellant's brother] or [the appellant] at least 14 days before payment of the Gift.

5. In the event that [the appellant's brother] predeceases [the appellant], [the respondent] will pay the Gift to [the appellant's sister]. Unless a trustee is otherwise appointed by [the appellant] or [the appellant's brother] under clause 4, the money is to be paid to [the appellant's sister] in whole to the exclusion of any other party, including her legal guardian or carer.

6. In the event that [the appellant's sister] predeceases [the appellant], [the respondent] will pay the total Gift to [the appellant's brother].

7. The parties agree that this Deed will have no application in the event that:

(a) The Parties do not own the Property as joint tenants as at the date of [the appellant's] death; or

(b) [the respondent] predeceases [the appellant].

8.(a) If the parties are separated or divorced and the Property is still owned by the parties as joint tenants, any property settlement or Family Court proceedings will take into account any payment made or to be made under this Deed by [the respondent].

(b) The payment under 8(a) will be:

(i) $1 million, if [the appellant] and [the respondent] have any children together which [the respondent] is supporting financially whether part of any settlement or court proceedings or otherwise; or

(ii) half the value of the Property with a minimum of $1 million if [the respondent] and [the appellant] do not have any children,

and such payment will be taken into account as part of the Property Settlement or Court proceedings.

(c) This clause 8 is intended to apply where the parties have separated or divorced and [the appellant] predeceases [the respondent] before a final property settlement is agreed or determined. It is not intended that [the respondent] pays twice under this Deed and then under any property settlement or proceedings."

The primary judge's analysis

22 The primary judge approached the parties' respective applications to alter their interests in property correctly by first determining what those interests were. His Honour noted that neither the fact of the marriage nor its ending carried with it an assumption that those interests should be adjusted[12].

23 It was the respondent's case that as he had provided all of the funds to acquire the property it was open to find that the appellant's legal interest was

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12 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [75]-[76], citing *Stanford v Stanford* (2012) 247 CLR 108 at 121 [39] per French CJ, Hayne, Kiefel and Bell JJ.

subject to a resulting trust for his benefit. The primary judge disposed of the submission shortly, observing that, putting aside the "constraints" thrown up by the presumption of advancement, a resulting trust could only arise in relation to the appellant's one tenth interest that had been created when the property was acquired[13]. And his Honour was satisfied that the appellant received her one tenth interest as a gift[14].

24 Turning to the balance of the appellant's interest in the property, his Honour accepted that the respondent had been "badgered" by the appellant to give her an additional 40 per cent interest[15]. Nonetheless, the inference that his Honour drew from the creation of the joint tenancy was that the respondent intended that the appellant be the owner of the whole undivided interest in the property with him and that she become sole proprietor in the event that he predeceased her[16]. There was no evidence that the respondent had done anything other than to comply with the appellant's demands for equality of ownership and it was difficult to see any trust arising in his favour[17].

25 His Honour found that at the time of the property's acquisition, the parties intended that theirs would be a lasting relationship and that the property would be the place in which they shared their lives[18]. The lack of fulfilment of this expectation was the circumstance that satisfied his Honour that it was just and equitable to make a property settlement order[19].

26 His Honour acknowledged the obligation that the respondent had assumed under the deed to make the payment to the appellant's siblings in the event that she predeceased him[20]. Clause 7(a) provided that the deed would have no application

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13 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52].

14 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [49], [51].

15 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52].

16 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52].

17 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52].

18 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [76].

19 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [78].

20 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [54].

in the event that the parties no longer owned the property as joint tenants as at the date of the appellant's death, and each party was seeking orders that would sever the joint tenancy[21]. In the circumstances, his Honour found it unnecessary to give further attention to the deed.

27 In considering what, if any, orders should be made for the alteration of the parties' property interests it was necessary for his Honour to take into account the factors set out in s 79(4), which include the matters set out in s 75(2) so far as they are relevant[22]. The s 79(4) factors included the financial and non-financial contributions made directly or indirectly by the parties to the acquisition, conservation or improvement of any of their property[23], the contribution that each made to the welfare of the family[24] and the effect of any proposed order upon the earning capacity of either party[25].

28 His Honour observed that this was "a short marriage of days and the relationship as a whole, [was] modest"[26]. His Honour assessed the appellant's non-financial contribution to the acquisition, conservation or improvement of their property to be modest, if not nominal[27]. His Honour was not satisfied that the marriage had had any effect on the earning capacity of the appellant[28].

29 Section 75(2)(o) required the Court to consider "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account". His Honour approached the determination upon a view that this requirement operates to relieve the Court of being confined "to strict contributions

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21 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [57], [99].

22 *Family Law Act*, s 79(4)(e).

23 *Family Law Act*, s 79(4)(a), (b).

24 *Family Law Act*, s 79(4)(c).

25 *Family Law Act*, s 79(4)(d).

26 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [103].

27 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [67].

28 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [103].

of the nature described in s 79(4)"[29]. In circumstances in which the appellant had received her initial ten per cent interest in the property as a gift, his Honour rejected the respondent's submission that it was just to hold that "as he paid for the item in the first place, on strict contribution lines, he should have it back"[30]. His Honour assessed the appellant as having made a ten per cent financial contribution to the acquisition of the property[31]. The respondent's financial contribution to the acquisition, conservation or improvement of the property of the parties to the marriage as a whole was overwhelmingly greater than that of the appellant.

30 In light of the appellant's conduct of the litigation, his Honour considered it appropriate to take into account, against any entitlement that she might otherwise have, the respondent's payment of $80,000 towards her legal costs[32]. Given that the purchase of the property was funded in part by the respondent's borrowing and that it had been renovated at his expense, the primary judge considered that the appellant's financial contribution to the property was less than $220,000[33].

31 The effect of the primary judge's orders was to leave the appellant with assets of $430,000 and the respondent with assets in excess of $12,000,000[34].

The Full Court's analysis

Application to adduce further evidence

32 Before the Full Court, the appellant sought to adduce further evidence in the form of three affidavits affirmed by her and filed on 20 November 2018, 27 November 2018 and 6 December 2018[35]. Documents exhibited to these affidavits were described by the Full Court as falling within one of four categories.

