HARMAN
Dispute Resolution

PROPERTY ADJUSTMENT ORDERS

This information is a brief outline of the relevant provisions of the Family Law Act 1975. You should obtain legal advice as to how a decision might be made in your specific circumstances.

The *Family Law Act 1975* provides that an order adjusting interests in property must be "*just and equitable*".[1] The High Court takes this further, making clear that every step of the decision-making process must be focused on justice and equity.[2]

In many ways, justice and equity can be thought of as "*fairness*". However, the term also means that decisions must be made:

- Having regard to the individual circumstances of each case and recognising and consistently adjusting for imbalances; and,
- By applying the same legal principles in the same way in each case (this is what is meant when we refer to our legal system as being a "*common law*" legal system – the law is common (or the same) in each case.[3]

Judges make decisions by applying legal principles in a consistent way to the facts of each case. Whilst each judge has individual discretion to arrive at the outcome they consider just and equitable, judges must exercise their discretion in accordance with legal principles. This means that, if the facts of a case are reasonably agreed, then the likely court ordered outcome will be reasonably predictable, albeit, with a "*range*" (between the best and worst that might be expected). But, this range, is rarely more than a 5-10% difference between best and worst.

A judge starts by identifying the present property interests of the parties. This is akin to compiling a balance sheet of what presently exists. The Court does not generally review the history of the relationship. The Full Court[4] has been clear that:

It is not the Court's function to conduct an audit of the marriage or of the relationship finances. The parties' remedies for resolving disputes about expenditure while they are together are centred on them and them alone. Choosing one transaction from many prior to separation for different treatments, specifically "to be added-back" or

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[1] Section 79(2) for married couples and s.90SM(2) for de-facto couples
[2] Stanford v Stanford [2012] HCA 52
[3] R v Watson; Ex parted Armstrong [1976] HCA 39; Wirth v Wirth [1956] HCA 71 and Stanford
[4] *Mayne & Mayne* [2011] FamCAFC 192

notionally included in the pool of property may make doing justice and equity between the parties difficult

Similarly, not all disposals of property or expenditure of funds after separation result in adjustments or *"add backs*". Parties are entitled to expend funds to support themselves. The Court will generally act if a party has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of assets, or acted recklessly, negligently, or wantonly to reduce or minimise the value of assets.[5]

A judge then considers the financial and non-financial contributions of each party (including contributions as a homemaker and parent).[6] Contributions are assessed globally rather than mathematically. All contributions are balanced against each other over the length of the relationship. Contributions need not be made to a specific asset (nor need they be financial).

Finally, a judge considers a range of factors,[7] sometimes referred to as "*future needs*" or "*maintenance*" factors, and including:

- The age and state of health of each of the parties
- The income, property and financial resources of each party
- The physical and mental capacity for appropriate gainful employment
- Care arrangements for children and child support arrangements
- Each party maintaining a reasonable standard of living
- Contributions by each party to the others' income earning ability
- The length of the relationship and its effect on the earning capacity of a party
- The need to protect a party who is parenting children
- The financial circumstances of new relationships

Whilst mediation is a self-determinative process of negotiation, "*ethical negotiation*" means negotiating within the parameters of the arrangements that might be ordered by the court. Further, negotiation should take account of the costs and uncertainty of litigation. Mediation is a not about one party winning or obtaining the best possible outcome that a court might order (and you should never assume you will achieve your best possible outcome). It is about neither party losing; the needs of all parties (and their children) being met and cost in all its forms being minimised (but certainly including legal fees). Mediation is about obtaining the best outcome that can be agreed so as to avoid court.

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[5] *Kowaliw & Kowaliw* [1981] FamCA 70
[6] Section 79(4) for married couples and s.90SM for de-facto couples
[7] Section 75(2) for married couples and s.90SF for de-facto couples