FAMILY COURT OF AUSTRALIA

CHAPMAN & CHAPMAN ***[2014] FamCA 70***

FAMILY LAW – CHILDREN – Best Interests – Family Violence – Where the presumption of equal shared parental responsibility is rebutted – Where there was ongoing violence perpetrated by the father against the mother – Where the children witnessed the father's violent behaviour – With whom the child spends time – Where it is in the children's best interest not to spend any time with the father – Where the father is permitted to send cards, letters or gifts on special occasions.
FAMILY LAW – PROPERTY SETTLEMENT – Just and Equitable – Contributions – Where the mother made significant contributions to the care and welfare of the father's children from a previous relationship – Superannuation – Where an order for a superannuation split is appropriate.

Family Law Act 1975 (Cth) ss 60B, 60CA, 60CC, 61DA, 65D, 65DAA, 75(2), 79
Family Law Rules 2004 (Cth) r 19.04
Domestic and Family Violence Protection Act 1989 (Qld)

Bevan & Bevan [2013] FamCAFC 116
Bowe & Bateman [2013] FamCA 253
Prince & Walsh [2012] FamCA 275
Stanford & Stanford (2012) 247 CLR 108

APPLICANT:	Ms Chapman
RESPONDENT:	Mr Chapman
INDEPENDENT CHILDREN'S LAWYER:	Stephen Richard Page
FILE NUMBER:	BRC 10215 of 2010
DATE DELIVERED:	14 February 2014
PLACE DELIVERED:	Brisbane
PLACE HEARD:	Brisbane
JUDGMENT OF:	Forrest J
HEARING DATE:	9, 10, 11, 12 July and 12 & 13 November 2012

REPRESENTATION

SOLICITOR FOR THE APPLICANT:	Ms Awyzio DA Family Lawyers
COUNSEL FOR THE RESPONDENT:	Ms Hawkshaw
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	The Hon Mr Foley
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Harrington Family Lawyers

ORDERS

Parenting Orders

(1) That B, born … October 2007 and L, born … February 2009, ("the children") live with the mother.

(2) That the mother has sole parental responsibility for the children.

(3) That the father shall be entitled to send letters, cards or gifts to the children at Christmas time, Easter time and for their birthdays to the address of the mother's parents or any other address that the mother shall, at her discretion, provide the father with and the mother shall, at her discretion, give those to the children.

(4) That the mother shall take all reasonable steps to ensure that the children are permitted to communicate with the father by letters, cards or other written communication and she shall ensure that such communication as they may choose to write to the father is forwarded to the father.

(5) That the mother shall ensure that she speaks of the father and his family, parents and friends respectfully and refrains from denigrating any of those people whenever she is speaking to or within the hearing of the children and that she uses her best endeavours to ensure that others do not denigrate or insult the father and his family, parents and friends in the presence of or hearing of the children.

(6) That the father is restrained from attending within 1 kilometre of:

(a) The home of the mother and children; and

(b) The day care centres and/or schools, including before/after school care and vacation care, at which the children are enrolled; and

(c) Any extracurricular, sporting or other organised activities for the children at public venues; and

(d) Any future places of employment of the mother or the children; and

(e) Any TAFE, University or education institution attended by the mother.

(7) That the children shall only spend time with the father as may be agreed between the mother and the father.

(8) That the father is also restrained from harassing the mother in writing, by telephone or any other electronic form.

(9) That the mother shall, at the end of each year, send to the father copies of each of the school reports received by her in respect of the children and copies of any school photographs she has obtained in respect of the children during the course of the preceding year and any other information she considers it appropriate and reasonable to provide to the father about the children, their growth and development.

(10) The Independent Children's Lawyer is discharged.

Property Adjustment orders

(11) That as soon as practicable upon the making of these Orders, the husband and the wife do all things necessary to cause the sum of approximately $185,000 held in an ANZ joint offset account to be paid to the wife and the interest, if any, earned on the amount that was held in that account since the conclusion of the trial, if it has accumulated in the account, to be paid to the wife as to 56 per cent of it and to the husband as to 44 per cent of it and the account to be closed.

(12) That on or before 28 March 2014 the husband shall pay to the wife, by payment to the wife's solicitors' trust account, the sum of $83,133 and shall cause the wife to be discharged and released from any and all liability to the ANZ Bank in respect of any debt secured by mortgage registered against the real property situated at Property 2, C Street, Suburb D ("the Suburb D property").

(13) That upon compliance by the husband with the obligations imposed upon him by Order (12) hereof, the wife shall surrender to the husband all right, title and interest in the Suburb D property.

(14) That in the event of default by the husband in respect of his obligations pursuant to Order (12) hereof, the Suburb D property shall be sold by private treaty or public auction before 30 June 2014 with any of the sum of $83,133 that remains unpaid after 28 March 2014 plus interest on that sum from 28

March 2014 calculated pursuant to the provisions of the Family Court Rules 2004 to be paid to the wife on settlement of its sale.

(15) That the wife shall retain as her sole property:

(a) The Toyota motor car that was in her possession at the conclusion of the trial;

(b) Any furniture, jewellery or other personal property in her possession save for any photographs of the husband that were his at the commencement of the cohabitation of the husband and the wife which shall be returned to the husband forthwith, if not already;

(c) Any money in bank accounts in her sole name.

(16) That save as otherwise provided for in these Orders, the wife shall indemnify the husband and keep him indemnified against any and all liability for any debts, including credit card debt and student debt, incurred in her sole name.

(17) That the wife shall retain as hers absolutely all of her interests in superannuation funds including E Super Fund, F Super Fund, G Super Fund and the parties' self-managed I Super Fund.

(18) That pursuant to section 90MT(1)(a) of the *Family Law Act 1975*, whenever a splittable payment becomes payable in respect of the superannuation interest of the husband in the parties' self-managed I Super Fund, the Wife shall be entitled to be paid an amount calculated in accordance with the Family Law (Superannuation) Regulations 2001, using a base amount, at the date of these orders, in the sum of $163,730 and that there be a corresponding reduction in the entitlement the husband would have had in the I Super Fund but for this order.

(19) That for the purposes of Order (18) of these Orders, the operative time is four business days from the service of these Orders on the trustee/s of the I Super Fund.

(20) That contemporaneous with the receipt by the wife of the cash payment referred to in Order (12) hereof, the husband and wife each do all necessary acts and sign all necessary documents so as to cause:

(a) the wife's member benefit entitlements in the I Super Fund, including all of that amount split to her from the husband's interest in that fund pursuant to these Orders, to be determined (with the assistance of expert advice if necessary), and then to be rolled out into a fund of the Wife's election;

(b) the removal and/or replacement of the wife as a member and as a director or secretary of any company that is trustee of the I Super Fund;

(c) the resignation and removal of the wife as a trustee of the Chapman Trust and the surrender by the wife of any interest in that trust.

(21) That other than as already provided for in these Orders, the husband shall retain as his sole property:

(a) Any furniture and other personal property in his possession in addition to any photographs that are delivered to him by the wife pursuant to these Orders;

(b) Any money in bank accounts in his own name;

(c) All of his shares in Chapman Pty Ltd and in I Pty Ltd;

(d) His interest in the Chapman Trust;

(e) Any motor car, boat, boat trailer, and tools in his possession.

(22) That subject to the superannuation splitting Order made in these Orders, the husband shall retain as his absolutely all of his interests in superannuation funds, including H Super Fund and the parties' self-managed I Super Fund.

(23) That the husband shall indemnify the wife and keep her indemnified against any and all liability for any debts, including credit card debts, incurred in his sole name and for any debt of the wife to the Chapman Trust, to Chapman Pty Ltd, to I Pty Ltd or any debt of the wife incurred in any way through involvement in any of those companies or the Chapman Trust, including any unpaid tax liability incurred by the wife in respect of involvement by her in any of those companies or the trust, including in respect of any distribution of trust income to her as a discretionary beneficiary of that trust but not limited thereto.

(24) That in the event that any party to these Orders refuses or neglects to comply with any or all of the provisions of these Orders, the Registrar or a Duty Registrar of the Family Court of Australia at Brisbane is hereby appointed, pursuant to section 106A of the *Family Law Act*, to execute all deeds and documents in the name of the husband and/or the wife and to do all acts and things necessary to give validity and operation to these orders.

(25) That the wife's application for lump sum spousal maintenance is dismissed.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Chapman & Chapman* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT BRISBANE

FILE NUMBER: BRC 10215 of 2010

Ms Chapman
Applicant

And

Mr Chapman
Respondent

REASONS FOR JUDGMENT

1. The children, B, who is 6 years of age, and his little sister, L, who is 5 years of age, live with their mother, Ms Chapman. The mother and children have not lived in the same house as the children's father, Mr Chapman, since not long after L was born in 2009. The children have spent virtually no time with their father for around three years. The parents remain locked in dispute about whether the children should spend any time with their father at all and, if they do, whether it should be supervised or not.

2. The parents also remain locked in dispute about how they are to finalise their financial affairs and divide up their property consequent upon the breakdown of their marriage relationship.

3. The responsibility for determining what parenting arrangements should be ordered now falls on this Court, as does the responsibility for determining how the property of the parties is to be settled as between them.

Background

4. The mother is 32 years of age, born in 1982. The father is nearly 50 years of age, born in 1964. They started a relationship in or around December 2003, having met in the workplace, when the mother was 21 years of age and the father 39 years of age. They began to live together in May 2004 when the mother moved in with the father and his two children of a de facto relationship that had only just ended. Those children are M, who is now 14 years of age, and K who is now 12 years of age. Their mother, Ms J, and the father had ended their relationship not long before the mother in this case moved in with the father. The mother and the father married in October 2005.
5. In or around May 2009, the children, M and K, began to live with their mother pursuant to order of the Federal Magistrates Court following contested interim

parenting proceedings. At around that time, the mother in this case spent a number of months as an in-patient in a Brisbane hospital that cares for women with post-natal mental health problems. L had only just been born. When the mother was finally discharged from that hospital, she and her two children moved out of the family home and went to live with her parents in their Brisbane home, where they still live. They did that because child protection officers of the Department of Child Safety (as it was then called) had informed the mother that if she did not move out of the home and away from the father they would act to remove the children from her care.

