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Contribution issues in the division of property in short-term relationships

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The term 'short-term' relationship encompasses not only relationships of marriage but also de facto relationships.

Since 1 March 2009, each was thought to have been able to be litigated under the provision of the *Family Law Act 1975* in either the Family Court of Australia or the Federal Magistrates Court of Australia.

However, due to a failure to proclaim the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 until 9 February 2012, fixing 11 February 2012 as the date on and after which the jurisdiction of the Family Court and Federal Magistrates Court in relation to de facto financial causes can be exercised in lieu of 1 March 2009. There is doubt (at the time of writing this paper) whether cases determining property disputes in de facto relationships made under the provisions of the Act in the period 1 March 2009 to 10 February 2012 are valid[1].

A '*short relationship*' is not defined. In *Lane & Wharton*[2]Watts J noted that the median duration of an unsuccessful marriage to date of separation was 8.9 years whereas in 1984 it had been 7.7 years[3]. According to the *Australian Bureau of Statistics* that period had decreased to 8.8 years by 2010[4]. The median time from marriage to divorce (as opposed to separation) was 12.3 years in 2010[5].

By inference we should assume that a 'short' marriage is one which has lasted for less than the median. There do not appear to be equivalent statistics about the length of de facto relationships

1 Watts J has determined that applications filed prior to 11 February 2012 that are determined on or after 11 February 2012 are valid in *Sabata & Sabata* [2012] FamCA 105 determined on 7 March 2012

2 [2010] FamCA 18 (21 January 2010) Watts J

3 *Ibid* para 164

4 3310.0 - Marriages and Divorces, Australia, 2010: Australian Bureau of Statistics.

5 *Ibid*

although in 2006-07 it was reported that the median length of live-in relationships was 18 years. For the purpose of the statistics "live-in relationships" include marriage:

LENGTH OF LIVE IN RELATIONSHIPS, 2006-07

		Age group (years)							
	Units	*18-24*	*25-34*	*35-44*	*45-54*	*55-64*	*65-74*	*75 and over*	*Total*
Have a current relationship	*%*	*21.4*	*64.7*	*75.4*	*75.5*	*76.4*	*70.5*	*51.8*	*64.5*
Median length of current relationship	*Years*	*2.3*	*6.2*	*13.6*	*24.2*	*35.6*	*45.2*	*55.0*	*18.3*
Had a previous registered marriage(a)	*%*	***0.3*	*5.3*	*15.3*	*27.5*	*28.5*	*34.7*	*53.6*	*20.1*
Median length of previous marriage(a)	*Years*	***1.0*	*4.0*	*6.1*	*10.1*	*15.0*	*23.0*	*39.1*	*14.0*
Had a previous de facto marriage(a)	*%*	*11.0*	*24.8*	*21.8*	*14.2*	*6.4*	*3.4*	**1.3*	*14.1*
Median length of previous de facto marriage(a)	*Years*	*1.1*	*2.0*	*2.1*	*2.1*	*3.1*	*5.1*	**5.1*	*2.0*

** estimate has a relative standard error of 25% to 50% and should be used with caution*

***estimate has a relative standard error of greater than 50% and is considered too unreliable for general use*

(a) Only includes people whose most recent previous live-in relationship was of this type[6]

[6] *Source: 2006-07 Family Characteristics and Transitions Survey*

"Contribution" is one of the main aspects the Court is required to assess in considering what order should be made for the division of property between spouses to marriage[7] and de facto relationships[8] and is usually the second step in the "four step process"[9] the Court engages in to determine a property dispute between the parties to a relationship, assuming jurisdiction to do so.

In determining the contribution of the parties to the relationship, the Court is required to consider:

a. the financial contribution made directly or indirectly by or on behalf of a party to the marriage or the de facto relationship, or a child of the marriage or the de facto relationship[10] to the acquisition, conservation or improvement of any of the property of the parties to the marriage or the de facto relationship or either of them; whether or not that property has, since the making of the contribution, ceased to be the property of the parties to the marriage or the de facto relationship or either of them; and

b. the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or the de facto relationship, or a child of the marriage or de facto relationship to the acquisition, conservation or improvement of any of the property of the parties to the marriage or the de facto relationship or either of them; whether or not that has, since the making of the contribution, ceased to be the property of the parties to the marriage or the de facto relationship or either of them; and

c. the contribution made by a party to the marriage or the de facto relationship to the welfare of the family constituted by the parties to the marriage or the de facto relationship and any children of the marriage or the de facto relationship, including any contribution made in the capacity of homemaker or parent.[11]

The wording of the sections shows that financial contributions and non-financial contributions (as opposed to 'contributions to the welfare of the family') can be made directly or indirectly and can be made by the party or on behalf of the party and, or by a child of the marriage or de facto relationship. However, those contributions must be linked to **the acquisition, conservation or**

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7 *Family Law Act 1975,* section 79(4)

8 *Family Law Act 1975,* section 90SM(4)

9 *Hickey & Hickey* [2003] FamCA 395; (2003) FLC 93-143 and *Coghlan & Coghlan* [2005] FamCA 429; (2005) FLC 93-220; *Pastrikos & Pastrikos* (1980) F.L.C. 91-987; *Lee Steere & Lee Steere* (1985) F.L.C. 91-626; *Ferraro & Ferraro* (1993) F.L.C. 92-335; *Clauson & Clauson* (1995) F.L.C. 92-595; *Whitely & Whitely* (1996) F.L.C. 92-684

10 See *Family Law Act 1975,* section 60F for the definition of a 'child of a marriage' and section 60HA for the definition of a child of a de facto relationship

11 *Family Law Act 1975,* Sections 79(4) and 90SM(4)

improvement of the property of the parties or either of them. On the other hand, subsection 4(c) provides that the contribution to the welfare of the family must be by the party and there is no reference to a 'direct or indirect' contribution.

Although the test to be applied to alter the interest of the parties in property is similar, the power to make orders in relation to financial disputes arising out of a de facto relationship is further restricted.

The Court has jurisdiction in relation to make orders in relation to a de facto relationship[12] for maintenance[13], urgent maintenance[14], altering property interests[15] , and to declare the rights title and interests of parties to a de facto relationship[16] if

a. the period, or the total of the periods, of the de facto relationship is at least 2 years[17]; or
b. there is a child of the de facto relationship; or
c. the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in section 90SM(4)(a), (b) or (c) **and** a failure to make the order or declaration would result in serious injustice to the applicant; or
d. the de facto relationship is or was registered under a prescribed law of a State or Territory.

The Court can only make a declaration of property rights or alter the property interests of the parties to a de facto relationship if the court is satisfied:

a. that either or both of the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the application for the declaration or order was made (the ***application time***); and

b. either:

   i. both parties to the de facto relationship were ordinarily resident during at least a third of the duration of the de facto relationship; or

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12 For cases relating to the existence of a de facto relationship, see *Smyth & Pappas* [2011] FamCA 434 per Cronin J; *Moby v. Schulter* [2011 FamCA 748 per Mushin J.; *Baker & Landon* [2010] FMCAfam 280 per Riehtmuller FM*; Jonah & White* [2011] FamCA 221 per Murphy J.; *FO v. HAF* [2006] QCA 555 per Keane JA; *IBM v. TTV* [2011] QDC 76 per Dorney SC DCJ.; and the paper delivered by the late Dutney J., at the Calabro Consulting Family Law Residential at Twin Waters on 30 September 2005 "*The Approach of the Courts to Applications under Part 19 of the Property Law Act"*

13 Section 90SE

14 Section 90SG

15 Section 90SM

16 Section 90SL

17 See *Dahl & Hamblin* [2011] FamCAFC 202. The period of the de facto relationship does not need to be a continuous period

ii the applicant for the declaration or order made substantial contributions in relation to the de facto relationship, of a kind mentioned in section 90SM(4)(a), (b) or (c);

in one or more States or Territories that are participating jurisdictions at the application time

or:

the parties to the de facto relationship were ordinarily resident in a participating jurisdiction when the relationship broke down. [18]

Contribution *per se* does not enliven jurisdiction until the parties have resided in a de facto relationship for a period or periods aggregating two (2) years unless either there is a child of the relationship or there has been a ***substantial*** contribution by the applicant ***and*** there would be serious injustice to the applicant if the order or declaration was not made.