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29 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [92], citing *Gabel v Yardley* (2008) 40 Fam LR 66 at 81 [72] per Bryant CJ and Coleman J.

30 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [86].

31 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [88].

32 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [93].

33 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [105].

34 *Hsiao & Fazarri* [2019] FamCAFC 37 at [15].

35 *Hsiao & Fazarri* [2019] FamCAFC 37 at [16], [18].

The first category comprised documents relating to whether the respondent was under pressure when he signed the transfer of the 40 per cent interest in the property to the appellant, and whether he subsequently acquiesced in the transfer. The second category comprised documents relating to whether the parties were living together on a genuine domestic basis before their marriage. The third category comprised documents relating to whether documents in the first and second categories were required to have been discovered by the respondent. The fourth category comprised documents relating to the appellant's failure to appear at the trial.

33 The Full Court found that, with the exception of a medical certificate dated 26 June 2018, all the documents comprising the further evidence were in the appellant's possession, or could have been obtained by her, before the trial. Their Honours found that reception of the documents in the first and second categories would have required a new trial[36]. In light of the primary judge's finding that the respondent had made the overwhelming financial contribution to the acquisition, conservation and improvement of the property during a short relationship and a very short marriage, the Full Court considered that the appellant's focus on the circumstances in which she obtained the further 40 per cent interest and her focus on the execution of the deed were distractions[37]. None of the documents in the first or second categories, in the Full Court's assessment, demonstrated error in the orders below, nor would they have produced a different result[38].

34 Given that the appellant had, or had access to, all of the documents in the first and second categories, the Full Court did not stay to determine whether the respondent had complied with his discovery obligations[39]. The medical certificate dated 26 June 2018 stated that the appellant had been "bed bound due to pelvic pain and migraines from Friday 8 June 2018 until Friday 15 June 2018"[40]. The Full Court noted that the appellant had appeared on her own behalf on the hearing of her interlocutory applications from 10.53 am to 4.16 pm on 14 June 2018.

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36 *Hsiao & Fazarri* [2019] FamCAFC 37 at [25], [37].

37 *Hsiao & Fazarri* [2019] FamCAFC 37 at [29].

38 *Hsiao & Fazarri* [2019] FamCAFC 37 at [30], [37].

39 *Hsiao & Fazarri* [2019] FamCAFC 37 at [39].

40 *Hsiao & Fazarri* [2019] FamCAFC 37 at [41].

35 The acknowledgment that the appellant had had the opportunity to file the further material before the trial and that she had deliberately refrained from doing so was held to weigh heavily against its reception on the appeal[41]. Their Honours held that it was not in the interests of justice to receive the further evidence.

The treatment of the appellant's interest in the property

36 Among her remaining grounds in the Full Court, the appellant challenged the primary judge's finding that the transfer of the property to the parties as joint tenants was not to be seen as a gift because she had pressured the respondent at a time when he was vulnerable. The finding was said to fail to take into account the respondent's "ratification and confirmation of that transfer by the terms of the deed" and the inference from its terms that, in the case of separation or divorce, the appellant was to receive the fair value of her interest.

37 The Full Court rejected the ground, noting the primary judge's express reference to the deed and his Honour's conclusions with respect to the parties' contributions to the acquisition, conservation and improvement of the property[42]. The Full Court also rejected a ground that contended that the finding of the respondent's overwhelming financial contribution failed to take into account the appellant's 50 per cent legal interest in the property. Their Honours noted that the primary judge had clearly taken into account the legal ownership of the property at the date of the trial[43].

38 A further ground contended that the primary judge failed to take into account that the property settlement order deprived the appellant of the benefit of the deed without giving her any compensation. The Full Court noted that both parties sought orders severing the joint tenancy. Their Honours said the primary judge was right to observe that the effect of the orders to be made would be that the deed was at an end[44]. The Full Court dismissed as incompetent unparticularised grounds that asserted, first, that there was no basis upon which the Court could be

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41 *Hsiao & Fazarri* [2019] FamCAFC 37 at [47], citing *CDJ v VAJ* (1998) 197 CLR 172 at 203 [116] per McHugh, Gummow and Callinan JJ.

42 *Hsiao & Fazarri* [2019] FamCAFC 37 at [70]-[73].

43 *Hsiao & Fazarri* [2019] FamCAFC 37 at [76].

44 *Hsiao & Fazarri* [2019] FamCAFC 37 at [80], [84].

satisfied that it was just and equitable to make the property settlement order and, secondly, that the primary judge's discretion under s 79 had miscarried[45].

The argument in this Court on the further evidence

39 It is convenient to deal at the outset with the appellant's ground which challenges the Full Court's refusal to receive the further evidence. The focus in this Court was on two documents, which were suggested to cast doubt on the respondent's credit and to demonstrate that he had engaged in "malpractice" in the conduct of his case at trial. Both documents were enclosed with a letter written to the respondent by his solicitor on 9 December 2014. The first was the transfer and the second was a Form 9A issued by the State Revenue Office of Victoria ("the SRO") to enable applications to claim exemptions from the payment of duty on the transfer of land from one spouse or domestic partner to another[46]. The solicitor asked the respondent to arrange for the appellant to sign both documents in the presence of a witness. Both documents were otherwise complete. The transfer recorded the consideration for the transfer of the respondent's 40 per cent interest in the property as "[t]he Natural Love and Affection the first named Transferor has for his domestic partner being the second named Transferee".

40 The appellant signed the Form 9A on 15 December 2014. It contained the following declaration:

> "I am the domestic partner of the transferor listed above. Although we are not married to each other we are domestic partners of each other and are living together as a couple on a genuine domestic basis (irrespective of gender)".

One inference is that the respondent's solicitor, acting on the respondent's instructions, arranged for the lodgement of the Form 9A with the SRO.

41 The appellant submitted that the Full Court erred in failing to take into account the respondent's failure to disclose the further evidence to the primary judge. It was said that either the respondent's evidence, that he and the appellant had not lived together, was contradicted by representations that they had which were made on his behalf to the SRO, or those representations were made in support of a deliberately false application for exemption from duty.