6. The officers of the Department had resolved on that course having determined that the children were at risk of psychological harm if the mother continued to live with the father, because of their probable continued exposure to violence, principally being perpetrated by the father against the mother.

7. Although the mother and the father continued their relationship after the mother and children moved to her parents' home, their relationship gradually deteriorated to the point of finally ending in or around February 2011.

8. I pause here to observe that these facts are as the mother asserts them. The father disputes some of them. However, I accept the mother's evidence as to these matters and reject the father's evidence. This is in accord with my findings generally on factual matters in dispute in this case, as I prefer the mother's credibility over the father's. The father did not impress me as an honest witness whose evidence I could generally accept as truthful. The mother impressed me as far more reliable in respect of the honesty of her account of the facts in issue in this case.

9. Since around October 2010, not the mother, not the Federal Magistrates Court (as it then was), nor this Court have permitted the children to spend any time with the father. Both the mother and the Independent Children's Lawyer now submit that should continue to be the case. They contend that final parenting orders should be made that provide for the mother to have sole parental responsibility for the two children and that make no provision for them to spend any time with their father, whether supervised or not. In contrast, the father submits that the final parenting orders should provide for the parents to have equal shared parental responsibility for the children and for them to spend time with him, initially to be supervised at a contact centre for three months before increasing over a period of time to unsupervised, alternate weekends with the father and overnight on one additional night in the other week.

10. I am in no doubt, having heard this matter over six days (four in July of 2012 and two in November of that same year), and having considered all of the evidence before me, that the father was violent and abusive towards his de facto partner, Ms J, whilst they were living together and that he was also violent and abusive towards the mother in this case whilst they were together. I am in no

doubt that the father continues to minimise his responsibility for his violence and that he lacks insight into his behaviour and its consequences. What makes this lack of insight so much more troubling, as well as highly relevant to the outcome in this parenting orders dispute, is the fact that the father has completed a multiple week course for perpetrators of domestic violence run by N Services on no less than three occasions. He has also attended various forms of marriage counselling and he has undertaken personal counselling with a psychologist over a six month period whilst these proceedings were awaiting trial.

11. The Family Consultant who assessed this family and prepared three reports for the assistance of the Court over the two years from 2010 to 2011, is a psychologist with a Masters Degree in Science with a Psychology major and with over 12 years post-graduate work experience in family assessment and therapy, parenting programme co-ordination, in private practice, within the non-Government organisational sector, and within this Court's Child Dispute Services Section. This Family Consultant, in her last report, said this:

> It seems despite significant therapeutic intervention [the father] has been unable to develop appropriate insight into his behaviour beyond explaining that his behaviour was reactive. It may be that [the father] lacks the cognitive ability to gain sufficient insight in this regard.

The Family Consultant goes on to say:

> I am not of the opinion that it would benefit [the father] to attend any additional therapeutic intervention specifically to address his tendency to behave violently in domestic situations. … I would support his continued participation in personal counselling to address issues of character, parenting and adjustment.

12. Although, of course, it does not absolve the father from personal responsibility for his own behaviour, I do observe that there is no dispute that the father was himself, as a child, the victim of significant domestic violence in his own family of origin. He apparently witnessed much violence perpetrated against his mother by his father and also suffered violence at the hands of his father and his older brother. Sadly, that led to him becoming violent in response. In his own words, he "flattened" his father when he was only 14 years old.

13. I do also observe that the mother had her own childhood difficulties and has suffered from an eating disorder and self-esteem problems since she was only 13 years old. She, too, already had been in one unhappy marriage for a short time before she entered the relationship with the father.

14. Against that background, it would fail to surprise most objective observers with some knowledge of the human experience to learn that the relationship that these two parties formed was a dysfunctional one, characterised by chronic

domestic violence with the mother being subjected to physical, sexual, emotional, psychological and financial abuse, yet one from which the mother found it virtually impossible to extricate herself, even when faced with the likelihood of losing the care of her children to the State child welfare authorities.

The Parenting Orders Dispute

15. It is with this background and with the best interests of the two young children being the paramount consideration that this Court must now determine the parenting orders that will regulate the parenting of these children for the immediately foreseeable future.

The Principles to be applied

16. As counsel for the ICL pointed out in his written submissions, I set out, in a very summary manner, my understanding of the principles to be applied in determining parenting orders cases in a previous judgment in *Prince & Walsh* [2012] FamCA 275 at [18] to [21]. That was as follows:

> 18. Part VII of the *Family Law Act 1975* ("the Act") sets out the statutory framework within which parenting orders are to be made by the Court. The Court is given discretionary power to make such parenting orders as it thinks proper.[1] In deciding whether to make a particular parenting order in relation to a child, the Court must regard the best interests of the child as the paramount consideration[2] and must apply a rebuttable presumption that it is in the best interests of a child for its parents to have equal shared parental responsibility in respect to that child.[3] The Court must, having regard to the objects of Part VII[4] and the principles underlying those objects[5], consider certain express "primary" considerations[6] and "additional" considerations[7] in determining what is in the child's best interests. The Court must also consider the extent to which each parent has fulfilled or failed to fulfil responsibilities as a parent in respect of some further particularly identified matters[8].
>
> 19. The presumption referred to does not apply in circumstances of abuse or family violence[9]or may be rebutted by evidence that satisfies the

1 *Family Law Act 1975* (Cth) s 65D.
2 *Family Law Act 1975* (Cth) s 60CA.
3 *Family Law Act 1975* (Cth) s 61DA.
4 *Family Law Act 1975* (Cth) s 60B(1).
5 *Family Law Act 1975* (Cth) s 60B(2).
6 *Family Law Act 1975* (Cth) s 60CC(2).
7 *Family Law Act 1975* (Cth) s 60CC(3).
8 *Family Law Act 1975* (Cth) s 60CC(4).
9 *Family Law Act 1975* (Cth) s 61DA(2).

Court that it would not be in the child's best interests for the child's parents to have equal shared parental responsibility for that child.[10]

20. If an equal shared parental responsibility order is made the Court must consider whether the child spending equal time with each parent is in the child's best interests and is reasonably practicable. If satisfied as to both, then the Court must consider making such an order and, if not, then must consider whether the child spending substantial and significant time with each parent is in the child's best interests and is reasonably practicable. If satisfied as to both of those matters, the Court must then consider making such an order (s 65DAA).[11] Determination of the reasonable practicability of equal time or substantial and significant time with each parent is made by reference to the factors identified in s 65DAA(5).

21. If an equal shared parental responsibility order is not made then the Court may make such parenting orders as it considers proper by regard to the best interests of the child.

17. I simply refer to that extract from one of my previous judgments as a summary of the principles applicable to determining the parenting dispute in this case.

The Evidence and My Findings

18. The mother deposed to having been abused by the father since prior to their marriage in 2005. She says that she cannot recall every incident of violence that occurred. However, she kept a diary throughout the relationship, with entries written contemporaneously to the events they record. Passages of her diary taken from over several years have been put into tabular form and put into evidence by her, attached to her affidavit evidence. She has also deposed in particular detail to much abuse she suffered at the hands of the father. I accept her evidentiary accounts of the abuse and violence she suffered. I do not accept that she has made any of it up.

19. The mother deposes to the verbal abuse the father subjected her to over several years. It was often vile, disgusting, humiliating and grossly offensive. It was language that not even a person of the strongest character should have to endure. I set out just one example of what the father said to the mother on 4 July 2007 after he had already grabbed her lower face and neck and yelled into her face:

> I just want to smash you into this wall.

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10 *Family Law Act 1975* (Cth) s 61DA(4).
11 *Family Law Act 1975* (Cth) s 65DAA.

When the mother had gone into the bedroom to read a magazine and try to calm down after that, the father came in and said to her:

> You're nothing. You need to fuck off. Get the fuck out of here. You're just a little, lazy, fat arse nothing. You are not even worth the steam that comes off my shit in the middle of winter. You are worse than a hair on a sheep's bum. You're a trashy, trashy, worthless piece of trash. Careful when you go outside or you'll blow away like a piece of trash. You're just a burden to the sheep. You're just a dreg holding shit to the sheep's bum.

The mother was 5-6 months pregnant with the couple's first child, B, at this time. No person deserves to be spoken to in this way at any time. The impact such vile verbal abuse would have on a young woman with low self-esteem and a history of emotional vulnerability, heavily pregnant with her first baby is difficult to imagine.

20. The mother deposes to the physical abuse the father subjected her to over the years. Her diary entry for 15 July, 2007 reads as follows:

> [The father] was calling me an Arsehole, so I went to the shops. When I came home [he] was still in a mood so I went to the wardrobe [where the evidence shows she used to regularly take refuge]. [The father] pushed his way in, kept hitting my head, grabbing me, pulling me up and pushing me down, I couldn't get out because of the draws [sic]. [The father] kept picking me up. [He] spat on me twice. Police were called.

21. An Occurrence Summary from Queensland Police Service records put into evidence by the ICL records that on 15 July, 2007 the following happened between the mother and the father:

> Incident started on the morning of 15/07/2007 which was a verbal argument between [the mother] and [the father]. The [mother] then went to the shops and when she returned she noticed the [father] was still angry and the [mother] has hid in the walk-in wardrobe of their bedroom and pushed some drawers up against it, so that the [father] could not gain entry. The [father] has pushed the door open and squeezed through. The [mother] sat in the wardrobe and the [father] started looking for the phone which the [mother] has then felt a blow to her back and several blows to the back of her head. The [mother] has suffered redness to her neck. No pain or discomfort suffered. The [father] has then taken the phone and then gone outside the residence. The [mother] has gone to the lounge room and returned to the wardrobe with the phone where she contacted police.

22. The mother's diary has another entry for 16 July 2007 which records:

> [The father] came home at lunchtime. He said he wanted 5 mins (sex). After, we picked up the kids together, came home I cooked for the kids, did

> homework, [the father] took [M] to soccer and he asked for his dinner to be ready at 7 pm. [He] came home after soccer and was in the office, in a bad mood and getting worse. I went upstairs and locked everything (I was scared and the kids were in bed). I called [the father] to see if he had calmed down, he stormed upstairs and got through the front door. He called my mum on his phone. I tried to call the police, he threw me around some more. I went next door for help but they were not home. I ran to the police station. Police took [the father] away. (My dad had come over and was home with the kids) The police took me home, and my dad left. Police said they would call when they let the [father] out. The police called at 1 am and asked if [the father] could have his car if supervised. I agreed. [The father] came at about 1:30 am and left at 2:30 am. I was left with the children.