The jurisdictional threshold to the making of an order in a relationship of shorter than the two year duration was considered by Coates F.M. in *Miller & Trent*[19]. His Honour said "*substantial contributions"* and "*serious injustice* "mean more than *mere contributions or mere injustice.* His Honour considered and was guided by the judgement of Holden CJ in *V and K*[20]*,* dealing with a similar West Australian legislative provision, where his Honour said*:*

> *.. contribution to domestic duties in circumstances such as exist in this case where there were no dependent children and over a short period of time ought not be seen to be substantial. In my view, substantial means something more than usual or ordinary. In my view, s.205XB(ii) is aimed at more exceptional circumstances where serious injustice may be caused by the application of ss(i)."*

Coates FM reviewed the dictionary definition of "substantial" as ***ample or considerable amount as well as something having real worth or value*** and ***having real importance or value and to a considerable amount*** and a definition from *Wentworth v Wentworth*[21]in which the court held that the word substantial means "*not illusory, something considerable or large".* His Honour concluded that the contribution had to be more than usual or ordinary or was a contribution having real worth, value or importance (as well as the requirement that a serious injustice may result). His Honour said that "serious" means "*not slight"* or *"weighty or important",* not "*a mere injustice".* The evidence must show serious injustice if the declaration is not made. His Honour said:

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18 Section 90SK

19 [2011] FMCAfam 324

20 [2005] FCWA 80 (at paragraph 21)

21 (1995) 37 NSWLR 703; [1995] ACL Rep 395 NSW 39

> *The wording of the Act takes into account short relationships of less than two years in that **substantial contributions** or **serious injustice** can enable the jurisdiction of the court but the legislature was very careful to ensure that people do not bring all claims simply because they have lived together for a short period, short being for a period less than two years.*

The legislature intended that 'ordinary' contributions in a de facto relationship for up to two years would not warrant an order under the legislation. The contribution must be ample or of a considerable amount or having real worth or value and there must be a serious injustice if an order is not made. In a marriage, there is no jurisdictional hurdle and the evidence need only show that the contribution is within the terms of section 79(4)(a), (b) or (c) without a consideration of whether it is or is not substantial or whether there would be serious injustice if an order was not made.

In *Kneen & Crockford*[22] the parties lived in a de facto relationship and one month after the applicant resumed cohabitation with the respondent following a period of separation and approximately 14 months prior to final separation, the applicant bought a lottery ticket and won $3 million. There was a dispute about the circumstances surrounding the purchase of the ticket.

The Federal Magistrate applied the analysis of the Full Court in *Zyk & Zyk*[23] and found the purchase should be regarded as a joint contribution.

What would the position be if the relationship had been for less than 2 years? What would the position be if it was found one party bought the ticket? Assume the Court found the other party had paid other expenses which 'freed up' the purchase price of the ticket. Is the contribution of, say, half the purchase price of the ticket worth a substantial contribution? Section 90SK requires the substantial contribution to be <u>to the de facto relationship</u> and of a kind referred to in section 90SM (4) (a), (b) or (c) i.e., 'to the property …" etc. There is nothing in section 90SK to indicate how 'substantial' is to be regarded or what 'substantial' is to be linked to. Is it to be weighed in terms of a dollar value or equivalent; is it to be weighed against the contribution of the other party; or is it to be weighed against the result produced by the contribution? The actual contribution in such a case could be minimal but the result could be substantial. A declaration under section 90SL would be beset with the same difficulty – jurisdiction will only arise if the applicant falls within section 90SK.

The requirement to show a jurisdictional basis for the alteration of property interests in de facto relationships of less than two year's duration is in conflict with the approach of the Court in property proceedings where the enquiry is to look at effort rather than the result.

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22 [2011] FMCAfam 372

23 (1995) FLC 92-644

52. *In Shewring, Nygh J emphasised the importance of evaluating the efforts of the parties rather than the results they achieved. His Honour expressed the opinion that any qualitative assessment of contribution should be based on the principle that each party should make such contribution as can reasonably be expected having regard to the nature of the party's capacity, the ability of each of the parties and expectation of the spouses.*

53. *The alteration exercise, therefore, involves an overall assessment of the proportionate responsibility of each party for the acquisition, maintenance and improvement of the property which represents the fruits of the totality of their joint efforts in their diverse but equally valuable roles in the marriage partnership, quantifying their respective contribution to the accumulated wealth and overall welfare of the family, apportioning the gains and losses they made, compensating them for unmet expectations or lost opportunities and misplaced reliance on the strength of assurances about the permanence and stability of the relationship, and providing for their likely future financial needs.*

54. *Economic justice is not a fixed standard. Every case depends on its own unique facts. What is important is to somehow give a reasonable value to all the elements that go to making up the entirety of the marriage relationship. As the Full Court recognised in Ferraro making a crucial comparison between contributions through fundamentally different activities is a difficult undertaking. So too is trying to objectively assess the value of contributions to the welfare, as distinct from the wealth, of the family. The former are vulnerable to undisclosed subjective value judgments and are not readily susceptible to measurement in dollar terms.*

55. *Care must therefore be taken not to undervalue the indirect and homemaker contribution of a wife in a marriage of short duration.*

56. *As the Full Court observed in Kennon, there are:*

> *"...a myriad of matters, large and small, which go to make up that union and differentiate it from more casual transitory relationships. It means sharing the minutiae of family life, support during good and bad times, care and intimacy . . . It - that is, marriage - is an intimate sharing of mutual but diverse talents for . . . joint benefit"..*[24]

In *Scofield & Shaw* [25]Brewster FM, considered an application under section 90SM (3) for the alteration of property interests in a de facto relationship. His Honour approached the application on the basis that he first had to consider what the parties' respective property interest would be if no order was made, i.e., as if the Court was making a declaration of property rights under section 90S. His Honour said that he would then consider if it was just and equitable to alter the parties' interests and then, if and only it was, he would consider the extent to which it was necessary to do so.

Brewster F.M., cited the Full Court in *Rogers & Rogers*[26]:

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24 *D v. D* [2006] FamCA 245 per Carmody J

25 [2011] FMCAfam 1296 (30 November 2011)

26 (1980) FLC 90-874

The Full Court cited with approval a decision of Strauss J in Ferguson & Ferguson[27] where his Honour said:

> *It seems to me that the main purpose of section 79(2) is to ensure that the court will not alter the property rights of the parties unless it is satisfied that cogent considerations of justice require it to do so, and that if the court decides that it is requisite to make any order under the section, the court must be satisfied that the alteration so ordered, will go no further than the justice of the matter demands.*

His Honour considered the contributions of the parties to the acquisition of the property and found it would be just and equitable to alter the parties' existing legal/equitable interests. His Honour said:

24. *I refer to the Full Court's statement in Rogers to the effect that any alteration in the parties' interests in a property should go no further than the justice of the matter demands. It has been said in many cases that the process involved in an alteration of property interests is not an accounting exercise. However this was a short relationship and in my opinion this case is an exception. I believe that it is appropriate to undertake such an exercise.*

25. *The course I propose to adopt is to apply what might be termed a modified Calverley v Green approach. I propose to divide the property in proportion to the parties' lump sum contributions, whether or not those contributions were made to either the acquisition of, or on improvement to, the property*.[28]

In *D & D*[29], Carmody J., said:

> *".. subsec 79(2) expressly requires the court to stay its hand and refrain from making any order for property division unless the alteration of existing property rights is just and equitable. Sometimes the relevant concepts of justice and equity will favour the status quo"*

An order altering the interests of the parties in property should only be made if it is just and equitable to do so and then only to the extent necessary to reflect a just and equitable division.

Issues relating to contribution in short term relationships ought to largely be the same as those which present in longer relationships – e.g. the weight to be given to initial contributions, 'add backs', waste, *Kennon* arguments and so forth.

However, the most obvious difference is that the opportunity to make a contribution must be limited by the short duration of the relationship. There may be little time/opportunity for one spouse to make a homemaker and parent contribution or to claim "significance" through the contribution of 'ordinary' income so as to be held to be ample, considerable, having real importance

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27 (1978) FLC 90-500

28 The stated approach appears to be contrary to the requirements of section 90SM(4)

29 [2006] FamCA 245 per Carmody J

or value; whereas the injection of an initial capital asset or the contribution of a high income will be more obvious to recognise.

In *D & D* [30] Carmody J., said:

64. *In Hirst and Rosen, Nygh J expressed the view that in marriages of short duration (34 months in that case) the focus should be on the actual financial contributions made directly or indirectly to the acquisition or preservation of assets.*

66. *The source of this comment was a statement by the Full Court in Wardman and Hudson to the effect that where a marriage is a short one and no question arises of the care and control of children, the question of assessment of the indirect contributions made by the parties becomes less important on the basis that it cannot have the same significance as it does where parties over a long period of time keep house and raise a family.*

67. *Thus, in a marriage of no great length a young childless couple who make roughly equal contributions during the marriage and there are no other* s 75(2) *factors leading to a different result, will usually see a property order made leaving the bulk of the assets remaining with the party contributing them.....*

68. Nonetheless, the duration of a marriage is expressly relevant under par (d) of subsec 79(4) but may, of course, be highly significant in assessing contributions too, because, as I noted earlier, the shorter the duration of the marriage the more weight may be given to financial, especially initial capital, contributions and less attached to the domestic role.