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45 *Hsiao & Fazarri* [2019] FamCAFC 37 at [86]-[87].

46 *Duties Act 2000* (Vic), s 43.

42 The appellant submitted that the respondent's non-disclosure of the transfer and the Form 9A amounted to malpractice. The Full Court's error, in this analysis, lay in not recognising that the interests of justice favour the exposure of malpractice. The Full Court's focus on whether the further evidence might have produced a different result in the circumstances was said to have been misplaced[47]. In any event, the appellant submitted, the Full Court was wrong not to find that there was a real possibility that there would have been a different result had the further evidence been before the primary judge[48]. With the benefit of the further evidence, it was submitted, the primary judge was unlikely to have accepted the respondent's evidence either that he had been pressured into transferring the further 40 per cent interest in the property or as to the nature and extent of the relationship. The refusal to receive the further evidence left the primary judge's findings, including that the respondent's disclosure had been adequate, standing. In the appellant's submission, the respondent's failure to disclose the further evidence, particularly the transfer and the Form 9A, occasioned a miscarriage of justice warranting a re-trial so that she might have the opportunity of putting her case.

The discretion to receive fresh evidence

43 The discretion that s 93A(2) confers on the Full Court to receive further evidence on an appeal exists to serve the demands of justice[49]. Against the background of the procedural history set out above, the appellant's submission, that those demands favour exposure of the respondent's asserted malpractice so that she may have the opportunity to put her case, is distinctly unattractive. Not later than when the respondent filed his evidence prior to trial the appellant may be taken to have understood its significance to her case. At that time the appellant was in possession of the further evidence or in a position to obtain it – significantly, a copy of the transfer was annexed to an affidavit filed in relation to the costs of the proceedings before the primary judge. The trial was the opportunity for the appellant to put her case and the appellant chose not to participate in it.

44 The main purpose of the *Family Law Rules 2004* (Cth) is "to ensure that each case is resolved in a just and timely manner at a cost to the parties and the

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47 See *Clone Pty Ltd v Players Pty Ltd (In liq) (Receivers and Managers Appointed)* (2018) 264 CLR 165 at 190-191 [50].

48 *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142-143.

49 *CDJ v VAJ* (1998) 197 CLR 172 at 202 [111] per McHugh, Gummow and Callinan JJ.

court that is reasonable in the circumstances of the case"[50]. Parties to proceedings under the Act are under an obligation to act in a manner that conduces to the promotion and achievement of that purpose[51]. Nonetheless, it is recognised that in proceedings under the Act, the need for finality will often be less prominent than in other appellate proceedings. Among other considerations, this takes into account the fact that proceedings under the Act will often affect the interests of children and that in many cases the Full Court is able to act on further evidence without the need for a new trial[52]. This is not to hold that in a case such as the present – property settlement proceedings following a notably short marriage that do not involve the interests of children – the need for finality does not present as a most material factor[53]. Here the respondent had no opportunity to deal with the further evidence and its reception would have necessitated a new trial. The Full Court's exercise of discretion was correct; the demands of justice would not have been served by receiving further evidence that would have necessitated a new trial in order to give the appellant an opportunity to present a case that she deliberately chose not to make at trial. That is so regardless of whether the further evidence might have produced a different result, albeit the Full Court's conclusion that it would not has not been shown to be erroneous.

Correct approach to making a property settlement order disregarded or misunderstood?

45 On the hearing in this Court, the appellant acknowledged that the primary judge's determination, that it was just and equitable to alter the parties' interests in property, proceeded on acceptance that they were joint tenants[54]. In the circumstances, the appellant's argument accepted that there was no question of the deed operating to affirm the joint tenancy. Her complaint with the primary judge's

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50 *Family Law Rules 2004* (Cth), r 1.04.

51 *Family Law Rules*, r 1.08.

52 *CDJ v VAJ* (1998) 197 CLR 172 at 200 [104], 202 [111] per McHugh, Gummow and Callinan JJ.

53 *CDJ v VAJ* (1998) 197 CLR 172 at 203 [116] per McHugh, Gummow and Callinan JJ.

54 *Stanford v Stanford* (2012) 247 CLR 108 at 120-123 [35]-[46] per French CJ, Hayne, Kiefel and Bell JJ.

treatment of the deed was his Honour's failure to refer, much less accord weight, to the provision made under it in cl 8.

46 In particular, cl 8(b)(ii) was suggested to address the very circumstances that had occurred: the parties remained joint tenants of the property, they were separated or divorced, and they did not have any children. Clause 8(b)(ii) was a "powerful statement of the parties' intention and expectation" that in such an event the appellant's interest in the property would be reflected by the payment to her of a sum representing half of its value, being a sum not less than $1,000,000. The argument acknowledged that the deed was not a "financial agreement" for the purposes of the Act[55] but maintained that its provisions were plainly material to any assessment of whether it was just and equitable to alter the parties' interests in the property.

47 The deed was executed in March 2015, not long after the transfer was registered and the parties became the proprietors of the property as joint tenants. The evident intention of the parties in executing the deed was to address the consequences of survivorship in the event that the appellant predeceased the respondent. It was a deed of gift in favour of the appellant's brother and sister (or the survivor of the brother and sister). Clauses 1 to 6 provided for payment of the gift, as defined, in the event that the appellant predeceased the respondent at a time when the marriage was on foot. Clause 7 made clear that the deed had no application in the event that the parties no longer owned the property as joint tenants at the date of the appellant's death, or in the event that the respondent predeceased the appellant.

48 Clause 8 needs to be understood in light of the fact that the Act permits property settlement proceedings to be continued by or against the legal personal representative of a deceased party to a marriage[56]. The evident purpose of cl 8 is to make provision in the event the appellant predeceased the respondent at a time when they were separated or divorced and before any property settlement proceedings between them were completed. Clause 8(c) states so. Contrary to the appellant's submission, cl 8(b)(ii) cannot be construed as providing for the respondent to pay to the appellant a sum representing half the value of the property in the event of their separation or divorce if they remained its owners as joint tenants. The only payments for which the deed provided were to the appellant's brother and sister (or the survivor of the brother and sister), or to a trustee

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55 *Family Law Act*, s 71A.