23. Another Occurrence Summary from Queensland Police Service records put into evidence by the ICL records that on 16 July, 2007 the following happened between the mother and the father:

> An argument broke out between the offender and the [mother] and the [mother] sustained injuries by being held down on the ground, the [mother] has then decamped the location and attended the … Police Station.

24. The seriousness of this event is particular because at that time there was a Protection Order already in place, earlier obtained by the mother pursuant to the provisions of the *Domestic and Family Violence Protection Act 1989* (Qld) ("the *DFVPA*"), naming the father as the Respondent and ordering him to refrain from committing domestic violence against the mother.

25. The seriousness of the father's behaviour at that time is even more particular because the father had already been convicted of breaching that order. On 12 March, 2007, in the Magistrates Court, he was convicted of two charges of having breached the order on 18 and 19 February, 2007 and fined $1,200. On 7 August, 2007 he was again convicted in the Magistrates Court on a charge of breaching the *DFVPA* order on 15 July, 2007. In evidence at the trial before me, the father conceded that he pleaded guilty to the charge as read out by the Police prosecutor. The mother was around five to six months pregnant with the baby, B, at that time. The father was placed on twelve months probation with special conditions imposed, including the requirement that he attend a domestic violence program and an emotional fitness program.

26. On the same day, he was convicted on a charge of breaching the *DFVPA* order on 16 July 2007. The father again conceded during the trial that he pleaded guilty to the charge as read out that day by the Police prosecutor. He was sentenced to three months imprisonment which was then wholly suspended for a period of two years.

27. Despite the suspended prison sentence and the father's compulsory attendance, week after week, at a domestic violence program for perpetrators of domestic

violence, the father's physical and verbal violence towards the mother did not stop. As just one example from many, the mother's diary records an entry on 28 January 2008, which details how the father tried to wheel the baby B's bassinette out of the bedroom because the baby had woken, hungry for a feed, whilst the father was trying to talk to the mother. The mother tried to stop the father doing this as the baby was crying and she wanted to feed him. The father threw the mother to the ground a number of times before he got the bassinette out of the room. Later that same day the father hurt the mother's wrist by twisting her arm and holding her down after he pushed her over in the kitchen.

28. The mother deposed to the father physically assaulting her on 28 July 2008. She says she had bruising on the neck and that she even suffered a broken rib. In this respect, the father conceded in the witness box that the mother had suffered broken ribs, at least twice, during the relationship. He said she had told him that and he accepted that. In addition, the Family Consultant reported in one of her reports that the father told her during one of her interviews with him that he had "heard [the mother's] rib break". The father did not dispute that evidence.

29. The mother put in to evidence many photographs depicting bruising and marking to various parts of her body that she said was caused by the father. Records that were put into evidence also record that the mother was taken away from their home to hospital by ambulance on occasion, that she attended hospital on more than one occasion, and that police were called to the home as a consequence of calls reporting domestic violence on multiple occasions during the relationship. The records also reveal that the family came to the attention of the Department of Child Safety on multiple occasions as a result of the children being exposed to domestic violence. The mother also put into evidence several photographs showing damage to the walls and doors of the family home, attributed to the violence of the father. I accept that it was damage caused by the husband.

30. Rather remarkably, in my view, during the period when the father's period of imprisonment that he was sentenced to for breaching *DFVPA* orders was still suspended, police were made aware of further violence occurring, yet no further action to have the father actually dealt with by the criminal justice system for these breaches appears to have been taken. Police records produced under subpoena and tendered into evidence by the ICL appear to reflect police discretion not to charge the father being exercised because of the fact that the mother and the father gave conflicting versions of how the mother suffered injuries. It appears that decisions not to charge the father were made because of a police officer's view that it was a case of "the mother's word against the father's word". Instead of charging the father, the mother was simply given referrals to Organisation O, a domestic violence support service. I digress to remark that I do not understand, in such circumstances, why the father was not charged, leaving the determination as to guilt by proof meeting the exacting

standard of beyond a reasonable doubt for the courts. As I see the factual circumstances, the father is extremely lucky that he was not charged with further breaches of the protection order during the time when his prison sentence was suspended, in circumstances where a further conviction might very well have resulted in his actual imprisonment.

31. The mother also deposed to repeated sexual abuse and violence being perpetrated against her during the course of the relationship. She gave evidence that the father had non-consensual intercourse with her on a number of occasions, including on one occasion when he commenced sexual intercourse with her whilst she was asleep. She gave evidence that he demanded to have sexual relations with her as and when it suited him. Her evidence was that she was too scared of the consequences of refusal to resist his demands.

32. The mother's evidence also included evidence that the father controlled and restricted her access to money at times during the relationship. The father accepted in the witness box that he had let her have a credit card to use after she was living at her parents' home in mid 2009 but that he had cancelled it, then reinstated it before cancelling it again, then reinstated it before cancelling it for a third and final time.

33. The father admitted having been violent. In an affidavit filed 17 May 2011, he said:

> I agree that our relationship was characterized by domestic violence. I accept that on a number of occasions I acted inappropriately towards [the mother] and the Police were called to our home on many occasions.

34. Interestingly though, he went on to say:

> I agree that I **reacted** inappropriately on numerous occasions and accept full responsibility for this. (my emphasis)

35. Quite remarkably though, he then went on immediately to say:

> Whilst my behaviour was inappropriate at times, [the mother's] behaviour was very controlling of me. ……. I felt like I was totally controlled by [the mother]…….. I believe it is false to suggest that she was afraid of me.

36. When the father saw the Family Consultant in the course of interviews for her report he said to her:

> Sure I was angry, sure I was violent … it takes two to tango.

37. He also told the Family Consultant that he doubted the mother was scared of him.

38. I do not consider the words just set out are the words of a man who accepts full responsibility for the serious, prolonged, systematic domestic violence that he perpetrated against the mother in this case and exposed all of his children to.

39. Even when the father was in the witness box during both stages of the trial, he still minimized the violence he admitted to having perpetrated against the mother and still asserted that his violence was most often reactive to the mother's behaviour, attributing responsibility for his actions to her. When pressed by me to tell the Court the violence that he actually admitted to, he conceded that he had sworn at the mother, that he had grabbed her against her will and shaken her and that he had "busted doors down" that were locked by her, behind which she was seeking refuge. When asked about the last of those concessions, the father said he had "busted down" two locked doors, the bedroom door and the wardrobe door, on one occasion as the mother was behind them and taunting him that he could not get to her, and he simply wanted to prove to her that he could. It is worth noting here that the father conceded that the mother often used to take refuge and hide from him in the walk-in wardrobe in their bedroom during the course of the relationship.

40. There is evidence in the form of records of the Department of Child Safety that reveal the father's two older children, M and K, were interviewed by child protection officers whilst they were still living with the father and the mother. They are recorded as having disclosed witnessing and hearing significant physical violence being perpetrated by the father against the mother. Earlier reports of the Family Consultant also reveal that the two older children made such disclosures to her during the interviews that took place as part of the family reporting process in the proceedings that were then extant between the father and his former de facto partner, Ms J.

41. It was actually through co-operation between the mother and Ms J (in circumstances where I am satisfied there had previously been conflict and animosity between them), in the shadow of stated Departmental intention to intervene, that the two older children left the father's care and went to live in their mother's care and, ultimately, the Federal Magistrates Court ordered that they continue to live in their mother's care.

42. The documentary evidence put before the Court by the ICL also includes records of the local Child and Youth Mental Health Service from November and December 2007 showing that the child, M, had been referred for assessment and treatment due to "his challenging behaviour at home (since parents separated in 2003) and at school (since 2007)." The father had reported that M had been misbehaving at that time, lying, stealing and being physically aggressive to his younger sister. In the Closure Summary of those records it is recorded that M's "presentation occurs within a prejudicial upbringing of domestic violence from Father." It also records:

> Perpetuating factors include lack of positive parenting, identity issues, [M's] difficulty coping with parents' separation and father's re-partnering and the effects of domestic violence on [M].

43. Other Health Service records also show M again getting specialist paediatric attention for behavioural problems throughout 2008 and early 2009.

44. The records of P Hospital and the report of the psychiatrist, Dr A, who is a Director of that Hospital's Centre for Post Natal Disorders, show that the mother was admitted there in a distressed state in late May 2009, only several weeks after baby L was born. She was tearful, had poor appetite, was having difficulty in organising herself and was diagnosed as suffering a depressive disorder with anxiety symptoms in the post natal period. Dr A reported that it became increasingly apparent during the course of the mother's admission (which lasted around about 5-6 weeks) that a lot of the mother's difficulties arose primarily from the marriage she was in. She had admitted to nursing staff that she had suffered domestic violence of a physical, verbal and emotional nature over the five previous years of her relationship with the father. She was observed, during her admission, to be more depressed and anxious following some interaction with the father. Even during visits from the father, or weekend leave when she went home with him, it was noted that they had heated discussions. The father was considered by hospital staff to be unsupportive of the mother. It is recorded that he still expected her to do housework and bookwork whilst at home on leave during her time in the hospital's care.

45. I am satisfied that it was before and during her period of admission to P Hospital that she worked with the older two children's mother to have the two older children go to live with their mother. I am also satisfied that on the mother's discharge that Departmental staff made it clear to her that if she did not move away from the father she risked having her own two children removed from her care. She did then move away from the father, initially to a women's refuge then to her parents' home. However, properly extricating herself from the dysfunctional, toxic relationship with the father took her another 18 months approximately. During that time she saw Dr A on six occasions and then again in June 2011. She had missed four appointments, just not turning up over that time and had cancelled once. At the trial in July 2012, Dr A said that the mother had seen him another five times since he had done his written report that was in evidence. I shall return to the Doctor's trial evidence a little later.