69. The difficulty of reflecting substantially disproportionate financial contributions at the beginning of the marriage in orders directed to the division of the property at the end of the marriage is, as the Full Court recognised in Zyk, an acute one. It is ordinarily just and equitable that the differential be treated as significant but cases, such as Crawford, Money and Bremner, emphasise that the disparity may be eroded over time and/or by the contributions of the parties during the course of the marriage. How and to what extent this is done is a difficult problem and one which is not susceptible to precise analysis. That is largely because it depends upon a number of variables, such as the initial difference, the use subsequently made of those assets, whether or not they have increased in value, due to the efforts of the parties, or external forces, the length of the marriage, and the size and impact of other contributions made in the intervening period (cf. Pierce)."

In my opinion the following emerges:

1. In short relationships, the approach is to look at the actual contribution more closely and to apportion the property more strictly in accordance with the actual contribution.
2. It is far easier to measure financial contributions in short relationships and to use that as the guide. Carmody J., said in *D v. D*[31]

30 *Ibid*

It is common for judges in short marriage cases to adopt the asset by asset approach involving a determination of the parties' respective interests in individual items or groups of property rather than assessing their overall contribution to the totality of the assets in the pool, especially where they have scrupulously kept their financial resources and assets separate from each other.

However, the Full Court preferred the global approach when re-exercising its discretion in J and S[32] where a childless couple who were married for five years had kept separate financial accounts

3. In de facto relationships the Court cannot entertain the application unless it has been for at least two years or there is a child of the relationship, or the applicant establishes that he/she made a substantial contribution and there will be serious injustice if the claim is not heard.
4. An order altering the parties' property interests should only be made if it is just and equitable to do so and then only to the extent necessary to do justice and equity.

Australia is a separate property regime. Under the general law the ownership rights of parties are determined by their respective contribution in line with the established legal principles and equitable doctrines discussed by the High Court in Calverley v Green. In the absence of any evidence or rule to the contrary, legal title is presumed to be held beneficially on trust - resulting, implied or constructive - in proportion to the financial or other recognised contribution made to the purchase, improvement or conservation of the property in question.

Marriage itself does not affect the property interests of spouses. Living together, per se, does not justify significant wealth transfer.

However, section 79 of the Family Law Act, 1975 enables a judge exercising matrimonial jurisdiction in property proceedings between former spouses to make "appropriate" orders altering their existing interests in property by transfer or settlement if (and only if) it is "just and equitable" in all the circumstances to do so.[33]

5. Each case must be decided on its own peculiar facts:

Economic justice is not a fixed standard. Every case depends on its own unique facts. What is important is to somehow give a reasonable value to all the elements that go to making up the entirety of the marriage relationship.[20] As the Full Court recognised in Ferraro[21] making a crucial comparison between contributions through fundamentally different activities is a difficult undertaking. So too is trying to objectively assess the value of contributions to the welfare, as distinct from the wealth, of the

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31 [2006] FamCA 245 (11 April 2006)
32 [2003] FamCA 618
33 *D v. D* (supra)

> *family. The former are vulnerable to undisclosed subjective value judgments and are not readily susceptible to measurement in dollar terms[34].*

I have set out in the appendix to this paper a number of decisions which determine the division or property in short relationships. De facto relationships do not feature until 2009 except in decisions of the State Courts under Part 19 of the Property Law Act 1974. I have also included some decisions relating to longer marriages/relationships in order to see if there is any appreciable difference in approach between short and longer relationships.

The difficulty that arises in with examining precedents which show the orders made in similar cases is that almost every case is different and each depends upon its own peculiar facts. In *Mallet v. Mallet*[35], Gibbs C.J., said at 79,111"

> *It is proper, and indeed often necessary, for the Family Court, in dealing with the circumstances of a particular case, to discuss the weight which it considers should be given, in that case, to one factor rather than another, It is understandable that practitioners, desirous of finding rules, or even formulae, which may assist them in advising their clients as to the possible outcome of litigation, should treat the remarks of the Court in such cases as expressing binding principle, and that Judges seeking certainty, or consistency, should sometime do so. Decisions in particular cases of that kind can, however, do no more than provide a guide; they cannot put fetters on the discretionary power which the Parliament has left largely unfettered. It is necessary for the Court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case"*

APPENDIX

Doyle and Doyle (1980) F.L.C. 90-845

The parties were married *15 weeks*. There were no children.

The husband owned an interest in a property in Hobart for a period of 3 years prior to marriage. He had been renovating and restoring the property together with a friend. The wife claimed to have helped in the improvements in wall papering, pulling up floor coverings, giving advice about fabrics

34 *D v. D* (supra)

35 [1984] F.L.C. 91-507

etc. She claimed wide ranging contributions (her claim was described as having 'cast as wide a net as possible') including prior to living together. There was no evidence of the value of any improvement as a result of the wife's contribution. It was found that the only relevant matter to take into account was the contribution of a small amount of money (quantum undetermined) and a small amount of labour to the conservation and improvement of the property. Wood J., at 75,337 said, in relation to the contribution as a homemaker and parent in the 15 week period:

> "*The provisions of section 79 in recognising a contribution made by a party as a homemaker must, to my mind, depend for their application in a given case upon proof of a genuine commitment by the claimant spouse to the marriage and the establishment and maintenance of a home. Such a contribution can be made during cohabitation both before and after marriage.. but it goes beyond the mere rendering of some domestic services and the contributing of some labour towards the furbishment of the matrimonial residence."*

The order made was for the payment to the wife of the sum of $1,000 plus the wedding and engagement presents, and a sum representing half the value of a dresser and chest of drawers.

Abdullah and Abdullah (1981) F.L.C. 91-003

The parties met in 1977, and became engaged in May/June 1978. The wife's mother then said to the wife:

> "*I want to give a property to John and you for a home so that you can move when you are married".*

She did so. It was purchased for $35,000. The parties married in November 1978 and lived with the wife's mother until May 1979 at which time they separated. The relationship was of approximately *two years although it was only 6 months from marriage to separation*.

They had, by then, subdivided the property given to them by the wife's mother and carried out some demolition work – financed by the wife's mother. The two blocks of land that resulted were sold yielding approximately $64,500. The proceeds were paid out by the conveyancing solicitors drawing cheques in equal amounts to each of the husband and wife. The husband gave the wife the cheque in her name together with half the balance deposit and he left the wife the day after. It transpired that he was, at all times, engaged to another and continued to see her during the course of the relationship – unbeknown to either her or the wife.

The husband did not claim to have made any financial contribution but did say he contributed labour (for about 40 days).

The trial Judge found that at separation the husband had the sum of $32,278.87 from the proceeds of sale together with a ½ interest in another separate property (his interest in that was valued at $19,000). He was found to have made no financial contribution, to have performed some minor cooking and to have bought some meat. He performed some labouring. It was found the husband was entitled to a total of $5,000 from the matrimonial property and as a result was ordered to pay to the wife $27,278.87.

Morgante and Morgante (1977) F.L.C. 90-297

The parties married in April 1973 when the husband was aged 22 and the wife 20. There were no children. The marriage was dissolved in April 1977. The parties lived together for only *10 months*. The husband's initial contribution was the provision of $6,000 (plus legal costs of $300) for the purchase of the parties' home which cost $12,500 and the wife contributed savings of $700 - $750 which was contributed to the purchase of furniture. She worked for a short time as a stable hand. At separation the parties agreed the husband gave the wife $1000 and provided her with an air ticket home to Adelaide (which he did). The wife repartnered in late 1975.

The trial Judge found this was a short marriage, the wife's contributions were minimal and any financial contribution she made was repaid by the payment to her of the $1000 which the trial Judge found was an appropriate payment

Segan & Bachrich [2011] FamCA 722 (8 September 2011) Ryan J.

The parties married in June 2007. They lived together for *11 months.* They had one child who resided with the wife. The husband was aged 41 and the wife was aged 39.

At the date of the hearing the assets had net assets worth $625,693.