56 *Family Law Act*, s 79(8)(a).

nominated by the appellant or her brother, in circumstances in which the appellant was deceased.

49 The execution of the deed remains central to the appellant's challenge. The deed, executed at a time when there was no suggestion that the respondent was under pressure, was premised on the appellant's 50 per cent interest in the property being preserved for the benefit of her siblings in the event of her death, including at a time when she and the respondent were separated or divorced. Why, she asks, is it just and equitable for the Court to disturb the parties' interests in the property without making reference to what they had themselves agreed?

50 The primary judge appreciated the necessity of identifying the parties' existing legal and equitable interests in property before determining whether it was just and equitable to make orders, as each party had invited the Court to do, altering those interests[57]. This was a brief marriage, which was not shown to have affected the appellant's earning capacity. There were no children whose interests stood to be affected by any alteration of the parties' interests in property. In the circumstances, arguments may be envisaged for and against finding that it was just and equitable to make a property settlement order. In the event, the arguments pressed on the appellant's behalf in this Court were not put to the primary judge and his Honour cannot be criticised for not addressing them.

51 The lack of fulfilment of the parties' expectations that their marriage would be lasting, and that the property would serve as the place in which to share their lives, was the consideration which his Honour found made it just and equitable to make a property settlement order. Accepting that it was open so to reason, the fact that shortly after becoming registered as joint tenants of the property the parties executed the deed to protect the appellant's interests in the event that she predeceased the respondent provides no reason to come to a different conclusion. His Honour's discretion did not miscarry by reason of his failure expressly to advert to the significance of cl 8 of the deed, especially given that cl 8 did not contemplate the making of a payment to the appellant under any circumstances. Further, both parties were seeking relief, the granting of which, as his Honour appreciated[58], would necessitate the severance of the joint tenancy, the

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57 *Stanford v Stanford* (2012) 247 CLR 108 at 120-123 [35]-[46] per French CJ, Hayne, Kiefel and Bell JJ.

58 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [57], [99].

continuation of which was a condition of the operation of cl 8. Clause 8, properly understood, had no bearing upon the proper exercise of his Honour's discretion.

52 Another way in which the appellant's argument was put was to challenge the basis for the distinction that his Honour drew between the initial gift of the ten per cent interest in the property and the subsequent transfer of the 40 per cent interest. His Honour distinguished the transfer from the initial gift on the basis that the latter was, at best, done at the appellant's "insistence" while the former was done under "pressure" from her[59]. This distinction was drawn in the context of assessing the direct and indirect financial contribution, if any, made by the appellant to the acquisition, conservation and improvement of any of the property of the parties to the marriage[60]. His Honour's conclusion that, unlike the transfer of the 40 per cent interest, the initial gift should be treated as a financial contribution to the acquisition of the property, notwithstanding that the respondent paid the whole of the purchase price[61], reflected his Honour's assessment of the justice of the case. Implicit in the analysis, in the context of this short marriage, is his Honour's further assessment that the justice of the case did not warrant treating the appellant as having made a financial contribution of 50 per cent to the acquisition, conservation and improvement of the property.

53 His Honour is not to be taken to task for not making a close examination of the facts to determine whether the transfer of the 40 per cent interest was voidable by reason of vitiating factors such as duress, undue influence or unconscionable conduct. His Honour made no such finding. Nor is his Honour to be taken to task for failing to give more comprehensive reasons for the distinction drawn between the appellant's acquisition of the initial ten per cent interest and subsequent acquisition of the additional 40 per cent interest in the property in assessing the parties' respective direct and indirect financial contributions. His Honour's reasons reflected the arguments that were put to him. The trial was the place to adduce such evidence and put such arguments as might favour a different finding as to the parties' respective financial contributions for the purposes of s 79(4)(a). The trial was not some preliminary skirmish which the appellant was at liberty to choose

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59 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [84]-[85].

60 *Family Law Act*, s 79(4)(a).

61 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [88].

not to participate in without consequence[62]. Her right of appeal[63] was a right to have the Full Court review whether the primary judge's discretion to make a property settlement order had miscarried, applying the well-established principles expressed in *House v The King*[64]. It was not an opportunity for the appellant to make a case that she chose not to make at the trial. The Court is invested with a wide discretion under s 79(1) to make such order as it considers appropriate[65]. It should not be concluded that his Honour's assessment of the parties' respective financial contributions, in this singular case, was not open.

Order

54 For these reasons there will be the following order:

Appeal dismissed with costs.

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62 *Coulton v Holcombe* (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

63 *Family Law Act*, s 94(1).

64 (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; see also *Norbis v Norbis* (1986) 161 CLR 513 at 517-519 per Mason and Deane JJ.

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

55 NETTLE AND GORDON JJ. We have had the advantage of reading in draft the reasons for judgment of the majority, but we have come to a different conclusion. We do not agree that the primary judge approached the matter, or that the appellant ever accepted that the primary judge approached the matter, on the footing that the appellant was a joint tenant of the property the subject of the present appeal ("the property"). As will be seen, the primary judge treated the appellant's interest as a joint tenant in the property as in effect abrogated by "pressure". But, as will be explained, it was not open on the evidence to find "pressure" sufficient to vitiate the appellant's interest as joint tenant, and, in any event, the vitiating effect of such "pressure" as there may have been was negated by the respondent's subsequent execution of the deed of gift ("the deed"). As a result, the primary judge failed to give proper effect to the existing legal and equitable interests of the parties[66]. And the appellant maintained throughout the proceedings in this Court that that was her case.

How the appellant approached the matter

56 As is explained in the majority's reasons, the appellant did not appear at the trial and it was conducted in her absence. Consequently, it may well be said that she bears a considerable degree of responsibility for the way in which the matter miscarried. But, as was her right[67], she appealed to the Full Court on grounds of appeal which included, relevantly, that the primary judge incorrectly concluded that the appellant placed pressure on the respondent to transfer an additional 40 per cent interest in the property to her, because the primary judge failed to take into account:

> "(a) that there was no evidence capable of sustaining a finding that the transfer could not be seen as a gift;
>
> (b) the [respondent's] evidence that during [the] relationship, he acceded to the [appellant's] every demand, in which case it was unlikely that any pressure was a cause of his signing the transfer;
>
> (c) [the respondent's] acquiescence in the transfer and his ratification and confirmation of that transfer by the terms of the deed under seal".