46. Dr A said in his report dated 10 June 2011:

> Throughout her subsequent appointments (after 6 August 2009) she was constantly feeling anxious, tense, on edge all of the time and she had lost

> significant weight and she was constantly watching out for her ex husband. …
>
> ...this lady has been suffering with a chronic adjustment disorder with depressive symptomatology and anxiety, a consequence of her marriage and perpetuated now by the process of going through access regarding her children and property settlement. It seems she is still vigilant regarding her husband. I think the domestic violence that she had been subjected to has made her very tense, anxious and obviously she was concerned about how her husband may react in relation to the pending court matters. …
>
> It would seem to me that until the court cases are cleared and she has some financial stability and also that she can feel safe from any repercussions from her ex husband, that she may be able to settle down and continue her studies (she had taken up … studies on an external basis) and to make a home for herself and her children

47. Late in 2009, the mother joined the proceedings that were then on foot between the father and his former partner, seeking orders that the two older children live with her. She discontinued her application in that case in early 2010. In August, 2010, after a number of family reports had been obtained by the ICL from the Family Consultant and another private family report writer, the father, the mother in that case, Ms J, and the ICL consented to orders in those proceedings that provided for the two older children to spend no regular time with the father and to only spend time with him as agreed between the parents.

48. All through this time, from June 2009 until around October 2010, though living in different households, the father and the mother were still seeing each other and carrying on a relationship, sexually and emotionally. They were also seeing counsellors. They were, I am satisfied, trying to keep their marriage going although living apart. The evidence satisfies me that the mother was just as responsible for this as the father. Indeed, I accept the father's evidence that the mother was throughout this period often calling him by telephone incessantly, sometimes many, many times each day. There are email communications between the two of them in evidence that reflect the mother's desire to improve and retain the relationship, and the father's apparent desire for the same. There is evidence that at Easter time in 2010 the mother went to the extraordinary length of dressing as an Easter Bunny and going right across town to visit the father at his home in the middle of the night, trying desperately to impress him and to be close and intimate with him. She said in evidence though that she did that to "make nice" to him so that she could keep herself and the children safe from him. Whilst I accept there may have been an element of reality in that, I also am convinced the mother was still emotionally committed to the relationship with the father at that time and was trying to maintain it.

49. However, the mother's diary notes for the period still reflect the father subjecting her to constant verbal abuse during that time. They reflect tirades

where he continues to blame the mother for the relationship difficulties. The mother also gave evidence under cross-examination, which I accept as true, that the father would cancel her phone (the account for which was still in his name) if she did not call him for a period of time. She even asserted that he caused her phone number to be diverted to his for a period so as to be able to check on who was calling her on her mobile. I accept that evidence.

50. In oral evidence during the trial, the father actually sought to persuade the Court that emails and communication he had with the mother through 2010, in which he was nice to her, or in which he suggested renewed efforts toward reconciliation, were simply him faking being nice to the mother, pretending to her that he was interested in maintaining the relationship, just so that he could see his children. I do not accept that. That he would attempt to try to convince me of that does him no credit in my view. I am satisfied that had he truly wanted the relationship between him and the mother to be ended, he could have and would have taken steps to ensure that actually happened, whilst still pursuing time with his two children. He was represented at the time by solicitors in respect of the parenting dispute with his former partner and he had access to a number of personal counsellors with whom he could have discussed the matter and sought advice as to how to extricate himself from the relationship if he had wanted to. I accept the evidence of the mother's diary note for 3 October 2010 where it records that the father said to the mother "are you gunna [sic] come and given [sic] me good sex otherwise I've got an invitation I'm gunna [sic] take up". They are hardly the words of a man eschewing a relationship with his wife.

51. The mother's diary notes reflect an entry about a week later, in October 2010, about a conversation she had with the father when they went to a café together that day. The father said "maybe I should pick up the kids from school and keep them away from you for 16 months." A few weeks later, matters came to a head between the couple when the father did turn up at the child B's day care centre, asking to see his son. It was a few days before the boy's birthday. When staff asked him to leave, after having received instructions in that regard from the mother, the father told staff that he would relieve them of their responsibilities and simply take the child. He was not able to do that. Police were called and he left. Although he has said that he had a birthday present in the car for the boy, he did not take it in or seek to leave it with staff to be given to the child or the mother. That was the last time the father saw B save for the occasions of interviews by the Family Consultant in the course of preparing her family reports. The parents' relationship effectively disintegrated from this point on with the mother actually proclaiming its end and eschewing any further contact with the father soon thereafter. She obtained a further Protection Order under the *DFVPA* in February 2011 ordering him to remain away from her and the children and not to contact her.

52. The father asserts, as part of his case, that the mother has denied him time, and continues to deny him time with the children by way of retribution for his not wanting to go on with the relationship with her. He gave evidence that she said to him in October 2010 "if you walk out that door, you will never see the children again". It may be that the mother did say that or something like it. However, I certainly do not accept the argument that this is her motivation for denying the father time with the children. She expressed fears for the children's safety and emotional wellbeing if they begin to spend time with the father, having regard to her history of experience of violence with him. She gave evidence of having seen him mistreat M and K when they were in their household by physically picking M up by the shirt, being verbally abusive of him and then throwing him back down on the ground. She gave evidence of him being emotionally abusive of those children by using them as pawns in the dispute with their mother. I accept that these are genuinely held fears on the part of the mother and that her arguments against the children spending time with the father are not maliciously motivated by any form of bad faith.

53. When Dr A gave oral evidence during the trial in July this year, he quickly confirmed that his diagnosis of the mother, offered in his written report of June, 2011, had not changed. He provided the opinion that what was impeding the mother's progress was the continuation of these proceedings, the marriage difficulties, the mother's lack of financial support and the continued need to live with her parents.

54. I accept that opinion evidence and express my regret at not having been able to deliver judgment in the matter before now. It is now fifteen months since the trial finished. The demands of hearing and determining cases in this Court in the meantime have simply prevented me from finalising my reasons and delivering judgment before now. I apologise to the parties for this delay and express my regret for the impact that this delay will have had on them.

55. The Family Consultant said that it is likely that the father may seek continued avenues to disrupt the mother's life if he is permitted any ongoing contact with the children. She said that the children have been exposed to family violence since they were born and that it would have influenced the development of their responses to stimuli and neural development. She went on:

> Given the total history of this matter, granting sole parental custody to the mother would, in my view, not be unwarranted. The ability of these parties to co-parent is greatly compromised.

56. The Family Consultant said that it was clear from the assessment that the youngest child, L, has not formed an attachment to the father and it was unclear exactly how the older child B views his relationship with his father. She said she did not see any behaviour that would suggest an attachment.

57. The Family Consultant did say that it is possible that the children may develop a positive relationship with the father if given the opportunity, but that this would require a concerted effort by the father to be patient whilst demonstrating appropriate parenting skills. She said that could take some time.

58. I accept those opinions. I am satisfied that without further professional intervention the father is not likely to be able to develop those skills.

59. The father adduced evidence for the trial from a psychologist who he had been seeing for counselling. She reported that the father had expressed the intention to maintain progress that he had already made from other counselling sessions and programs "which had helped him achieve significant change" and to "further develop insight into difficulties, particularly with regards to negativity and anger within personal interactions." The psychologist went on to report that the "insights and strategies reported by [the father] have the potential to enable him to overcome his previous tendency to engage in angry and violent behaviour."

60. However, just as counsel for the ICL pointed out in his written submissions, the psychologist conceded freely that the foundation of fact on which her opinions were based was information supplied to her by the father. She said the father had told her that he called the mother "names" and that he had been involved in "pushing" and "shoving" and having hit the mother. She was confronted in cross-examination by counsel for the ICL with the full detail of the violence the father had subjected the mother to. She then conceded that her opinions about the father's insight and progress would not be valid where the father had not told her the true facts about the family violence. Accordingly, I give very little weight to the opinions the psychologist expressed in her written report that the father adduced.

61. I am satisfied that the father has failed to demonstrate that he has come to terms with his unacceptable anger and violent behaviour directed at his former partners and his children. I am not satisfied that he has demonstrated the appropriate level of insight for the Court to accept that he has the capacity to parent the subject children without subjecting them to an unacceptable risk of physical or psychological harm by being subjected to or exposed to violence perpetrated by him. I am equally unsatisfied that he has the capacity to provide adequately for the emotional needs of the children or that he is likely to develop that capacity without further professional assistance in the short term future.

62. The youngest child had no observed attachment to the father when last seen with him. The older child's level of attachment was doubted by the Family Consultant. I am not satisfied that professionally supervised time with the father provides the children the means with which they can develop and

maintain meaningful relationships with him. In circumstances where the Court is unable to be satisfied that the father has capacity to acquire insight into his actions and the consequences of his actions or that he is likely to develop capacity to provide appropriately for the children's emotional needs where the children do not have attachment to him, it is not in their best interests to subject them to indefinite supervised visits with him, at the same time as their mother would be remaining hyper vigilant and significantly anxious about the impact on them of spending time with their father at all, as I am satisfied she would be.

63. The Family Consultant recommended that the mother should be given sole parental responsibility for the two children. The ICL supported that position. The statutory presumption that it is in their best interests for their parents to share equally parental responsibility for them is clearly rebutted by the Court's findings about the violence in the relationship.

64. The Court is readily satisfied that the subject children's best interests are served by them continuing to live with the mother and by conferring sole parental responsibility on the mother. The Court accepts the submissions of the ICL and recommendations of the Family Consultant to that effect. The emotional wellbeing of the mother would, I am satisfied, be at risk if she is required to continue to communicate with the father about decisions pertaining to the children. I will not order the mother to engage in written consultation with the father about decisions in respect of major long-term issues in the children's lives.

65. The Court is also satisfied in this case that the need to protect the children from physical and psychological harm is most appropriately met by not making any order for them to spend time with the father in circumstances where they have been assessed as having no attachment or no obvious attachment to him and where the Court cannot be satisfied at this point in time that any meaningful relationship could be developed without compromising their safety. It follows, I am satisfied, that the father should also be restrained from attending the children's schools and/or child care centres as recommended by the Family Consultant and submitted by the ICL so as to allow the children "space free from the dispute."

66. Finally in respect of the parenting orders, the Family Consultant recommended that the father be permitted to "engage in written communication with the children in the form of cards, gifts and pictures relevant to the children's age and literacy skills". The ICL expressed qualified support for this recommendation whilst expressing concern for the possibility that receipt and monitoring of such communication by the mother might prove unduly stressful for her.