The husband was employed in the financial services industry and was earning in excess of $100,000 per annum. He had assets at the commencement of approximately $130,507. The wife had net assets of $802,631. She was a private consultant and contracted out at $1,700 per day. The wife obtained work in Singapore earning SGD$212,000. The husband obtained work in Singapore earning SGD$145,000. His income increased sometime after separation to SGD$266,000 but that contract was later terminated and he had a period of unemployment. The wife subsequent to separation bought a home in Sydney for $1,340,000 and returned to work in 2011.

The husband's assets at the date of trial were found to be less than those he had at the start of the relationship because he had to draw on capital to support himself. It was also accepted that the wife's position had deteriorated since the relationship formed.

It was found that the wife had made the greater financial contribution and her contribution as homemaker and parent was absolute. The Court ordered the wife receive 90% of the pool on the basis of contributions. An additional loading of 7% was awarded in favour of the wife for section 75(2) factors.

Harper & Pint [2011] FamCA 771 (24 August 2011) Bennett J.

The parties commenced their de facto relationship in September 2008 and separated on 29 August 2009. There are two children of the relationship born in October 2008 and March 2010.

At the commencement of the relationship the mother had savings of between $10,000 and $15,000 which was subsequently spent on overseas travel, and an interest in an investment property held by her and a brother. The father had a motor vehicle subject to a loan.

The parties bought a block of land in December 2008. The deposit and costs were paid by the mother. They borrowed $180,000 from the mother's parents. The land was registered in the sale name of the father. They contracted to build and borrowed, in the sole name of the father, from a bank. Part of the money borrowed was to have been paid to the mother's parents but when the parties separated the father refused to pay the money over. He later claimed to have spent the money or most of it. He eventually paid $20,400 into the mortgage account but did not pay money to the mother's parents. The father was declared bankrupt on his own petition. He had depleted his bank accounts deliberately so the Court could not freeze his funds and had engaged in other such tactics!

The mother obtained an order formalising that she held an interest in the former home at the commencement of the trial. The balance assets were the father's car worth $6,000, some belongings, mobile telephone unit and figurines worth $600, a queen size bed mattress and an Apple Mac Book. The father had superannuation interests of $30,000.

The trial Judge assessed the contributions at 75%/25% in favour of the wife.

Under section 90SF (3) the trial Judge awarded the mother an additional 25% bringing her entitlement to 100% of the available property

Anastasio and Anastasio (1981) F.L.C. 91-093

The parties were married in October 1977 and separated in December 1978 *(14 months*). The wife earned 22.78% of the parties' total income during the marriage. While together, the husband bought a lottery ticket in his name which resulted in his receiving $60,000.

It was held that although a mathematical approach to property division is not appropriate, in this case, particularly because of the shortness of the marriage, it was appropriate that they receive what they had contributed to the marriage.

Baker J said, at 76,650:

> *Marriage is for most partners an economic union. The parties to a marriage in the main work together, strive together with the ultimate object of buying a home and acquiring other assets. What happened in the present case is no different to what occurs in thousands of marriages throughout the country.*

The lottery winnings were distributed in the same proportions and manner as the other property.

Hirst and Rosen (1982) F.L.C. 91-230

The parties were married in January 1978 after a short period of cohabitation, and separated in September 1979 (*approx. 20 months*). The husband was aged 72 and the wife 65 at trial. The wife's assets were worth $458,000 and the husband's $60,000. The parties maintained independent finances and contributed equally to household expenses.

At 77,251 Nygh J., rejected what he described as the '*soup kitchen approach'* and said that section 79(2) was controlled by the factors set out in section 79(4):

> *It is, therefore, not an "open sesame" for the Court to administer justice as it thinks fit."*

His Honour said that in a short marriage, the Court should look primarily at the actual contributions made directly or indirectly to the acquisition or preservation of the assets. He referred to *Wardman and Hudson* (1978) F.L.C. 90-466 and said:

> *Where a marriage has lasted for some time or where there have been substantial contributions made to the care and control of children of the marriage, the indirect contribution, especially that usually made by the spouse who assumes the primary role of homemaker and parent, must be taken into account, but where a marriage is of short*

> *duration and no question arises of the care and control of children, the question of assessment of the indirect contributions made by the parties becomes less important. It cannot assume the same importance as it can where the parties over a long period of time, keep house, look after the children and make financial and physical contributions toward the acquisition and maintenance of property.*

It was found the husband had made a small contribution over and above sharing household expenses in the form of a loan to the wife to enable her to purchase a property in which she resided at trial and which the wife repaid, and in the payment by him of an amount over his ½ share of the expenses but totalling no more than $2000.

The husband was awarded $2,617.

Quinn and Quinn (1979) F.L.C. 90-677

The parties were married in December 1973. There were no children. They separated on 13 November 1975. They were divorced in March 1979. There was a period of 3.25 years from marriage to decree nisi, *cohabitation was less than 2 years*, and they lived in what was their matrimonial home for 18 months.

The wife brought in to the relationship the proceeds of a damages claim of $28,000 plus some other assets worth $2,600. The parties lived in the home of the wife's late father and bought a block of land on which they erected a house. The costs were paid from the wife's funds together with a loan of $10,000. The husband made mortgage repayments of $2,340 and the wife $1,275. The wife did not work. The husband earned a total of $17,000 and maintained the wife and her 2 children from an earlier marriage.

The husband was awarded $3,500. The Full Court dismissed his appeal against the award.

Evatt CJ said:

> *The fact that the marriage was of short duration, in the circumstances of this case ... does give added weight to the capital contribution which the wife made to the acquisition of this home, as against the contributions which the husband made from his income and earnings during the marriage. That is, because the marriage was of such short duration, the asset in question to a large extent could be seen not as an asset accumulated from the efforts of the parties during the marriage but still largely an asset brought into the marriage by the wife.*

Kneen & Crockford [2011] FMCAfam 372 (21 April 2011) Lindsay F.M.

The parties lived together for periods between 2004 and final separation in December 2009. It is unclear how long they resided together but as it was a de facto relationship the aggregate of the periods was in *excess of 2 years* and must have been *less than 6 years*.

There were no children of the relationship. The applicant was aged 27 years and the respondent aged 29. The respondent was earning $60,000 per annum. The applicant was earning $35,000 per annum.

In October 2008 (about one month after the applicant resumed cohabitation with the respondent following one of their periods of separation) the applicant bought a lottery ticket and won $3 million. There was a dispute about the circumstances surrounding the purchase of the ticket. The Federal Magistrate applied the analysis of the Full Court in *Zyk & Zyk*[36] and found the purchase should be regarded as a joint contribution.

The parties had few other assets. The pool was found to be $3,100,844.67 including superannuation interests of approximately $20,000.

The pool was divided equally save for an adjustment of $100,000 in favour of the applicant to take account of her lower earning capacity.

Spano and Spano (1979) F.L.C. 90-707

The parties married in early 1974. They separated in early 1976. The relationship was therefore approximately *2 years* duration. The husband owned the substantive assets, valued at $150,000, at the time of the marriage. The wife made some contributions to the property and in her role as homemaker and parent. She had few assets at the time of marriage and had $4,000 remaining out of a $9,000 compensation claim at the hearing. She had received little maintenance from the husband. The parties had a child aged 3 years at the time of the hearing who was in the care of the wife.

The husband was ordered to pay $5,000 by way of property settlement, plus $25,000 lump sum maintenance for the wife and $5,000 lump sum maintenance for the child. The Full Court allowed the appeal only insofar as the lump sum maintenance orders were concerned and substituted a periodic payment of $55 per week for the wife and $15 per week for the child.

[36] (1995) FLC 92-644

Bondar-Twersky & Twersky [2009] FMCAfam 163 (4 March 2009) Neville F.M.

The parties were in a relationship for three years. The wife aged 59 was from the Ukraine. The husband aged 59 was a farmer in Australia.

The husband was facing a sale of his farm primarily due to crop failure because of drought. The wife's situation was unpredictable as she had left the Ukraine to marry the husband and had no family support.

Neville F.M. reviewed a number of short marriage cases including *Quinn*[37]*, Bushby & Bushby*[38], *In the marriage of Goodwin*[39]*, Turnbull & Turnbull*[40] in which case Baker J said:

> *The wife, in my view, married a wealthy man and lived in very comfortable circumstances on prime grazing land, albeit for two years only. She had the expectation of a long and happy marriage and enjoyed a very comfortable standard of living. Since the separation, she has lived in a basic cottage in a small country village.*

Cohen & Cohen[41], and *Maguire & Richter*[42] which dealt, in particular, with the dislocation experienced by a party coming to Australia from overseas.