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66 As is required by s 79 of the *Family Law Act 1975* (Cth), in accordance with the principles set out in *Stanford v Stanford* (2012) 247 CLR 108 at 120-121 [36]-[40] per French CJ, Hayne, Kiefel and Bell JJ.

67 *Family Law Act*, s 94(1).

57 The Full Court rejected grounds (a) and (b) as follows[68]:

> "In respect of contention a), there was evidence from the respondent capable of sustaining a finding that the transfer of 40 per cent could not be seen as a gift ... There is no basis for contention b), that the primary judge failed to take into account the respondent's evidence that he acceded to the appellant's every demand ... when concluding that the appellant pressured the respondent at a vulnerable time."

58 The Full Court rejected ground (c) on the basis that[69]:

> "There is no basis to suggest that the primary judge failed to take the deed into account when making findings about what had happened when the respondent signed the transfer in December 2014."

59 The appellant then appealed to this Court on grounds which included, as her first and principal ground of appeal, that:

> "The Full Court erred in holding that the circumstances in which the appellant obtained an additional 40% legal interest in [the property] and the Deed of Gift signed by the appellant and respondent in about March 2015 were distractions in the disposition of the appeal."

60 Likewise, in the appellant's amended written submissions filed some months in advance of the hearing of the appeal before this Court, it was stated that:

> "The first issue, which arises under s 79 of the *Family Law Act 1975* ... has two parts. *The first part is the question whether the respondent's gift to the appellant making her a joint tenant of [the property] was voidable or not.* The second part is whether the property settlement order made by the primary Court, by which her interest in the property was transferred to the respondent, should have been upheld." (emphasis added)

61 Later in the same submissions, the appellant contended that the Full Court failed to identify the existing legal and equitable interests:

> "32. The correct approach to be taken to the analysis of the first issue described ... was set out by this Court in *Stanford v Stanford* (2012) 247 CLR 108. The Court said that 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

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68 *Hsiao & Fazarri* [2019] FamCAFC 37 at [66] per Strickland, Kent and Watts JJ.

69 *Hsiao & Fazarri* [2019] FamCAFC 37 at [72] per Strickland, Kent and Watts JJ.

and equitable principles, the *existing* legal and equitable interests of the parties in the property.

33. That required the Court below to decide whether the appellant's joint tenancy was voidable because procured by undue influence (or pressure, as the primary Court and the Court below described it), or had become absolute by virtue of the deed.

34. What the Court below did was merely to accept the primary Court's finding of pressure, without embarking on the enquiry whether the effect of any pressure was spent by the coming into operation of the deed.

35. The deed defined the property and referred to the parties and their joint tenancy. It provided for a gift of $1 million by the respondent to the brother and sister of the appellant in case she should predecease the respondent. Evidently, this was intended to be some sort of compensation to the appellant should the respondent, as the survivor, take the whole property. The terms of the deed provided that if the parties were separated or divorced, any property settlement would take into account any payment of the $1 million gift. Relevantly, the deed contemplated that the appellant would not lose her interest in the property by reason of the parties' separation or divorce.

36. Even if, as the Court below apparently accepted, the appellant had pressured the respondent to such an extent as to render her joint tenancy voidable, it is thus apparent that the respondent made an election to affirm it. This being so, when and after the property proceedings commenced, the gift of the tenancy was no longer voidable (if it ever had been), and the appellant's joint tenancy was not liable to be set aside. Having regard to the deed, this was the only finding open.

37. Thus, the Court below failed to undertake the first step required in beginning its consideration of whether it was just and equitable to make the property settlement order depriving the appellant of her joint tenancy.

...

42. The question is, considering that the appellant's interest was not one vitiated by pressure (and so not voidable), whether or not there was any principled reason for depriving her of its value." (emphasis in original, footnotes omitted)

62 Submissions to substantially the same effect were also advanced in the appellant's outline of oral argument handed up shortly before the commencement of the hearing of the appeal to this Court:

> "8. The approach of the Trial Judge, approved by the Full Court, is flawed for at least the following reasons:
>
> a) It is not clear that, as a first step, the legal and equitable interests of the parties to the marriage were identified. The Appellant was a joint tenant of the Property when the parties married and at the date of trial. The Trial Judge obscured the position by suggesting that the joint tenancy transfer '*could not be seen as a gift*' ... and referred to '*the issue of the interest she contributed in [the property]*' ... In determining whether to make an order under section 79, the Trial Judge did not take into account the Appellant's interest as joint tenant of the Property ... The Full Court approved the Trial Judge's findings ...
>
> b) When the Court has identified the property of the parties to the marriage, section 79(2) requires that the Court must only make any order altering the interests of the parties to the marriage in the property, including an order for a settlement of property in substitution for any interest in the property, if the Court is satisfied it is '*just and equitable in the circumstances*'. As is clear from Stanford ... this requires more than an assessment of '*contributions to the acquisition, conservation and improvements of [the property]*' ...
>
> c) The provisions of the Deed of Gift are important. First, the Deed of Gift, in relation to which there is no suggestion of pressure, is a clear affirmation of the transfer. Second, the provisions of the Deed of Gift provide that the gift constituted by the transfer is for the benefit of the Appellant, notwithstanding separation or divorce. In the circumstances, the Court below cannot have been satisfied that it was just and equitable to make an order depriving the Appellant of her interest in the Property without an order providing for payment to her of a sum of money equal to its value.
>
> d) The Full Court ... mentioned that the Deed of Gift was not an agreement under section 71A and observed that the '*primary judge was not bound*' by the terms of the Deed of Gift ... Although not bound by the Deed of Gift, consideration of the Deed of Gift was of primary importance for the Trial Judge