67. In the written Case Information document that was filed for the mother on 2 December 2011 the mother did include in the orders that she was at that time

asking the Court to make, orders that the father be permitted to send letters, cards, gifts and other written communication to the children no more than on one occasion each fortnight and for their birthdays, Easter and Christmas and for the mother to permit the children to communicate with the father in writing with such communication to be forwarded by her to the father. In the draft orders that were handed up on behalf of the mother at the start of the trial, the proposed order for the father to be able to communicate in writing with the children was not included.

68. I will make orders that do permit the father to send letters, cards and gifts to the subject children for Christmas and Easter each year and for the children's birthdays each year, but not more frequently than that. The orders will require the mother to provide the father with a postal address to which such letters, cards and gifts can be sent by the father. The orders will give the mother the right to determine not to give any letter, card or gift to the children if she considers that the content is inappropriate for them. This will, I am satisfied, provide incentive for the father to only include appropriate child-focused content and not to write or include anything that seeks to re-engage or upset the mother. I consider it is in the children's best interests to continue to receive appropriate communication and gifts from their father if he chooses to take advantage of that opportunity. It may also keep open the possibility of the children seeking opportunities to engage with the father when they themselves consider it appropriate in the future. I do not consider that the mother will deliberately withhold from the children communications from their father that are appropriately child-focused in content.

69. It should be clear to the father from these reasons for judgment what he must be able to demonstrate at some future stage, if he truly wishes to have a child-focused, meaningful relationship with his children. He will have to demonstrate that he has developed insight into the part his own violent behaviour has played in the position he now finds himself in in respect of his four children. He will have to demonstrate insight into the impact of family violence on children and that he truly does have capacity to meet the emotional needs of his children. If he is confident that he will be able to do that at some point in the future then he need not go away from these proceedings thinking that he will not ever have a relationship with his children.

70. In the meantime, the Court is satisfied that the children's needs will be suitably met in the care of their mother.

The Property Adjustment Proceedings

71. Both the husband and the wife (as I shall now call them) seek property adjustment orders from the Court, relying on the Court's power to alter the property interests of parties to a marriage by the Court making such order as it

considers appropriate.[12] Shortly after this case was heard and whilst this judgment was reserved, the High Court handed down its decision in *Stanford & Stanford* (2012) 247 CLR 108. In that decision, the plurality observed that a Court cannot make an order under s 79(1) of the *Family Law Act 1975* (Cth) ("the *FLA*") unless it is satisfied, in all of the circumstances, that it is just and equitable to make the order.[13] The consideration of whether it is just and equitable to make a property settlement order must begin by identifying, "according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property".[14] Legal principle is to be followed and applied when exercising the discretion conferred by s 79,[15] and care must be taken not to conflate the s 79(2) question of whether it is just and equitable to make property settlement orders at all with the separate s 79(4) question as to the particular orders to be made if any are to be made.[16]

72. Once it is determined that it is just and equitable to make property adjustment orders between the parties at all there are seven matters that must be taken into account in "considering what order … should be made under [s 79(1)] in property settlement proceedings". Those matters are set out in s 79(4). These include the contributions made by the parties to a marriage (in various forms); the effect of any order on either party's earning capacity; consideration of the matters to be taken into account under s 75(2) of the *FLA*, so far as they are relevant; any orders already made under the *FLA*; and any child support that has been provided, is to be provided or might be provided in the future for a child of the marriage.

73. Having said that, in my view, that which the Full Court of this Court has in the past described as "the preferred approach to the determination of an application brought pursuant to s 79 of the *Family Law Act*"[17] is still very much a useful and relevant exercise as part of the process by which the discretionary exercise may be approached. The use of this approach to "illuminate the path" to determining the just and equitable orders to be made once the s 79(2) question has been answered does not, in my view, offend any of the reasoning in *Stanford*. I consider that the Full Court accepted as much in *Bevan and Bevan* [2013] FamCAFC 116.

74. That "preferred approach" is said to involve four inter-related steps: firstly, making findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing; secondly, identifying and assessing the contributions of the parties within the meaning of

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12 *Family Law Act 1975* (Cth) s 79(1).
13 *Family Law Act 1975* (Cth) s 79(2).
14 *Stanford and Stanford* (2012) 247 CLR 108, [37].
15 Ibid at [38]-[39].
16 Ibid at [40].
17 See *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC 93-143 at [39] and *Coghlan and Coghlan* (2005) FLC 93-220 at [22].

subsections (a), (b) and (c) of s 79(4) and determining the contributions based entitlements of the parties expressed as a percentage of the net value of the property of the parties; thirdly, identifying and assessing the relevant matters referred to in subsections (d), (e), (f) and (g) of s 79(4) – including, because of s 79(4)(e), the matters that are relevant pursuant to s 75(2) – and determining the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step 2; and fourthly, considering the effect of those findings and determinations and resolving what order is just and equitable in all the circumstances.

75. Of course, it has never been mandatory to take this four step approach, and now, as just discussed, it is critical, once the parties' legal and equitable interests in property have been identified, to determine the question of whether it is just and equitable to make property settlement orders at all in all the circumstances of their marriage. The discretion conferred upon the Court is a broad and "holistic" one[18] and it can equally be properly exercised in different ways, as long as legal principles, including those set out in s 79 of the *FLA* itself, are followed and the reasons that are given make that clear.

76. At the conclusion of the trial, the parties agreed that their interests in property included the following:

Proceeds of sale of real property situate at Property 1, C Street, Suburb D held now in ANZ account in joint names	$185,000
Real property situate at Property 2, C Street, Suburb D registered in name of husband	$430,000
Toyota motor car of wife's	$12,000
Wife's jewellery	$3,300
Husband's household contents and personal possessions	$55,945
Wife's savings in bank accounts	$17.83
Husband's savings in bank account	$1,825.36
Total value of interests in property	**$688,088.19**

77. The parties agree that there is a mortgage debt over the property at Property 2, C Street, Suburb D. At the end of the trial, it was agreed that it was $246,867. Accordingly, the value of the net interests of the parties in property amounts to about $441,000. Of that, the wife has a motor car, jewellery and some savings

[18] Per Murphy J in *Watson & Ling* (2013) 49 Fam LR 303, [13].

worth about $15,000 of her own and there is $185,000 in a joint bank account with the balance being the husband's.

78. The parties have agreed that the wife has $53,728 in superannuation interests in a variety of superannuation funds, including a self-managed fund of the parties. The evidence established that the husband has $382,183 in superannuation in the self-managed fund and another $5,675 in another fund.

79. I am readily satisfied that the factual circumstances that present in this case support a finding that it is just and equitable to make property adjustment orders as between the parties. The husband and wife are no longer living in a marital relationship and no longer commonly sharing property as they did during that relationship. Leaving their property interests as they stand now, without adjustment, would, in my view, be unjust and inequitable having regard to matters of contribution made by each of them pursuant to the common purpose underpinned by their marriage during the duration of their marriage.

80. I will be making property adjustment orders in this matter. I go on to consider the matter now, essentially in accordance with the four step "preferred approach" that I have just discussed above.

81. The first step of that approach generally involves identifying not just the property interests of the parties in the form of their assets and liabilities secured by any of those assets and their superannuation interests in order to determine what is the value of their total net interests in property, but also the amount of other liabilities that the parties might owe jointly or individually. The amount of such liabilities are then generally deducted from the value of the net property interests to determine the total net value of the assets and liabilities of the parties against which just and equitable property adjustment orders are ultimately determined.

Liabilities

82. There was disagreement between the parties about whether some other liabilities that the husband asserted that he owed actually exist and whether any of them should be taken into account at this part of the process in any event. All of the following were listed by the husband as debts that he said should be taken into account in the property adjustment.

ANZ credit card debt of Husband	$9,573
Debt by Husband to his parents	$10,000
Debt owed by Husband to friend, Mr Q	$10,000
Debt Husband asserted owed to Accountants in respect	$5,731

work done for Trust and SMSF	
Tax debt of Husband's company, Chapman Pty Ltd	$12,950

83. In respect of the credit card debt, the evidence that was presented to the Court about this by the husband was a reference to an estimated liability on his ANZ credit card of $5,000 in his trial affidavit and in his Financial Statement, both filed in 2011. During the trial, the solicitor for the wife tendered into evidence three monthly statements from the husband's credit card account for February, March and April of 2012. They showed that the monthly opening balances were always paid off in one payment by the husband. They also showed that nearly all of the expenditure on the card was claimed by the husband to be business expenditure of his company, Chapman Pty Ltd, the corporate trustee of the family trust through which he conducted his tradesman business. In cross-examination, the husband was asked what the balance of his credit card was at that time (July 2012) and his answer was "$3,000 odd dollars".

84. The wife's solicitor submitted that as the parties were in agreement that the company had no value because its assets and liabilities cancelled each other out no liability on the husband's credit card, which was essentially a business credit card, should be taken into account. She further submitted that there was no evidence supporting the contention that $9,573 was a liability owed on the credit card in any event. That submission was correct. I cannot find that the husband had a liability of $9,573 on an ANZ credit card simply because his counsel tells me so in her final submissions when there is no evidence before me to support that finding. I will not include such a liability in my consideration of this matter.

85. The wife's solicitor makes exactly the same submission about lack of evidence in respect of the liabilities asserted by the husband for accounting work done for his company and the tax debt he asserts for the company. It is again correct that there is absolutely no evidence before the Court from the husband about those two matters save for having deposed in his trial affidavit to the fact that accountants were yet to do some outstanding financial statements and tax returns and that tax would likely be owing. Accordingly, I am not able to find that the amounts asserted by the husband as owing in respect of these matters are actual liabilities that should be taken into account. Simply asserting that they are in final submissions is not good enough. In the absence of agreement on matters like this, evidence supporting such assertions must be adduced in admissible form if there is to be any prospect of taking such amounts into account.

86. Finally, in respect of the two amounts of $10,000 the husband said were funds borrowed from his parents and from his friend, Mr Q, for the purchase of a

motor home, the evidence adduced by the husband is nothing more than the assertion in his trial affidavit, repeated in his Financial Statement, that he borrowed such amounts from his parents and his friend to use to put towards the purchase of a motor home. The husband adduced no corroborative affidavit evidence from any of those people and no documentary evidence that supported the evidence. He was cross-examined about the matter and asserted that various entries recorded in bank statements on bank accounts supported his evidence. He maintained, when challenged on the issue, that he did owe money to these people as he had asked them to loan him the money to make up the shortfall on the purchase price of the motor home when he bought it. He said in cross-examination that he was "pretty sure" the motor home had cost him $110,000 when he bought it after separation from the wife, even though he had deposed in affidavit to it costing $100,000. He agreed that he had said in his affidavit that he had paid $90,000 for it from their joint account but under cross-examination he said that most of the $90,000 had come from the joint account but not all of it. A further $20,000 was to be paid to complete the purchase. The husband agreed with the proposition that the motor home was purchased in or around September 2010, saying "without looking at that paperwork that sounds about right, yes".