The net assets of the parties were found to be $1,021,213. It was held that the wife receive $112,333 or 11% of the pool.

Rouse and Rouse (1981) F.L.C. 91-073

The parties were married in 1975. There was one child born in 1979. They separated in July 1979 after cohabitation of *3½ years*. The marriage was dissolved in 1980.

At the time of the marriage the husband had assets of $108,000. The wife had $11,800. During the marriage the husband received a further $76,000 from his father and the wife received an entitlement of $4,500 from her family interests. The wife worked until the end of 1978. Her earnings were less than those of the husband but not substantially so.

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37 supra
38 (1988) F.L.C. 91-919
39 (1991) F.L.C. 91-192
40 (1991) F.L.C. 92-258
41 [2008] FamCAFC 54
42 [2009] FMCAfam 85 (6 February 2009)

They bought a home in September 1977 – the husband provided the total cost of $65,760. The husband carried out substantial renovations.

At the end of the marriage the wife had property totalling $17,100 other than her interest in the home and the husband had property worth $138,500 excluding the home. The home was worth $95,000 at the hearing. The wife was renting and the husband was paying $90 per week maintenance.

It was found that this was a short marriage, the preponderance of financial contribution came from the husband, the preponderance of homemaker and parenting contribution came from the wife (which it was found would continue into the future). The wife was found to have made an indirect contribution to the conservation and improvement of the assets of the parties.

The wife was awarded $55,000 (in addition to her separate assets) which included a lump sum spousal maintenance award of $20,000. She was ordered to transfer her interest in the home to the husband.

DDM & GAJ [2003] FMCAfam 229 (15 May 2003) – Walters FM

The husband was born in February 1936 and the wife was born in August 1945. The parties married on 1 August 1998. According to the husband, the parties separated on 12 January 2002. According to the wife, they separated in December 2001. The relationship was of between *3 years 4/12 or 3 years 5/12.*

The wife had assets totalling $235,473.00 at the date of marriage. The husband had assets to the value of $131,611.00.

The wife transferred a property to her former brother in law which cost some money and the husband had expended some labour in that exercise. In June 1999 the wife received an inheritance from her sister. She gave members of her family a total of $37,000.00

The main asset acquired by the parties during the course of their relationship was the former matrimonial home. The wife contributed $124,657.00. The husband contributed $17,748.00 plus the block of land and labour. Each contributed to the welfare of the family to the extent to which he/she was able. Due to the wife's ill health, however, it became necessary for the husband to take a more significant role in the homemaker/parenting area than did the wife.

The asset pool was $332,088.00.

On a contributions basis it was found that a division 62.5/37.5 in favour of the wife was appropriate with no further adjustment for section 75(2) factors.

Adams & Randall [2011] FamCAFC 204 (11 October 2011)

The parties were aged 36 and 35 respectively. The parties met in 2005, commenced cohabitation in February 2006 and separated in July 2009. (*3 years 5/12*). The wife had a son from a previous relationship. There were three children of the subject relationship.

Non-superannuation assets were valued at $84,486. Superannuation assets were worth $100,158. Both the parties were found to have made financial and non-financial contributions during the course of the relationship. The husband contributed $100,000 from pre-relationship savings. The wife was the primary homemaker/parent both before and post separation. The husband agreed to pay the wife $200 per week spouse maintenance commencing on the sale of a property.

The Federal Magistrate ordered a division of 70/30 in favour of the husband then adjusted the result by 15% in favour of the wife for section 75(2) factors providing a 55/45 result in the husband's favour overall of both the non-superannuation and superannuation pools.

The wife challenged the adjustment under section 75(2) saying the Court had failed to properly take into account her need to rehouse herself.

The Full Court dismissed the property appeal. No superannuation splitting order had been sought. To alter the division would mean that despite the husband's significant initial contribution he would be left with no 'hard' assets – only superannuation.

Evans & Barnes [2011] FamCA 453 (29 April 2011) Cronin J.

The parties resided together for 3 years 7/12. There were no children of the relationship. The husband was aged 55 and the wife was aged 48. The husband worked as a self-employed person in information technology and the wife worked in education.

The wife made an initial contribution of a house, motor vehicle, contents, superannuation and some savings. The husband had some modest motor vehicles, some furniture and equipment and a very

small amount of savings in superannuation. The husband brought in about 10 – 15 % and the wife the balance.

His Honour found the asset position at trial to be about 10-15% held by the husband and the balance by the wife. He found the wife had earned more than the husband and that the wife had contributed greater in non-financial contributions.

The wife sought an order that the assets remain where they are and his Honour made orders to reflect that position.

Waldrop & Barrett [2011] FMCAfam 352 (21 April 2011) Burchardt F.M.

The relationship was of between *4 and 5 years* duration. The wife contributed more than $60,000 at the commencement of the relationship. The husband had a business with a considerable cash turnover. Through a friendship he had the parties were able to acquire a home at an under value of approximately $20,000. The wife (or her family) undertook the bulk of the renovations to the property.

On a contributions basis the Federal Magistrate found the wife had contributed in excess of the husband and required a 25% loading. In the final result the orders required the wife to pay the husband a sum which equated with 22% of the pool.

Manwaring & Manwaring [2011] FMCAfam 50 (4 April 2011) Willis F.M.

The parties had a *five year* relationship. The period from separation to trial was also about 5 years.

They had two children aged 9 and 7. The children lived with the wife and she was solely responsible for their financial upkeep.

The husband owned a house at the commencement of the relationship sold soon after and the proceeds invested in a unit and a block of land. He also had some debt. The properties were repossessed at the end of the relationship when the husband could not continue making repayments.

All that remained was a negative pool (debt of $28,000) and superannuation. At trial the wife had superannuation worth $292,816 and the husband had superannuation worth $440,278. At the commencement of the relationship the wife's was worth $66,250 and the husband's was worth $127,691.

The wife was found to have earned higher than the husband during the relationship. She was a better money manager both during the relationship and post separation. The wife made the greater homemaker and parenting contribution during their time together and post separation. The husband had used alcohol to excess. He suffered pancreatitis and was hospitalised.

The wife took a redundancy package of $87,426 shortly prior to separation. She had $28,000 left at separation and used the balance of the funds for the benefit of the family. She cared for the husband during his illness. The husband had also lost money gambling.

The parties conceded contributions were equal during the relationship but for the gambling issue.

The Federal Magistrate found the wife's non-financial contributions during the relationship exceeded the husband's, thus balancing against the husband's greater initial contribution, and determined contributions overall to separation as equal. The wife was found to have made significant contributions under section 79(4)(c) post separation and required an adjustment of 7.5% in favour of the wife.

Her Honour referred to Watts J., decision in *T & T*[43] in relation to the treatment of superannuation interests. A further adjustment of 7.5% in favour of the wife was made to take account of the section 75(2) factors providing an ultimate division of 65%/35% in favour of the wife.

Pullman & Carmody [2011] FMCAfam 1357 (14 December 2011) - Foster FM

The parties commenced cohabitation in January 2004 and separated in March 2010. *(5 years 10/12*). The applicant had little at the commencement of cohabitation. The respondent had approximately $150,000 in cash assets (or equivalent), $260,000 in company interests and superannuation entitlements of approximately $37,000.

The applicant had 4 children from a prior relationship. The children lived with the parties throughout cohabitation. The respondent had a significant involvement with the children, provided

[43] [2006] FamCA 207; (2006) F.L.C. 93-263

financial support and paid school fees and the like. The respondent had 3 children of his prior relationship but they did not form part of the household.

The applicant worked for the respondent's companies from shortly after cohabitation commenced.

The parties were aged 46 (applicant) and 51 (respondent) at trial.

At trial the pool was worth $2,730,000 (including superannuation interests of $253,000).

Contributions were assessed at 95% to the respondent and 5% to the applicant. There was an adjustment of 7.5% under section 90SF (3) to the applicant.

Luxton & Lindsay [2011] FMCAfam 1332 (9 December 2011) Halligan F.M.

The wife was aged 32 and the husband was aged 31. The parties commenced cohabitation in December 2002 and separated in November 2010. (*7 years 11 months*) There is one child born in 2009.

The wife had a new computer and some savings of not less than $2,679 at the commencement. There was no evidence that the husband had any assets. The wife received $69,009 from her mother in 2004. She received $10,000 which was used as a security deposit for the husband's permanent residency application and $27,860 was used toward the wife's mother's permanent residency application.

The husband's parents also gave the parties $80,000 used in the purchase of the home and two further sums of $10,000. They also gave the husband further cash sums to bring the total received from his parents to $114,700.