> in making the determination whether or not to exercise the power under section 79. The Full Court also remarked that, in any event, '*given the applications each party has made for final orders, clause 7 provided that the Deed of Gift has no application*' ... This observation is simply wrong. Clause 7 does not address the state of affairs which was before the Family Court." (italics and underlining in original)

63 When counsel for the appellant began his oral submissions before this Court, he stated that the appellant was no longer seeking 50 per cent of the current value of the property but only half the value of the property at the date of trial less the $100,000 awarded by the primary judge. Having then briefly outlined some of the facts, he observed that it appeared from the respondent's outline of oral argument that the respondent no longer contended that the appellant had not been entitled legally and beneficially to her interest in the property as joint tenant. And, as counsel for the appellant obviously appreciated, that was a remarkable concession on the part of the respondent, given that, both at first instance and on appeal to the Full Court, the respondent had argued, successfully, that the transfer of the property to the appellant as joint tenant could not be considered a gift because it was made under pressure. Hence, the observation of counsel for the appellant in his submissions before this Court that, in light of this concession, "whatever is the significance of the suggestion that [the transfer] was not a gift, it is not a consequence [of it being something other than a gift] that there was not a joint tenancy".

64 Counsel for the appellant later turned to the decision of the Full Court and the holding of this Court in *Stanford v Stanford* and concluded that section of his argument with this:

> "My friend concedes today that there was a joint tenancy, and indeed the judge did so. But the fact that there was a gift made does not affect the nature of the joint tenancy. *The starting point of the judge's consideration should have been an unequivocal statement that there was a joint tenancy created by the gift, not simply to call into some sort of question whether the gift was freely given.*
>
> Second, the court identified the property of the parties to the marriage but when it has done so, it requires that the court must only make an order altering the interests of the parties of the marriage and the property, including an order for the settlement of the property in substitution for any interest in the property, if the court is satisfied that it is 'just and equitable' in the circumstances.
>
> Well, in the present case, in considering that question of whether something is just and equitable, the deed of gift should have been carefully

considered by the court. It was not considered by the judge at first instance, and the [Full Court] simply said the judge was aware of the deed of gift and that was sufficient.

It is not sufficient ... that the deed of gift is based on the assumption that in the circumstances with which it deals, the [appellant's] interest as a joint tenant will be preserved in some sense, either by a payment of money or otherwise, including in the circumstances of Family Court proceedings. That is what the parties agreed among themselves. Why is it just and equitable that the court should disturb that without expressly referring to what the parties themselves agreed?" (emphasis added)

65 Counsel for the respondent argued in response that while the respondent now conceded that the transfer was not vitiated by pressure and that "there was a joint tenancy ... a joint tenancy legally and beneficially", there was no reason to doubt that the matter had been dealt with at first instance and on appeal in the exercise of the discretion created by s 79 consistently with the requirements set out by the plurality in *Stanford v Stanford*.

Primary judge's failure to identify the existing interests of the parties

66 As the decision of this Court in *Stanford v Stanford* makes plain, the starting point in the determination of what is "just and equitable" for the purposes of s 79 of the *Family Law Act* is the determination, according to ordinary legal and equitable principles, of the *existing* legal and equitable interests of the parties in the property that is to be settled[70]. So much follows from the text of s 79(1)(a) of the *Family Law Act* itself, which refers to *altering* the interests of the parties[71]. But just as importantly, it is the statutory imperative to take into account the considerations stipulated by the legislature, including, critically, the existing interests of the parties, that characterises the power conferred by s 79 as judicial power[72]. Consequently, proper consideration of existing interests is of fundamental importance. In the present case, the primary judge failed to identify or give effect to the existing interests of the parties in a critical respect.

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70 (2012) 247 CLR 108 at 120-121 [36]-[40] per French CJ, Hayne, Kiefel and Bell JJ.

71 *Stanford v Stanford* (2012) 247 CLR 108 at 120 [37] per French CJ, Hayne, Kiefel and Bell JJ.

72 See *Sanders v Sanders* (1967) 116 CLR 366 at 379-380 per Windeyer J; *Cominos v Cominos* (1972) 127 CLR 588 at 594-595 per Walsh J, 598-600 per Gibbs J, 602-606 per Stephen J, 608 per Mason J.

67 The primary judge's findings of fact are set out in the majority's reasons for judgment and it is unnecessary to repeat them. It suffices to emphasise for present purposes the primary judge's conclusions[73] that, although "the relationship [between the appellant and the respondent] was an intimate one", it was "hardly one that would satisfy the criteria for a de facto relationship"; that, in relation to the property, "the [respondent] was badgered by the [appellant] to give her 40 per cent of his interest [sic]"; and that, because the respondent "was under pressure and ... not in a position to argue", "the 10 per cent interest *could not be seen in the same light as the 40 per cent*" (emphasis added).

68 The primary judge found[74] that the appellant had a 10 per cent interest as tenant in common in the property that the respondent had given her at the time of the acquisition of the property in April 2014. Thus, as his Honour stated[75], "it is difficult ... to see how [the respondent] can simply ignore the creation of the 10 per cent interest in the first place because that was not anything other than deliberate even if he did it under the [appellant's] 'insistence'". Consistently with *Stanford v Stanford*, the primary judge took the appellant's 10 per cent interest in the property into account in deciding how the parties' respective interests in the property should be adjusted[76].

69 The primary judge also found[77] that the appellant's interest in the property was increased, with effect from 27 February 2015, from a 10 per cent share as tenant in common to, effectively, a 50 per cent interest as joint tenant, by the appellant and the respondent executing and, later, registering, in consideration of "natural love and affection", a transfer of the property from themselves as tenants in common to themselves as joint tenants. But, in contrast to the way that the primary judge gave full effect to the appellant's 10 per cent interest in the property in the application of s 79, his Honour treated the increase of 40 per cent to the interest as joint tenant as something that should *not* be taken into account in arriving at a just and equitable outcome under s 79, because, his Honour said[78]:

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73 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [39], [52], [84] per Cronin J.

74 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [49] per Cronin J.

75 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52] per Cronin J.

76 See *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [76]-[90] per Cronin J.

77 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [52] per Cronin J.