87. The wife's solicitor then showed the husband statements from two separate bank accounts. One of those bank accounts was the bank account used by the husband for his tradesman business. The other was his own personal account. They were admitted into evidence as exhibit 37, showing a transfer of $20,000 from the business account to the personal account on 20 September 2010 and a withdrawal of $20,000 from the personal account by card at Suburb D the same day. It was suggested by the wife's solicitor to the husband that the $20,000 withdrawal was then the $20,000 that was used to pay the balance purchase price for the motor home and the husband denied that. The husband said that he believed his parents paid $10,000 directly to the vendor of the motor home and that Mr Q had paid $10,000 to him first which he then paid to the vendor. A few moments later, the father said that he had statements at home "showing money from [Mr Q] and from Mum and Dad."

88. The husband's veracity had not impressed me at any point during the trial. I did not believe his evidence when he was answering these questions about the purchase of the motor home and the alleged borrowings from his parents and his friend. In the absence of the corroborative evidence that the father said he had, as well as the absence of any evidence from his parents or his friend supporting his claim, I do not accept that he owes his parents $10,000 or that he owes his friend $10,000. No such amounts will be included in my consideration of this matter.

89. The parties did agree that the mother had a liability of $663 in respect of fees for tertiary studies she was engaged in.

90. There was some further argument during submissions about liabilities the parties were said to have to Legal Aid Queensland in respect of Independent Children's Lawyer's fees in respect of proceedings in 2010. However, each agreed that there was no evidence about this issue before me either and, in the absence of agreement or actual evidence of the liability, again I will not take such alleged debts into account.

Should there be amounts "added back" to the net property interests?

91. Not unusually, each of the parties in this case contended that amounts should notionally be "added back" to the total value of the net property interests of the parties against which just and equitable property adjustment orders are to be determined, for a variety of reasons.

92. For the wife, it was submitted that $2,192 should be "added back" representing the amount of one monthly mortgage instalment that was not paid by the husband on the loan secured by mortgage over Property 1, C Street, Suburb D in the period just before it was sold. It was submitted that it should be "added back" as the husband had been ordered to pay those mortgage instalments as and when they fell due at the adjournment of the part-heard trial in July 2012 and had he complied with that order the equity the parties would have realised on the sale of the property would have been $2,192 more than it was. Documents tendered into evidence as exhibit 36 support a finding that the husband did not make the last monthly payment on 17 September 2010 and that the debt that was paid out would have been at least $2,192.70 less than it was on discharge, had he done so.

93. Counsel for the husband submitted that such an amount should not be "added back" simply because the debt had been completely discharged on the sale of the property.

94. Another amount of $967.92 was not paid by the husband in respect of the mortgage liability on the other real property when he had been ordered to continue to make such repayments. Counsel for the husband, in submissions, agreed with the submission made by the solicitor for the Wife that this amount be notionally "added back" to the value of the net property interests of the parties for the purposes of determining property adjustment orders in this case.

95. For the wife, it was also submitted that an amount of $23,874 should be "added back" representing money that the husband had received back after separation from the company, R Company, on the failure of that company, in respect of a larger amount of money that had been invested by the husband in that company in its managed tax effective investment schemes.

96. There is no dispute that the husband did receive that amount back. The evidence supports a finding that he did and that such money was deposited

back to the bank account he operated as the business account. It was that account from which the husband generally paid his legal fees in respect of the representation he had in these proceedings as they were incurred.

97. Similarly, for the wife, it was also submitted that an amount of $19,195 should be "added back" representing money that the husband had received in 2011 by way of back payment of Family Assistance Payments after he had put his tax return in for an earlier year during which the family were still together. The evidence supports a finding that he did receive such an amount and that it was deposited to the business bank account also. Like the R Company money, it, too, has been spent by the father since its receipt.

98. The solicitor for the wife submits that these two amounts should be "added back" because they are amounts that would have formed part of the pool but for their unilateral expenditure by the husband. Counsel for the husband submitted that half of the Family Assistance Payments were paid in respect of the father's two other children. I do not accept that fact alone is of any significance in the determination of this issue.

99. For the husband, it was submitted that an amount of $83,000 be "added back" representing funds said to have been withdrawn from the parties' bank accounts prior to separation by the wife and spent by her. Just where the husband gets that figure from or how he calculates it is something I do not understand. In his trial affidavit, the husband deposed to the wife transferring the sum of $62,000 to an account in her name in July 2009. He deposes to the account number into which he says the amount was transferred but has not adduced any other evidence of that.

100. The wife deposes in her trial affidavit to transferring $40,000 from the parties' joint account into her personal account in June 2009. She says she did this as she observed from the banking records that the husband had been transferring funds out of that joint account. The wife also goes on to say that she discovered that the husband had transferred $10,000 from the joint account into accounts in the names of his two older children and she then transferred that money into her personal account as well. I understand this to mean that she is deposing to transferring $50,000 out of joint funds into her own personal account at that time. That is $12,000 less than the husband deposed to and $33,000 less than the husband is asserting now should be "added back".

101. The wife exhibits to her trial affidavit statements from the parties' joint account for June of 2009. They reflect an amount of $40,000 being transferred from that account to the account number that the husband included in his trial affidavit where he said the wife transferred $62,000 to that account in July 2009. There is only a very small amount left in the joint account after the $40,000 was transferred out of it and there is no other amount that corresponds with $22,000 to support the husband's case on that point.

102. Counsel for the husband did tender through the cross-examination of the wife a statement from an ANZ account in the wife's name as trustee for her son showing account transactions from 16 July to 16 October 2009. $30,000 was deposited into that account on 31 July 2009. $11,500 was drawn out of that account on 5 August 2009. $35,000 was deposited into the account again from another account on 9 October 2009 and a total of $57,000 was drawn out of that account on 13 and 16 October 2009, leaving little in it. The only cross-examination of the wife about that statement and the money that was in it was directed to what she had done with the money. She said she had spent it on living expenses, particularly in the period of six months after she had moved out of the family home with the two children during which she said she did not receive Centrelink benefits as not being assessed as entitled to.

103. On the evidence, I certainly cannot find that the wife withdrew $83,000 from the joint account that is unaccounted for. Indeed, it is just as difficult to find that the wife withdrew $69,000 from the joint account in July 2009 that is unaccounted for. In all the circumstances, I accept the wife's evidence that she transferred $50,000 out of joint funds at separation to her own accounts and I reject the husband's evidence that it was more than that. I will come back to the issue of whether or not this amount should be "added back" as I still understand the husband contends for.

104. There was agreement between the parties that the sum of $20,000 be notionally "added back" to the total of the net property interests of the parties for the sum of $20,000 that had been paid to the wife after the part-heard days of the trial in July 2012 pursuant to consent orders that included observation that the payment be by way of partial property settlement. There was further agreement that the sum of $6,000 be "added back" as well for the $6,000 that was paid to the wife by the husband by way of spousal maintenance pursuant to the orders I made at the end of the part-heard trial in July in which I included the order that the sum be treated as partial property settlement already received by the husband.

105. Finally, there is the issue of whether or not amounts paid by each party for their legal fees up to trial should be "added back" to the total value of the net property interests. The solicitor for the wife argued that the money received by the husband from R Company and by way of Family Assistance payments were spent by the husband on his legal fees and should, therefore, be added back. Those two amounts totalled $43,069.

106. The husband was cross-examined as to the amount of money he had spent on legal fees. He said that he thought he had paid one firm that had acted for him $43,000. He then said that he thought he had paid the next firm that had acted for him $15,000 to $20,000. He was not cross-examined about how much he had paid the barrister who appeared for him on a direct access brief at the trial.

107. During the trial, I directed the parties to hand up a letter of costs notification pursuant to Rule 19.04 of the Family Law Rules 2004 (Cth). Counsel for the husband handed one up dated 12 December 2012 that said the husband had paid to the first firm of solicitors the sum of only $34,000. The letter said:

> Costs are per client instructions for previous legal representatives
> Invoices not provided to Counsel.

108. That costs letter said nothing about any payment to the second set of solicitors but did set out that the husband had paid $13,000 to the barrister who was directly briefed. The letter also said that the husband had paid approximately $7,000 to the expert witnesses. I accept that money was paid on behalf of both parties.

109. The letter also said that the husband had sourced the money he had paid in legal fees from a) a loan from his company, b) wages drawn by him from the company, c) Income protection funds he had been receiving and, d) borrowings from his brother. No further particulars were provided.

110. The solicitor for the wife handed up a costs letter too. It is dated 12 November 2012. It set out the costs incurred between January 2010 and October 2012 and actually paid by the wife as $56,451. No particulars were provided as to the source of those funds. In the wife's Financial Statement filed in 2011, the wife deposed to owing her solicitors approximately $25,000 at that time. I am satisfied that the wife would have paid the sum of $20,000 she received in partial property settlement after the part heard trial in July 2012 towards her legal fees. I consider that to "add back" the whole of the $56,451 as well as that sum of $20,000 would be including the sum of $20,000 twice. I consider that would not be just and equitable and not appropriate. If any amount is to be "added back" for the wife's paid legal fees it should be limited to $36,451. That amount I am satisfied probably was paid from money the wife transferred into her personal account from joint funds in July 2009.

111. As to the husband, it is impossible to determine with any accuracy or confidence just how much he spent on legal fees and from where it was all sourced. However, it is probable, I find, that he did spend on his legal fees at least the equivalent of the amount of $43,069 being the money he received back from R Company and the total of the Family Assistance payment he was paid after separation that was back payment for a period the parties were together. If any amount is to be "added back" for the husband's paid legal fees it is, in my view, safe and appropriate for the amount of $43,069 to be included.