The parties both studied initially and later obtained part time work. They obtained full time employment in 2005 or 2006.

At separation the parties had $80,000 which they split equally. They contributed equally to the mortgage payments and the costs of utilities.

For the first three months after the birth of the child the wife stayed at home. She returned to work then and the paternal grandparents cared for the child until they left Australia in October 2010. Since separation the wife has been the primary carer. The wife was found to have made the greater non-financial contribution.

At trial the wife was earning $985 per week and the husband $1,441. They were separated under the one roof and shared the costs of supporting the child.

The pool totaled $401,443. Apart from capital contributions from family the wife had made a slightly greater contribution. Halligan FM determined the financial contributions at 53.25%/47.5% in favour of the husband and the non-financial contributions as justifying a 10% loading to the wife – giving her 52.5%.

Galliano & Galliano [2011] Fam CAFC 149 (13 July 2011)

The husband was aged 31 years and the wife 32 at trial. The met in 1998 and commenced cohabitation in 1999.

The wife was then a retail assistant and the husband was in receipt of worker's compensation payments. They lived for nine months in a property owned by the husband's mother and paid rent to the husband's father. There was evidence the wife's mother and brother assisted by lending money to buy a property. The parties also resided with the wife's mother from June/July 2005 until separation.

They married in 2003. They separated in July 2006. From cohabitation to separation was *6 – 7 years*.

The husband received a lump sum compensation payment of $250,000 one month prior to separation. He failed to account for $235,203 of those funds at trial. He was detained in a hospital clinic about 3 months after separation and was transferred to the campus of a mental health service in September 2007. He was diagnosed with paranoid schizophrenia complicated by substance abuse.

The wife paid the mortgage on one of their properties and the repayments on a line of credit post separation. The husband failed to make the mortgage payments or pay the rates and utilities on the other of the properties they owned. A notice of default and threat of Supreme Court proceedings was received.

The property the wife had been servicing was sold. The wife moved into the property the husband was supposed to be servicing.

At trial the pool was found to be net $496,471 (which included an 'add back' of the $235,203). The Federal Magistrate found the parties had made equal contributions and that an adjustment of 5% to the husband was appropriate under section 75(2).

Strickland J., allowed the appeal on the basis he was unable to determine the manner in which the Federal Magistrate came to an equal division based on contributions particularly when faced with the $250,000 payment received by the husband. In re-exercising his discretion his Honour found that at separation the husband's contributions far outweighed those of the wife. Taking into account the wife's contributions post separation, Strickland J found the division based on contribution should be 60/40 in favour of the husband. The section 75(2) adjustment was unchallenged so the overall result was a 65/35 result in favour of the husband.

Coventry & McNamee [2011] FamCAFC 123 (9 June 2011)

The husband was aged 43 years and the wife 41. They commenced a relationship in 1991, married in February 1995 and separated on 8 July 2001 (*6 years 5/12*).

The husband had been in the RAAF from 1981. There were three children who resided with the wife. The husband had accommodation provided by the RAAF. He provided support to the wife for a period of 3 months post separation.

The home was agreed to be worth $252,000 and the superannuation worth $581.457. The husband argued (and the Federal Magistrate accepted) that only $134,735 of the value of his superannuation should be taken into account, being the value accrued attributable to the period of cohabitation.

The Federal Magistrate found contributions to separation were equal. The wife had provided greater care for the children post-separation and had, through her care of the children during the marriage enabled the husband to undertake study. The wife's contribution to the assets other than super was found to be greater but the husband's contribution to his superannuation was greater.

The Federal Magistrate found the parties' interests in the home should be divided 70/30 in favour of the wife and the wife receive 35% of the husband's superannuation. The Federal Magistrate allowed an adjustment of 10% for section 75(2) factors but only in relation to the interest in the home (which would have been divided 60/40 based on contribution). However, at earlier points in the Judgment the Federal Magistrate had indicated the wife was to receive 40% of the husband's superannuation entitled as at 30 May 2009.

The appeal against the decision was dismissed, although Strickland J indicated he would cause the Federal Magistrate to be notified of the error in ordering a 35% division of the superannuation when it was clear elsewhere in the Judgment the percentage division was intended to be 40%.

Doyle & Lynch [2011] FMCAfam 1320 (5 December 2011) Brown F.M.

The period of the relationship was in dispute but found to be *seven years.* The parties met in 1996, married in 2005 and separated in 2009. There were no children. The husband suffers a psychiatric condition and had not worked for several years. He was in receipt of a disability pension. He was not likely to obtain employment. He was living with his mother and step father at trial.

The wife was employed until April 2008 when she went to complete her diploma. They had a home which was worth $340,000 at trial. It was purchased in the wife's sole name. She was the sole mortgagor. The Federal Magistrate found that it was her purchase alone and she brought it into the marriage. It nearly tripled in value over time due, mainly, to the increase in the property market. The husband's financial contributions were found to be modest and not significant. He was found to have performed some but not all housework and he was found to have made some non-financial contributions in renovations.

The pool of assets was found to be $359,000 plus superannuation of $30,334. Brown F.M. said that the relationship cannot be regarded as of significant length but nor could it be regarded as short. The contributions were assessed at 82%/18% in favour of the wife. An additional 12% of the non-superannuation assets were awarded to the husband for section 75(2) factors – resulting in a 70%/30% division in favour of the wife.

Granger & Sloper [2011] FMCAfam 192 (16 March 2011) Coker F.M.

The parties married in September 2000 and separated in late 2008 but with some significant periods of separation giving a duration of *8 years* described by His Honour as "*a matrimonial period .. of eight years and a cohabiting period of approximately four years*".

The pool was found to be $580,000. The husband made the far greater initial contribution – in the order of 94% against the wife's 6%.

It was found that during the periods the parties were living together they contributed equally to the household and the day to day needs of the household. The husband had drawn down some $90,000 from the assets by trial. The wife's financial contribution was described by his Honour as virtually nil and that her claim for 50% of the assets in her material and 35% in submissions was described as

fanciful. The trail Judge found a division of 87.5% to the husband and 12.5% to the wife an appropriate division based on contribution. No adjustment was made for section 75(2) factors.

Jordan & Jordan [2011] FMCAfam 457 (12 May 2011) Hughes F.M.

The parties cohabited for *9 years 2/12*. They had two children aged 7 and 8 living in a 'week about' arrangement.

The wife worked prior to having the children and then returned to part time work six months after the birth of the first child until two weeks prior to the birth of the second. She did return to some part time work for a period of 18 months at a later time but found it too stressful. She was diagnosed as suffering from a bi-polar disorder requiring hospitalisation for two periods and her condition was well managed with medication.

The husband had interests in two real properties and an investment scheme at the commencement of the relationship. One of the properties was sold later producing approximately $290,000. No profit was made on the sale of the other property. The investment scheme produced no profit. The husband had his own business at the commencement of the relationship. He sold it during the marriage and the proceeds of sale were used to retire debt so no profit was made. He worked for another company but was retrenched and remained unemployed for a period of 7 months post separation. He then obtained work on contract but his employment situation was uncertain at trial.

The total value of the pool was found to be $463,755 including superannuation of $116,595. The trial Judge found contributions in the proportions 56% the husband and 44% to the wife reflecting the husband's greater initial contribution (and giving credit to the wife for some contributions she had made to the properties he brought in).

The section 75(2) factors were considered and an adjustment of 15% in favour of the wife was made to take account of the husband's greater earning capacity and the wife's health problems. The end result was a 53%/47% division in favour of the wife.

Wahlers & Bagley [2011] FMCAfam 169 (5 April 2011) Bender F.M.

The parties had resided in a de facto relationship for a period of *10 years.*

The wife was aged 49 years and was employed part time earning $40,000 per annum. The husband was aged 39 years and was earning $200,000 per annum. The applicant had two children from a prior relationship aged 17 and 18 at trial. The respondent had an interest in a property at the commencement of the relationship worth $60,000 which enabled the former matrimonial home to be acquired.

On a contributions basis it was found there should be a loading in favour of the respondent of 20%. An adjustment of 10% to the applicant was made under section 90SF (3). The Federal Magistrate cited *Clauson and Clauson*[44] and *Mallet and Mallet*[45] where, in *Clauson* the Full Court said that the application of the section 75(2) factors (in a marriage) was *"not an exercise in social engineering"* and in *Mallet* where the High Court held:

"*The object of this section is not to equalise the financial strengths of the parties"*

The pool of assets for distribution was $191,000 'realisable' assets and $112,229 superannuation entitlements. The distribution of the 'realisable' assets was found to be 60%/40% in favour of the respondent with no adjustment for superannuation.