78 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [51] per Cronin J.

> "Having acquired [the property], the [appellant] asked the [respondent] to increase her interest to 50 per cent and that occurred although in controversial circumstances. He said that whilst in hospital with a suspected heart attack, the [appellant] demanded he sign a transfer and he did. The title was altered from 27 February 2015. *Unlike the 10 per cent, this could not be seen as a gift because of the circumstances under which it arose. I accept the [respondent's] unchallenged evidence that the [appellant] pressured him at a vulnerable time.*" (emphasis added)

70 As this Court has previously stated[79], in a case where a transaction is sought to be impugned by the operation of vitiating factors such as duress, undue influence, or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts ... in order to determine whether a claim to relief has been established". Here, however, as counsel for the appellant submitted before this Court, it is not at all apparent why his Honour considered that the facts as found meant that the appellant's 40 per cent interest in the property should either at law or in equity be conceived of as ineffective. There is nothing in the facts as found or elsewhere in his Honour's reasons that suggests that the appellant exerted any improper pressure by making unlawful[80] or lawful[81] threats, or that she was capable of subjecting or subjected the respondent to any recognisable form of improper economic pressure[82]. Perhaps, his Honour conceived of the case as one of undue influence of such effect as to overbear the respondent's independence and voluntariness of free will[83], or of unconscionable conduct constituted of the appellant taking unconscientious advantage of the respondent's found state of disability the result of being hospitalised for a suspected heart attack[84]. But his

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79 *Thorne v Kennedy* (2017) 263 CLR 85 at 104 [41] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, quoting *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [14] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

80 cf *Barton v Armstrong* [1976] AC 104.

81 See and compare *Tsarouhi & Tsarouhi* [2009] FMCAfam 126. See also *Thorne v Kennedy* (2017) 263 CLR 85 at 114-115 [71]-[72] per Nettle J and authorities there cited.

82 cf *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298.

83 See and compare *Johnson v Buttress* (1936) 56 CLR 113 at 134 per Dixon J; *Louth v Diprose* (1992) 175 CLR 621 at 625-626 per Mason CJ; *Thorne v Kennedy* (2017) 263 CLR 85 at 99-100 [31]-[32] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, 118-119 [83]-[87] per Gordon J.

84 See, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

Honour did not say so, and, contrary to the Full Court's conclusion, his Honour's findings certainly do not go far enough to sustain either conclusion.

71 In those circumstances, to treat the appellant's 40 per cent interest in the property as not a gift, and thus as somehow to be disregarded in the settlement of property under s 79, was contrary to the need to recognise and adjust legal and equitable interests mandated by *Stanford v Stanford*, and was an error of law.

72 Furthermore, even if the facts as found had been capable of sustaining a conclusion that the transfer creating the joint tenancy was vitiated by illegitimate pressure, undue influence or unconscionable conduct, in March 2015 – months after the respondent was released from hospital and without any suggestion of him any longer being "badgered" or "pressured ... at a vulnerable time" – the respondent and the appellant executed the deed, drawn up by the respondent's solicitor in accordance with the respondent's instructions. In the deed, the appellant and the respondent confirmed the appellant's interest in the property as joint tenant, and provided, inter alia, that if the appellant predeceased the respondent while the appellant and the respondent remained joint tenants, the respondent would pay the appellant's brother and sister a total of $1 million or, if the appellant and the respondent did not have any children together whom the respondent was then supporting, the greater of $1 million and half the value of the property. The deed further provided that:

> "If the parties are separated or divorced and [the property] is still owned by the parties as joint tenants, any property settlement or Family Court proceedings will take into account any payment made or to be made under this Deed by [the respondent]."

73 The primary judge noticed the execution of the deed but deemed it to be of no consequence[85]:

> "Because of the orders I intend to make, the parties will immediately no longer own the property as joint tenants. I propose to sever the tenancy by the orders and that brings the application of the deed to an end."

74 The deed, however, was of profound consequence, because, as Turner LJ famously observed[86] in *Wright v Vanderplank*, in equity, where a transaction is

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85 *Fazarri & Hsiao [No 2]* [2018] FamCA 447 at [57] per Cronin J.

86 (1856) 8 De G M & G 133 at 146-147 [44 ER 340 at 345]. See also, eg, *De Bussche v Alt* (1878) 8 Ch D 286 at 314 per Thesiger LJ (James and Baggallay LJJ agreeing); *Lamotte v Lamotte* (1942) 42 SR (NSW) 99 at 103 per Roper J, citing *Powell v*

impeachable all that is required to render it unimpeachable is "proof of a fixed, deliberate and unbiassed determination that the transaction should not be impeached". Granted, an act may not have that effect unless the party concerned knows of his or her entitlement to seek to have the transaction impeached[87], and, in the case of a transaction vitiated by undue influence, such an act of affirmation is only effective if committed after the undue influence has ceased[88]. But here the respondent knew of the nature and circumstances of execution of the transfer, which he argued below entitled him to have the transfer treated as nought; as the evidence disclosed, the respondent was a senior commercial partner of one of the largest and most prestigious firms of solicitors in the country; and the respondent had the added benefit of his own solicitor's advice in the preparation and execution of the deed[89]. In those circumstances, it cannot be doubted that the respondent fully appreciated the extent of his rights in equity to apply to have the transfer set aside as the product of "pressure"[90]; and, given the facts apparently thought to establish that the transfer was vitiated by excessive pressure related primarily to the facts surrounding the respondent's hospitalisation and associated sedation – rather than the respondent's evidence that he was emotionally dependent on the appellant – there is no evidentiary basis to conclude that any undue influence was continuing at the time the respondent and appellant executed the deed.

Powell [1900] 1 Ch 243 at 245-246 per Farwell J; *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539 at 567 per Hill J.

87 *Burrows v Walls* (1855) 5 De G M & G 233 at 253 per Lord Cranworth LC [43 ER 859 at 867-868]; *De Bussche v Alt* (1878) 8 Ch D 286 at 314 per Thesiger LJ (James and Baggallay LJJ agreeing).