112. Notionally including amounts as "add backs", along with the balance of the net divisible property, in order to determine a "pool" that is considered throughout the balance of the process of determining property adjustment orders has been

authoritatively considered to be the exception, rather than the rule.[19] However, since *Stanford* was decided, the discretionary treatment of what are generically described as "add backs", in the light of the High Court's decision, has been discussed by a few of my judicial colleagues on this Court.[20] Young J proffered the view that the decision in *Stanford* would likely "ensure a change in approach" to the way in which the issue of "add backs" is dealt with. Murphy J in *Bowe & Bateman* [2013] FamCA 253 observed that the principles relating to "add backs" "*may* need to be examined in light of the decision of the High Court in *Stanford"*.

113. After those single Judge decisions, in *Bevan and Bevan*, the Full Court said, at [79], that it is important to deal with this question of "adding back" notional property carefully, recognising that the money or property no longer exists but that its disposal forms a potentially important part of the history of the marriage. The Full Court acknowledged that s 79(4), and in particular s 75(2)(o) gives "ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property". The Full Court did not say that the issue could not be dealt with as it has been in the past, prior to the decision in *Stanford.*

114. Having regard to everything I have just discussed, I am satisfied that amounts of $36,451 and $43,069 should be notionally "added" to the value of the total of the net property and superannuation interests of the parties being considered in order to determine appropriate property adjustment orders in this matter, in respect of amounts paid from capital of the parties that would, but for its expenditure on legal fees, have been still subject to property adjustment orders. I consider the notional "add back" of amounts of capital spent on legal fees still to accord with authority and an important step in arriving at appropriate adjustment orders that are just and equitable.

115. I will also notionally "add" the sums of $2,192 and $967.92 being the amounts the husband did not pay as ordered on the mortgage debts on the two real properties in the period just before the conclusion of the trial. Had he made those payments the parties net property interests that could be made subject to property adjustment orders at the time of the conclusion of the trial would have been greater by at least that same amount. That he did not pay the amounts when he was ordered to, in my view justifies treating what are relatively small amounts exceptionally in this case.

116. I will notionally "add back" the $6,000 that was paid by the husband to the wife for her maintenance pursuant to my July 2012 orders by which that

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19 See *Farnell & Farnell* [1995] FamCA 140; *DJM & JLM* [1998] FamCA 97; *Chorn v Hopkins* (2004) 32 Fam LR 578; *Omacini & Omacini* (2005) FLC 93-218.

20 See *Watson & Ling* [2013] FamCA 57 and *Bowe & Bateman* [2013] FamCA 253 per Murphy J and *Sebastian & Sebastian (No5)* [2013] FamCA 191 per Young J; see also what the Full Court said about the issue in *Bevan and Bevan* [2013] FamCAFC 116.

amount was to be included as partial property settlement already received by the husband. I considered that appropriate as the husband was accessing that money from the joint account of the parties and it was, effectively, a pre-payment of an amount I considered the husband otherwise had capacity to pay periodically from his income. It was done because I was satisfied the wife needed money at that time.

117. I will notionally "add back" the sum of $20,000 that the wife also received pursuant to the orders made in July 2012 as the parties agreed that such amount was to be treated as partial property settlement received by the wife.

118. I will not notionally "add back" any other amount representing the balance of the $50,000 I am satisfied that the wife took from the parties' joint funds in June 2009 having already determined to notionally "add back" the sum of $36,451 most likely to have come from those funds for money she spent on legal fees. I accept her evidence that she spent the balance of that capital on the living expenses of herself and the children. That is not unreasonable in all the circumstances of this case.

What is the value of the total net property interests plus the amounts notionally "added back" against which further consideration is to be given having regard to the matters contained within s 79(4)?

119. Accordingly, I calculate the total of the net property interests, superannuation interests and amounts notionally "added back" to equal $990,824.11. It is that global sum against which I will now go on to assess matters as required pursuant to s 79(4).

Assessment of Contributions

120. There is disagreement between the husband and the wife as to when they commenced their relationship and started living together. The wife said that they started their relationship around December 2003 and commenced living together in May 2004. The father said that they started a "work based friendship" in December 2003 and says he "tried to keep [the wife] at arm's length". He does not give a date as to when he asserts their relationship actually commenced and the wife was not challenged about her evidence in cross-examination. As I said at the commencement of these reasons, I accept her evidence about the relationship starting in December 2003.

121. The husband said that from around May 2004, when the mother said they started living together, that she would actually stay at his home with him for one or two nights each week and that by October 2004, she was staying at his home with him "more often than not". The wife was not cross-examined about the difference on this. The husband was not cross-examined about it either.

However, as I preferred the credibility of the wife overall in the proceedings, I accept her evidence about when they started living together.

122. It is agreed that they married in October 2005 and that they began to live apart in late June 2009, after the wife had been discharged from P Hospital where she had been staying for several weeks for treatment for post-natal depression. The wife said in her trial affidavit that she moved out of the home with the two children of the marriage as she was told by officers of the Department of Child Safety that if she did not move out with the children that the Department would take them into State care due to the family violence they were being exposed to.

123. The wife asserts that she carried on a relationship with the father after she moved away but that it gradually deteriorated, ultimately to a point where she says she considered it was ended, which was in February 2011. The husband does not agree that the relationship ended in February 2011. He says that whilst they worked at reconciliation after the wife moved away in the middle of 2009, they were separated and did not resume their relationship. However, the evidence clearly establishes that they did continue their relationship after the mother moved with the children to live with her parents at Suburb S. They communicated with each other regularly, sometimes incessantly. They saw each other and spent time together. They continued to have sexual relations. The wife appeared to find it almost impossible to extricate herself from what I am satisfied was an extremely abusive relationship. I accept that the relationship did continue after cohabitation ended but that it did deteriorate to the point of actually ending in around the end of 2010/beginning of 2011.

124. Accordingly, I am satisfied that their cohabitation lasted for just over five years but that their relationship as a couple did not entirely end for another 18 months after they stopped actually living together in the same house.

125. Each of the parties was in an existing relationship when they commenced their relationship. The husband had two children with his former partner. The wife and her former husband had no children.

126. The wife then finalised a property settlement with her former husband. The husband finalised a property settlement with his former partner too.

127. The wife's property settlement was finalised by Court orders made 9 February 2005 and they provided for her to keep the motor car she had, some shares that she owned and to receive $71,000 from her former husband in return for his retaining certain real property. Although the husband does not accept the wife's evidence that she contributed this property and the sum of $71,000 to their relationship, I accept that she did receive that in 2005 and did contribute it to the relationship. Some portion of it, probably around $19,000, was used to purchase a new motor car for her and the husband and his two children who

remained in his care following the breakup of his relationship with his former partner.

128. There is no evidence that the husband's property settlement with his former partner was ever formalised by Court order. However, the parties agree that the father owned the real property at Property 1, C Street, Suburb D and that it had a mortgage debt encumbering it of approximately $300,000. The wife said she was told by the husband that it had been purchased in 2003 for $515,000 but that it was valued at only $450,000 in 2006. The husband said that the property was still worth $515,000 at the time that he and the wife commenced their relationship. Without agreement or expert opinion evidence, it is difficult for me to make any finding about the value of the property when the two parties commenced living together.

129. It is also agreed that the husband was running his tradesman business but that it had no value of note. Further, it is also agreed that the husband had $300,000 in superannuation at the commencement of their relationship, some shares, boats and a trailer and the furniture in the home he retained. In 2006, the parties created their own self-managed superannuation fund and the husband's superannuation interest was transferred into that along with the wife making a contribution of $15,000 to it from her funds.

130. The wife worked in employment until December 2004 and then ceased working outside the home completely. She then devoted herself to homemaking and parenting, including parenting the husband's two children of his former relationship who principally lived with the husband and the wife until early 2009 when they went to live principally with their mother pursuant to Court orders.

131. The husband continued to work throughout the length of the relationship in his tradesman business.

132. The parties agree that they subdivided the C Street property into two separate lots in 2007 and they began to build a home on the second lot. That was completed after the wife left in mid-2009 and the husband moved into that home and rented the other one out until it was sold before the end of the trial in this matter in late 2012. From the sale they have the $185,000 in the bank and they had an agreed equity of just over $183,000 in the remaining property at the conclusion of the trial. Accordingly, the property, owned by the husband at the commencement of the relationship generated, by the conclusion of the trial, around $368,000 in equity for the parties. He says he already had equity of $215,000 in it when they commenced their cohabitation and the wife says it had reduced to about $165,000 by 2006 through some devaluation of the property. In any event, it was directly contributed by the husband at the commencement of the relationship but the subdivision was something both

parties were involved in achieving and that certainly led to even further increase in the amount of equity that was in the property by the end of the trial.

133. Clearly, the parties started their cohabitation with net interests in property and superannuation to the value of in excess of $536,000. By the end of the trial, that has become $990,824 including $108,679 notionally "added" as already discussed, to represent capital of the parties dissipated by them since separation.

134. Calculating the proportionate value of the wife's initial contribution as part of the property and superannuation interests that they had at the start of their relationship, reveals that the wife contributed, at best, something around 13 -15 per cent of the total, but probably not as much as that in reality. It is impossible to be more accurate than that.

135. I am satisfied on the evidence that was before me that the mother did most of the parenting of the husband's two older children during the years that they were living with the parties and most of the parenting for their two children after they came along. I accept the mother's evidence that the father worked very long hours as a tradesman and that it was not uncommon for him to leave very early in the morning for work and not be home until evening. I accept that the mother did all of the cooking, cleaning and work around the house, save for the mowing and hedge trimming that I accept the husband did. I am satisfied that the husband worked hard during the years of the relationship, generating income that was used in supporting the family.

136. It is to be remembered that the wife had no parental "duty" to parent the father's children of his former relationship. The contributions that she made in this regard were voluntary and significant and are not matched or counter-balanced by the contributions the father made in working, earning income that was used to support those two children financially, as that was his duty. That must be taken into account in this process. Counsel for the father quite properly conceded as much in her oral submissions at the end of the trial.

137. I consider that the contributions the mother made as a parent and homemaker during the 5 years of cohabitation must be regarded as exceeding the contributions made by the husband across all spheres of the relationship, most particularly because of the significant contribution she made in parenting the father's two children of his former relationship. Those children left the household in early 2009, not long before the parties no longer lived in cohabitation.