Simpson & Simpson [2011] FMCAfam 843 (23 August 2011) Terry F.M.

The parties had a *10 year* relationship. They had two children aged 13 and 11 who were in the primary care of the mother. The wife was a low income earner. The wife had two children from a prior relationship. One of them lived with the parties throughout and the other lived with them for 5 ½ years.

Their assets were worth $1.16 million plus superannuation of $51,290. The husband had assets worth over $558,125 at the commencement of the relationship and the wife had assets worth $77,793. The main issue was how the initial contributions should be treated.

The husband was the main breadwinner. The wife worked for a time until the birth of the children and then was the main homemaker/parent. The Federal Magistrate concluded the contributions during the relationship were equal. The wife's post-separation contributions were found to exceed those of the husband.

44 (1995) F.L.C. 92-595 at 81,912

45 [1984] HCA 21; (1984) F.L.C. 91-507 at 79,127

The Federal Magistrate referred to *Lee Steere*[46]*, Pierce & Pierce*[47], and to *MH & MZ*[48] *MH & MZ* was described as being a relationship of similar length and with a similar pool but the husband's initial contribution was less than the instant decision. Terry F.M. said at para 94:

> *It is important that there be a measure of consistency between decisions if possible but it is not always easy just to start with to reconcile the outcomes in the various reported cases.*

The Federal Magistrate cited the Full Court in the decision where the Court said:

> *Ultimately the final contribution assessment is very much a matter of the subjective opinion of the trial Judge. The authorities on appellate inference speak of the generous ambit within which a reasonable disagreement is possible. See Norbis & Norbis (1986) 161 C.L.R. 513*

Terry F.M. noted that in taking in to account the initial contribution the Court not only had to look at the initial contribution but also the capital growth in the properties brought in and the parties joint decisions to buy and sell a number of properties during the course of their relationship. The Federal Magistrate determined that the contributions should be 65% by the husband and 35% by the wife. An additional amount of 7.5% was awarded to the wife for section 75(2) factors.

Although the issue of the husband's contribution to the wife's children of her prior relationship was raised, it appears a submission was made that the contribution should be 'taken into account' but no submission was made how the contribution[49] should affect the overall assessment of section 75(2) factors.

Dalrymple and Cabrera [2011] FMCAfam 160 (8 March 2011) McGuire F.M.

> "*A committed de facto relationship is in many ways a partnership. The parties contribute in many and various ways and often according to their skills, talents and a separation of tasks. It is often, as in the matter now before me, difficult to quantify the various contributions of the parties in dollar terms. It is no accident that the legislation refers to both "direct" and "indirect" contributions. Similarly, there are contributions of a direct financial nature and non-financial contributions. In this matter there was no evidence of any value attributed to either Mr Cabrera's labour expended on the improvements or, in fact, any value added by those improvements. The unchallenged evidence of Mr Cabrera is that at least some of his efforts were put in during a period of separation. Such a factor, of course, must be weighed against all of the other contributions of the parties both at that time and throughout the relationship."*

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46 supra

47 [1998] FamCA 74; (1999) F.L.C. 92-844

48 [2005] FamCA 287; (2005) F.L.C. 93-226

49 See *Robb & Robb* [1994] FamCA 136; (1995) F.L.C. 92-555

An *11 year* relationship with some periods of separation. The wife had a superannuation interest of $12,000 and some furniture and contents at the commencement. The husband had cash of $150,000 and later contributed an inheritance worth $60,000. The pool totaled $650,926.

The wife had three children from a prior relationship. The Federal Magistrate cited the following passage from *Robb & Robb* [50]:

> *Accordingly, in contributing to the support of these children the wife was merely honouring a legal obligation which she owed to the children, whilst the husband, in making his contribution, was acting essentially as a volunteer assisting the wife in the discharge of her legal obligations. Upon that basis, whilst we consider the justice of the case clearly required the husband's contribution to be taken into account under s. 75(2)(o), the same cannot be said of the wife's contribution. In making that contribution the wife was in no way discharging or assisting to discharge any legal obligation of the husband.*
>
> *Turning, then, to ordinary notions of justice and equity, we are of the view that such notions do not call for any allowance to be made in the wife's favour, in the property proceedings between the husband and wife, because she honoured her legal obligation to maintain her own children of a prior marriage. We believe that a failure to make such an allowance would not offend the ordinary reasonable man or woman's notions of justice*

A division of property in the percentages 67.5% to the husband and 32.5% to the wife was ordered

Kouros & Kouros [2009] FMCAfam 242 (20 March 2009) Baumann F.M.

A *13 year* marriage with one child. The pool was of approximately $1.9 million. The main issue to be resolved was the extent to which the parties have utilised funds available at cohabitation for their own purposes and whether leave entitlements should be added into the property pool - annual leave ($15,120) and long service leave ($24,192). Baumann F.M. said that leave entitlements are to be taken into account under a consideration of section 75(2)[51].

The issue of the funds used by the parties was resolved by His Honour as a factual issue and the pool was determined to be $1,910,407.

The husband's assets at the commencement of the relationship were found to be far greater than that of the wife. The husband was the primary breadwinner and the wife was devoted to the role of homemaker and parent apart from some work in the initial periods of the marriage and some casual

50 (1995) FLC 92-555

51 See *Gould & Gould* (1996) F.L.C. 92-657

work after the birth of the child. The husband's family provided support through a trust in which the husband had an interest but he also had the use of the home post separation. On a contributions basis His Honour found the husband should receive the 'first 25% of the pool' – presumably splitting the balance equally – giving an overall contributions based award of 62.5% to the husband.

The section 75(2) factors favoured the wife and an adjustment of 10% in her favour was made giving a division of 52.5%/47.5% in favour of the husband.

Tomlin & Nilsen [2011] FMCAfam 166 (5 April 2011) Bender F.M.

The de facto wife was aged 44 years and the husband 45 years at trial. The parties commenced cohabitation in May 1995. They separated for 18 months in 2003/04 and finally separated in September 2009. (*14 years)* They had four children aged between 12 and 15 years. The children resided with the wife. The wife's daughter from a prior relationship lived with the parties for at least seven years.

Shortly after the commencement of cohabitation the respondent accepted a redundancy package so the parties could move closer to the wife's family. He received $65,550. His parents entered into a contract to buy the matrimonial home in which the parties lived. The parties provided the deposit of $8,000 and made the mortgage repayments and met the outgoings. In 2006 the husband obtained full time employment and was then able to refinance the mortgage into the parties' names and they took a transfer for the amount necessary to discharge the mortgage.

The net realisable pool of assets was worth $98,199 and superannuation interests were worth $43,029.

The Federal Magistrate found the contribution by or on behalf of the husband was greater and that there should be a 5% adjustment in his favour. The section 90SF (3) factors required a loading of 25% in the wife's favour.

The Federal Magistrate was of the view that the realisable assets should ordinarily be divided 70%/30% in favour of the wife but after taking into account the superannuation entitlements of each

of the parties determined to order the whole of the realisable assets be transferred to the wife and that there be no superannuation splitting order, relying on *D and D*[52] and *L and L*[53].

In *D and D* the Full Court said:

> *Since the availability of such orders following the introduction of Part VIIIB consideration of the constitution or "mix" of the assets with which each party will be left as a result of proposed orders would seem a necessary, if not critical, factor in determining the justice and equity of proposed orders in each case in which superannuation interests are involved.*

Wardman v.Hudson (1978) F.L.C.90-466

The parties were married in October 1960 and separated in May 1974 *(14 years)*. There were three children aged 14, 12, and 8 all of whom lived with the wife. The husband had been in the R.A.A.F. The wife worked until 1962 when the husband was transferred to Malaysia. The wife's earnings, when she was employed, were always substantially less than the husband's which she used for herself and to provide things for the children. The husband lived in the property post-separation and had repartnered and had another child. The wife had remarried by trial. She and her second husband owned a property jointly worth $62,000; she had no independent income and no other assets to speak of.

The husband was a public servant earning $12,000 per annum and had no assets. He had disposed of $16,000 post separation by taking out life insurance and pre-paying premiums.

The parties' matrimonial home was worth between $29,500 and $34,000 (the valuers were not cross-examined) and was subject to an encumbrance of $6,000 at trial ($6,500 at separation).

The trial Judge awarded 33.3% to the wife. The Full Court concluded there was no reason why it should be divided other than equally.