88 See *Allcard v Skinner* (1887) 36 Ch D 145 at 188-189 per Lindley LJ, 192 per Bowen LJ.

89 As to the relevance of independent advice to claims of undue influence, see generally *Allcard v Skinner* (1887) 36 Ch D 145 at 185 per Lindley LJ; *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 730 per Fletcher Moulton LJ (Buckley LJ agreeing); *Kali Bakhsh Singh v Ram Gopal Singh* (1913) 41 LR Ind App 23 at 31 per Lord Shaw of Dunfermline; *Watkins v Combes* (1922) 30 CLR 180 at 196-197 per Isaacs J; *Royal Bank of Scotland Plc v Etridge [No 2]* [2002] 2 AC 773 at 807-808 per Lord Nicholls of Birkenhead.

90 See *Wright v Union Fidelity Trustee Co of Aust Ltd* (unreported, Supreme Court of New South Wales, 1 October 1985) at 20-22 per Hodgson J; *Franknelly Nominees Pty Ltd v Abrugiato* (2013) 10 ASTLR 558 at 601-602 [232], 603 [243] per Buss JA.

75 It is, therefore, apparent, and should have been held by the primary judge, that the respondent had, by his execution of the deed (which *ex facie* was predicated on the efficacy of the transfer), ratified or adopted the transfer, and that he was thereafter precluded by his conduct from taking proceedings to have it set aside[91]. It was not open to the primary judge to treat the appellant's interest as a joint tenant in the property as in effect abrogated by "badgering" or "pressure".

Errors of the Full Court

76 As has been seen, the Full Court rejected the appellant's contention that the primary judge erred by treating the transfer as in effect set aside. Their Honours held that[92]:

> "The focus of the appellant's submissions, which were about the circumstances in which the appellant obtained the 40 per cent interest in [the property] and the Deed of Gift the parties signed in about March 2015, *are distractions*. What the primary judge was bound to do, as part of making a determination under s 79 of the Act, was to assess contributions to the acquisition, conservation and improvement of [the property]. The primary judge concluded that the appellant could only claim the most moderate non-financial contributions and that the respondent had made the overwhelming financial contributions to the acquisition, conservation and improvement of [the property] during a short relationship and a very short marriage. When considering s 79(4)(d)-(f), the primary judge was cognisant of the respondent's financial position and earning capacity as compared to those of the appellant. The primary judge made the property settlement order after considering the relevant evidence in light of the statutory requirements." (emphasis added)

77 So to hold compounded the primary judge's error by decreeing that the circumstances surrounding the execution of the transfer, and thus in effect why the appellant's 40 per cent interest in the property should be regarded as not a gift, were a "distraction". That was erroneous in three respects.

78 First, the existence of the appellant's 40 per cent interest in the property was not a "distraction". As was made clear in *Stanford v Stanford*, because that interest

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91 See *Wright v Vanderplank* (1856) 8 De G M & G 133 at 146-147 per Turner LJ [44 ER 340 at 345]; *De Bussche v Alt* (1878) 8 Ch D 286 at 314 per Thesiger LJ (James and Baggallay LJJ agreeing); *Allcard v Skinner* (1887) 36 Ch D 145 at 188 per Lindley LJ, 192 per Bowen LJ; Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at [37-030]-[37-035].

92 *Hsiao & Fazarri* [2019] FamCAFC 37 at [29] per Strickland, Kent and Watts JJ.

was one of the existing legal and equitable interests of the parties in the property to be settled, it should have been front and centre – the very starting point – in the determination of what was "just and equitable" for the purposes of s 79.

79 Secondly, although the parties' respective financial and non-financial contributions, financial positions and earning capacities were unquestionably relevant considerations in the adjustment of the parties' existing legal and equitable interests in the property to be settled, and although, for the sake of argument (but no more), it may be supposed that it would have been open to the primary judge to conclude on the basis of his Honour's assessment of the appellant's contributions to the aggregation of the property and otherwise that she should be stripped of her 50 per cent interest in the property in return for a payment of $100,000 (plus $80,000 that had been advanced on account of costs), that is not what his Honour did. As has already been explained, the primary judge excluded the appellant's 40 per cent interest in the property from consideration as something other than a gift because it was the product of "badgering" and "pressure".

80 Just as it is necessary for a trial judge closely to scrutinise the facts to determine whether it is open to find that a transaction has been vitiated by duress, undue influence, or unconscionable conduct, so too must an appellate court closely scrutinise the trial judge's findings and (subject to bearing in mind the advantages enjoyed by the trial judge) assess any challenge to the trial judge's conclusions in light of those facts and the applicable legal and equitable principles[93]. The Full Court erred in their failure to do so.

81 Thirdly, it is altogether unrealistic to suppose that the primary judge could have arrived at the same conclusion, or made the same orders, if his Honour had not treated the appellant's 40 per cent interest in the property as something other than a gift and therefore as such to be excluded from consideration[94]. For even allowing for the primary judge's assessment of the exiguousness of the appellant's financial and other contributions, which the Full Court so much emphasised, what justice and equity could there be in stripping the appellant of the totality of her 50 per cent legal and beneficial interest in the property and conferring it on the respondent, who, on the evidence, was an extremely wealthy man with assets worth more than $9 million, in return for a payment to the appellant of $100,000 and $80,000 for legal costs previously advanced? To the contrary, assuming the propriety of the value of contributions relative to value of total assets which found favour with the primary judge and was endorsed by the Full Court, if the primary

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93 *Thorne v Kennedy* (2017) 263 CLR 85 at 104 [41] per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ.

94 See and compare *House v The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

judge had taken the appellant's 40 per cent interest into account, rather than treating her as having no more than a 10 per cent interest, his Honour should logically have awarded the appellant approximately five times what she recovered.

Conclusion

82 It follows in our view that the appeal should be allowed. It should be ordered that the orders of the Full Court made on 5 March 2019 be set aside, and, in their place, it be ordered that the appeal to the Full Court be allowed with costs, the orders of the primary judge made on 19 June and 29 October 2018 be set aside, and the matter be remitted to the primary judge for further determination according to law. The respondent should pay the appellant's costs of the appeal to this Court.