138. After mid-2009, the wife continued to principally care for the two young children of the relationship, the youngest of which was just an infant. The wife has solely cared for those two children for a few years now without respite by way of them going to spend time with the father. The wife and the children

have had to live with her parents, as she has not been able to afford her own accommodation, whilst the husband continued to solely occupy the newly constructed Suburb D property, meeting the mortgage repayments on the property, of course. The wife did have access to some joint funds for her financial support and the support of the children in the early days after they moved away from the family home at Suburb D. That is to be considered as contributed to by the husband as much as by the wife. Nevertheless, I still consider that the wife's contributions, given she has almost solely cared for the children without being able to afford her own accommodation whilst the husband remained in the family home, for the period post-separation to trial exceed the husband's contributions during that same period.

139. Converting those findings to a quantitative division of the net property and superannuation interests plus the amounts notionally "added back" is the next part of the discretionary process that I undertake. The parties were not very far apart in respect of their positions on this. Counsel for the husband submitted that the assessment of contributions should result in a notional 70/30 division in favour of the husband. The solicitor for the wife submitted that it should result in a 60/40 division in the husband's favour.

140. I do not consider a 70/30 division attributes sufficient weight to the greater contributions made by the wife during the parties' cohabitation and since then. Similarly, I am of the view that the 60/40 notional division urged upon me by the solicitor for the wife does not give sufficient weight to the husband's direct contributions of property and superannuation at the commencement of the relationship. Doing the best I can in this discretionary leap, I am satisfied that a notional 64/36 division appropriately recognises the differences in their contributions that I have accepted were made.

Consideration of other matters, including the matters set out in s 75(2) in so far as they are relevant.

141. In determining the appropriate property adjustment orders to make, the Court is required to consider other matters, in addition to the contributions of the parties, pursuant to s 79(4) (d) to (g) of the *FLA.* Those include all of the matters set out in s 75(2) so far as they are relevant, the effect of any proposed order upon the earning capacity of either party, the other orders made under the *FLA* affecting a party or the children, and any child support that the husband has provided, is to provide, or might be liable to provide in the future for the two children of the marriage.

142. The wife is 32 years of age and at the time of the trial was in relatively poor emotional health. Evidence from her treating psychiatrist was that she had been suffering with a chronic adjustment disorder with depressive symptomatology and anxiety and still was when he last saw her in May 2012. He also reported that she had suffered with an eating disorder since the age of 13 and that she

was still suffering with that at the time of the trial. At the time of the trial she was not employed and had not been since she ceased employment early in the relationship. She was in receipt of Centrelink benefits as her principal source of income support. She was dealing with her emotional difficulties by seeing a psychologist regularly, in addition to seeing her treating psychiatrist on a less frequent basis. She was also parenting her two young children full-time, with a little assistance from her parents with whom they were living and there was evidence, which I accept, that the parties' little boy suffers from an autistic spectrum disorder which requires additional care.

143. The wife gave evidence that she was in need of some significant dental work, including root canal work, fitting of crowns and surgical removal of wisdom teeth. There was no challenge to her evidence that she needed such work to be done. I accept that such work would be expensive.

144. The wife had been studying externally and part-time through a Queensland university towards obtaining a degree. She had passed some of the subjects and failed a couple. She said in her trial affidavit that she planned to study one or two subjects per semester and was not sure whether she will be able to finish the degree but had a plan to finish it in 2018. Her treating psychiatrist gave evidence that he did not consider it unrealistic for her to attempt to study this discipline. She did say that she wished to remain a full-time, stay-at-home mother to her two children though.

145. The husband is almost 50 years of age. In his affidavit evidence, he said that he had weak knees, poor eyesight and ongoing back pain. Given that he had been a hardworking tradesman, I consider it reasonable to accept that to be true, notwithstanding the absence of any expert medical opinion adduced by him supporting the assertions.

146. During the first part of the trial in July 2012, the husband said he was not working and had been incapacitated for work due to injuries he suffered in a sport accident earlier in the year. That evidence took the wife and her solicitor by surprise and the wife's solicitor was clearly sceptical of it, particularly given the fact that the husband's business bank statements continued to reflect a monthly amount received from one company that appeared as if it could have been for tradesman work being done by the husband. The husband's evidence that payments were still being made monthly for invoices he had sent out prior to suffering his injuries was very difficult to accept. In any event, the husband gave evidence that he was in receipt of payments from his income protection insurer of $3,559 gross per fortnight that produced $2,651 after tax per fortnight.

147. At the final part of the trial in November 2012, the husband was given leave to put in an updating affidavit. In that, he deposed to still being incapacitated for work due to injuries suffered in the sport accident but that he was still receiving

the payments from his income protection insurer. He still did not adduce any medical evidence supporting his assertions though or any evidence as to there being any limitations on the payments from the insurer.

148. I am satisfied that he was receiving from the insurer the equivalent of $68,926 after tax income per year and that is at least reflective of what he was earning before he began receiving it. He had deposed in his own Financial Statement filed in November 2011 to receiving $2,000 per week income before tax by way of wages or drawings from the company he ran the business through. I am satisfied that the husband has an earning capacity, when physically well, of at least around $100,000 gross per annum. Further, in the absence of any evidence of medical opinion, I cannot make any findings in respect of the likelihood or otherwise of him not being physically able to return to work or the likelihood of him not continuing to receive income support of around that amount. Accordingly, I find that the husband is in a much superior financial position to the wife, particularly looking to the short term future, and that much of that is attributable to the wife's parenting obligations and her emotional health, significantly affected by the nature of the relationship she had with the husband. Long-term, if she is able to obtain a degree, she may improve her earning capacity and eventually be in a better financial position. That is likely to be a decade or more into the future.

149. Additionally, the wife will have the sole care of the children for the indefinite period of time that it takes for the husband to take steps to address the issues that have caused me to determine that they not spend any time with him. She will bear not only the practical responsibility of caring for them but also the financial responsibility of caring for them with very little assistance from the husband in the form of child support. In his trial affidavit, the husband conceded that he was assessed to pay only $220 per month in child support for their two children. I am satisfied that is significantly less than half of the reasonable expenditure requirements for the support of two young children and that, therefore, the mother will be bearing most of the financial responsibility for the parties' two children.

150. I am also satisfied that the wife's care of the husband's two children of his former relationship as well as their two children allowed the husband to work as hard as he did throughout the duration of their relationship, contributing to the earning capacity that he currently possesses.

151. A notional division of the "pool" of property, superannuation and amounts "added back" as to 64/36 in favour of the husband would see the husband retaining property, superannuation and the benefit of the amounts "added back" to the value of $634,128 and the wife receiving $356,696. 10 per cent of the "pool" is $99, 000. It takes the husband only a year to earn that much and a good earning capacity has often been recognised by this Court as one of the best assets a person can take out of a relationship breakdown.

152. I am satisfied that appropriate property adjustment orders that are also just and equitable require an adjustment to the notional division arrived at having regard to contributions findings for all of these additional, relevant matters. I determine that an adjustment of $200,000 in favour of the wife is appropriate. Accordingly, I consider that appropriate orders will provide for retention by the husband of net property and superannuation interests and the benefit of the funds represented by the notional "add backs" to the value of $434,128 and by the wife to the value of $556,696.

What orders are appropriate to give effect to this determination?

153. The wife should retain her car, jewellery, savings and superannuation interests that were valued at the trial at $69,045. She had a liability of $663 and the benefit of monies that are to be "added back" as I have determined, being the amount of $56,451. The net total of these is $124,833. She is to receive a further $431,863 in property, superannuation and cash from the husband and the funds jointly held in the bank.

154. The husband has the real property valued at $430,000 with a mortgage debt at the time of the trial of $246,867. That leaves $183,133 in equity. He has chattels and personal property valued at $55,945 and cash in the bank of $1,825. The parties have just under $185,000 in a joint account in the bank. That account is described as an offset account. It may be that no interest has been earned on that account or, if any interest has been earned, it has been offset against interest payable on the liability secured by mortgage on the remaining real property. The husband also has an interest in the parties' self-managed superannuation fund of $382,183 and another superannuation interest of $5,675.

155. To make up the additional $431, 863 the wife is to receive, I consider that she should get the sum of approximately $185,000 that is invested in the bank account. Any interest earned on those funds should be divided in the proportions of 56/44 in favour of the wife. The wife would still need to receive $246,863.

156. There is $183,133 equity in the real property the husband retains and his superannuation interests total $387,858. The Court was informed that the husband wanted to try to retain the real property if he could. I consider that a reasonable position given that he has lived there in that house since it was completed after separation.

157. As the husband is 50 years of age, he does not have as long to wait as the wife does before he can access his superannuation. The wife, with the responsibility of caring for the children, needs access to money now. If the husband were to retain $100,000 equity in the property, at the $430,000 value attributed to it at

the time of the trial in 2012, he would have an equity to value ratio of 23.25 per cent. He adduced no evidence about his capacity to refinance or the limitations there may be upon that, but I consider that given his earning capacity and that equity to value ratio, he might very well be able to refinance in order to pay the wife an additional $83,133. That would see her receiving $185,000 from the money in the bank and another $83,133 from the husband, a total of $268,133 in cash. She would then be entitled to a superannuation split from the husband's interest in the self-managed superannuation fund of $163,730, leaving the husband with $224,128 in superannuation interests and giving the wife $217,458 in superannuation interests. The current and future value of that superannuation should not be underestimated.

158. I am quite satisfied that orders providing for property adjustment and superannuation splitting as just outlined are appropriate and just and equitable in all the circumstances of this case.

159. The wife also had an application for lump sum spousal maintenance. Of course, as things currently stand, she has a need that she is unable to meet herself. The receipt of $268,133 in cash will meet her immediate needs. She might not be able to purchase a home, but invested and managed carefully, that money will certainly help her meet her needs and help her financially support the children. At the same time, she will have almost $200,000 in superannuation that should continue to grow for her over the next 30 years to provide her with some capital in her later years. I do not consider a lump sum spousal maintenance payment appropriate at this point. I will dismiss her application for lump sum spousal maintenance.

160. I make the orders set out at the commencement of these reasons for judgment.

I certify that the preceding one hundred and sixty (160) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Forrest delivered on 14 February 2014.

Associate:

Date: 14 February 2014.