The husband acquired interests in four other properties through inheritances from his later father's estate during the course of the relationship. One property remained held by the husband at trial. One was sold shortly prior to separation and he held the proceeds of sale at that time. A mortgage on one of the inherited properties was paid out from a lump sum received by the husband on

52 [2006] FamCA 199
53 [2003] FamCA 40

retirement from the R.A.A.F. The Full Court held that the wife should be regarded as having been entitled to a half interest in that property.

Conti & Conti [2011] FamCA 451 (10 June 2011) O'Reilly J.

The parties were in a relationship of between *17 and 18 years*. There were three children aged 18, 15, & 13. The pool was approximately $100,000. There was doubt about the extent of debts since there were unresolved potential claims against the parties. The wife had a claim for damages for personal injuries arising out of a motor vehicle accident. Her claim is a chose in action and not property. Once an award is made then it will become property[54] but there is no rule that it would be left out of the pool[55]. It is, though, normally considered a contribution by the party who suffered the injury[56].

The application before the Court was an application to restrain the payment to the wife of the sum she might receive from her damages claim and contains a useful reference to the main cases relating to personal injuries awards.

Lint & Lint [2011] FamCAFC 115 (27 May 2011)

The husband was 46 and the wife 45 at trial. They commenced cohabitation in 1986 and married in 1987. They separated in 2005. *(19 years).* There were two children aged 19 and 17 at trial. The net pool was found to be worth $9,602,540. The trial Judge found the contributions favoured a 62.5/37.5 division in favour of the husband where there had been significant contribution from the husband's family. The trial Judge allowed a 7.5% adjustment to the wife based on section 75(2) factors. Two factors, in particular were given significance by the trial Judge – the older child was autistic and required assistance notwithstanding his age; and the husband's higher earning capacity.

Ross & Audley [2011] FMCAfam 280 (6 May 2011) Bender F.M.

The parties cohabited for *22 years* and were married for 21 years. There were four children.

54 *Zorbas & Zorbas* (1990) F.L.C. 92-160
55 *Williams & Williams* [1985] HCA 52; (1995) 61 ALR 215.
56 *Aleksovski & Aleksovski* (1996) F.L.C. 92-705 at 83,437

The husband owned a block of land worth $15,000 at the commencement of cohabitation. They were provided assistance through free housing by the wife's family.

The wife's mother dies four years prior to separation. She inherited a significant estate. At trial their assets were worth $3.15 million. The Federal Magistrate referred to *Gosper & Gosper*[57] and *Bonnici & Bonnici*[58] in relation to the treatment of the inheritance and to *Rickaby & Rickaby*[59] in relation to the rent free accommodation provided by the wife's family. It was found that, in reality the whole of the estate available for division was the result of the wife's inheritance.

On a contributions basis the Court found there should be an allowance of 25% in favour of the wife after taking into account the inheritance and the length of the relationship together with the contributions made by both during the course of their relationship. I assume the resulting division was therefore a 62.5%/37.5% division in her favour. No adjustment was made for section 75(2) factors.

Shroeder & Drummond [2011] FamCA 741 (22 September 2011) Ryan J.

The husband was aged 35 years. The wife was aged 37 years. They parties commenced cohabitation in November 1995. They finally separated in May 2007. *(22 years)* There are two children. Parenting proceedings resulted in orders that the children live with the wife and spend minimal time with the husband. The wife has sole parental responsibility.

The wife was employed as a clerk throughout. The husband was an apprentice at the commencement of the relationship and later became a qualified tradesman. The wife earned considerably more than the husband. She had assets worth about $17,000 at the commencement. The husband had assets with no equity. The parties moved to live with the husband's mother and later to a home owned by his father and were able to live rent free until they rented their own place. There were periods of separation.

The pool of assets consisted of the net proceeds of sale of the home of $46,721, the wife's superannuation of $50,000, a motor vehicle worth $6,000 and some savings of $500. The husband had an interest in a home he inherited from his father but did not produce evidence of the value of

57 (1987) FLC 91-818
58 (1992) FLC 92-272.
59 (1995) FLC 92-642

it, he had debts of $29,000 owing to his former lawyers and $22,000 for a judgment debt in relation to which her Honour said there was real uncertainty about whether he would be required to pay it[60]

Both parties repartnered.

It was found that the wife made a greater initial contribution and earned more than the husband for a time. Post separation the husband made a greater financial contribution but he had the greater use of the home. Ryan J., held the contributions led to a division of 70%/30% in favour of the wife of all assets other than the husband's inheritance in relation to which the wife made no contribution.

An adjustment for the section 75(2) factors was applied giving the wife 100% of the assets other than the inheritance.

Danford & Danford [2011] FamCAFC 54 (17 March 2011)

The parties were both aged 57 years. They married in 1983 and separated in 2006 (*23 years*). There were three children aged 20, 21, & 22 at the date of trial. The wife also had two older children who had lived with the parties during the marriage.

The husband contributed assets worth $55,000 at the commencement of cohabitation. He received gifts totalling $45,000 from his mother in the period 1997 to 2006. The husband had an accident in September 1999 and was hospitalised for 7 months. He then lived at home but spent two periods in a psychiatric facility. He received an award of damages of $1,441,941 in September 2006. The parties separated under the one roof 10 days later. (The husband ultimately had a leg amputated).

At trial the husband's income was $1000 per week gross from interest on the investment of the damages award. He did not have the capacity for employment. He had future needs requirements in modifications needed to housing and would require 6 hours domestic assistance per week.

The wife had savings of $50,000 at the commencement of cohabitation. Her financial contributions and her homemaker/parent contributions increased significantly after the accident. She accompanied the husband to medical and legal appointments and gave instructions from time to time in relation to his compensation claims. She had received bequests totalling $59,123 in 2007 and 2009. The wife earned $712 per week gross.

The pool was worth $3,010,257 of which $554,516 was superannuation.

[60] See *Biltoft and Biltoft* [1995] FamCA 45; (1995) F.L.C. 92-614

Contributions from the date of marriage to the date of the accident were agreed to be equal. The disparity in contributions related to the 10 year period from the accident to trial.

The trial Judge found contributions to non-superannuation assets 55/45 in the husband's favour and decided a 3% adjustment should be made to the husband for section 75(2) factors. The parties each retained their own superannuation – the husband's was worth $38,000 more than the wife's.

The Full Court found no error made in assessing contributions. The trial Judge had dealt with the husband's contributions to the wife's children in assessing the section 75(2) factors which, in itself, had not lead to error. The Full Court determined that the 3% adjustment for section 75(2) factors lead to a 6% differential and was within the range.

Taugher & Canes [2011] FamCAFC 191 (20 September 2011)

The Husband was aged 65 and the wife was aged 60. They cohabited from 1976 until 2000 (*24 years*). They married in 1980. There were no children. The trial Judge found an equal division of property as at 2001 would have been appropriate and that appears to have been accepted by the parties.

On appeal there were challenges to the inclusion/exclusion of certain items in the pool but most significantly the appeal was against the trial Judge finding the husband made a "negative contribution" to the property in the post separation period plus the factor that post separation profits were contributed by the wife leading to a 60/40 division in favour of the wife. There was also a challenge to the section 75(2) adjustment. The trial Judge made an adjustment of 10% in favour of the husband. There was no appealable error found. It was not established that the trial Judge erred in the exercise of his discretion in the adjustment made pursuant to s 75(2) in favour of the husband.

Manolis & Manolis (No. 2) [2011] FamCAFC 105 (13 May 2011)

The parties commenced their relationship in 1980 and married in 1982. They were married for *26 years*. There were no children of the marriage although the husband had children from previous relationships who lived with the parties from time to time and who were provided with financial support. The husband was 75 and the wife 57 at trial. Both were retired.

The pool was found to be $4,075,563.20.

The Federal Magistrate found the contributions during the marriage were equal. The Magistrate did not make an adjustment for section 75(2) factors. The Federal Magistrate determined the husband should receive an additional 5% for his initial contribution when considering the 'justice and equity' requirement.

The husband appealed contending the differential did not give proper recognition to his initial contribution. The wife cross appealed contending the award gave an unduly generous adjustment for the initial contribution.

The Full Court held the appeal and cross appeal should both be allowed because the Federal Magistrate could not properly 'adjust' the orders under section 79(2). Any factor which might give rise to the adjustment in this case had to be found in either section 79(4) or section 75(2). The Full Court also found inconsistency in the reasons for Judgement and, further, an error in not making an order allowing for the distribution of interest rather than attributing to one party a fixed sum.

The Full Court determined that the husband's contributions exceeded the wife's by reason of his initial contribution and that the section 75(2) factors did not lead to any further adjustment. An order was made for a 55/45 division in favour of the husband.