IN THE HIGH COURT OF AUSTRALIA No. M137 of 2019

MELBOURNE REGISTRY

BETWEEN:

HSIAO
Appellant

and

FAZARRI
Respondent

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APPELLANT'S AMENDED SUBMISSIONS

Part I: CERTIFICATION

1. We certify that the submission is in a form suitable for publication on the Internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The first issue, which arises under s79 of the *Family Law Act 1975* ('the Act'), has two parts. The first part is the question whether the respondent's gift to the appellant making her a joint tenant of G Street in Suburb H ('the property') was voidable or not. The second part is whether the property settlement order made by the primary Court, by which her interest in the property was transferred to the respondent, should have been upheld.

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3. The second issue presented by the appeal, is whether the Court below, rather than refusing to exercise its discretion under s93A(2) of the Act in favour of receiving further evidence, should have received the evidence; and if it should have, whether that evidence was sufficient to establish that there had been a miscarriage of justice necessitating a retrial.

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Part III: SECTION 78B NOTICE

4. We certify that the appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*, and considers that no such notice is required.

Part IV: CITATIONS

5. Primary Judge of the Family Court of Australia: *Fazarri & Hsiao (No. 2)* [2018] FamCA 447 ('primary Court'); and as to costs, *Fazarri & Hsiao (No. 3)* [2018] FamCA 867 ('primary Court').

6. Full Court of the Family Court of Australia: *Hsiao & Fazarri* [2019] FamCAFC 37 ('Court below').

Part V: NARRATIVE STATEMENT OF FACTS

7. Paras 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25 and 28 of the statement which follows describe facts which, while not found or admitted in the Court below, are proved by the evidence which the Court below refused to receive by dismissing the appellant's application under s93A(2) of the Act and filed on 20 November 2018.[1] In this appeal, the appellant contends that the Court below erred in so refusing and seeks an order that the application be allowed.[2]

8. An intimate relationship between the parties began in August 2012.[3] The respondent had assets of approximately $20 million, which were subsequently reduced to about $9 million, and the appellant had minimal assets.[4]

9. The respondent was a partner of a law firm. The appellant was not engaged in paid employment of substance during the relationship and marriage of the parties.[5]

10. After the respondent separated from his then wife _____ in March 2013, he rented premises.[6]

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[1] See the Reasons of the Court below ('FCAFC') [16] to [48], Core Appeal Book ('CAB') 66 to 75.

[2] See the Notice of Appeal at 2(f) to (h) and 3(a) and (b)(iv), CAB 92.

[3] FCAFC [7], CAB 65.

[4] FCAFC [10], CAB 65.

[5] FCAFC [8], CAB 65. See also the Reasons of the Primary Court at CAB 30 ('FCA') [40], CAB 14 and FCA [48], CAB 15.

11. During the relationship, the parties unsuccessfully attempted to have a child. The appellant received benefits from the respondent, including access to his bank and credit card facilities and having her expenses paid. The appellant was made a beneficiary of a family trust and received $20,000 by way of contribution to her superannuation fund and a new motor vehicle.[7]

12. In April 2014, the respondent purchased the property for $2.2 million, which was financed by the respondent from his own funds and borrowings. Simultaneously with the settlement of the purchase, the respondent transferred 1/10th of his title to the property to the appellant by way of gift ('the first gift'), so that the registered proprietors of the property were the respondent as to 9/10ths and the appellant as to 1/10th as tenants in common. The property was not habitable. The respondent subsequently paid for renovations to it.[8]

13. On 9 December 2014, the respondent's conveyancing solicitor (a Mr P) wrote to him a letter enclosing an instrument of transfer providing for the transfer of the property to the appellant as joint owner and a Form 9A.[9] The Form 9A was a form of statutory declaration to be supplied to the State Revenue Office (Victoria).[10]

14. Where the parties to a transfer are spouses or domestic partners of each other, the transferee may claim an exemption from duty in respect of the transfer.[11] The Form is designed to enable the transferee to furnish evidence to the State Revenue Office sufficient to satisfy it that the exemption applies. The exemption was not available unless the parties were living together as a couple on a genuine domestic basis.[12]

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[6] FCAFC [7], CAB 65.

[7] FCAFC [9], CAB 65.

[8] FCAFC [11], CAB 65.

[9] See fn11 *infra*.

[10] See FCAFC [32], CA 72. 'Exhibit-13' referred to in the appellant's affidavit filed 20 November 2018 in support of her application to the Court below (AIBFM 112 to 115) contains the completed Form 9A. Note that 'Exhibit' here and elsewhere in these footnotes refers to a document identified by the initials of the appellant and a number in the affidavit referred to. The number is given in these footnotes after 'Exhibit' followed by a hyphen.

[11] See s43 of the *Duties Act 2000* (Victoria).

[12] See s3(1), 'domestic partner' and 'domestic relationship' of the *Duties Act 2000*. The parties were not in a registered domestic relationship: see the appellant's affidavit filed 20 November 2018, [31] and [32], AIBFM 66 and 67, Exhibit-12, AIBFM 109.

15. The letter asked that the parties sign the transfer and gives advice on the manner in which the appellant should make the statutory declaration. The appellant deposed to this letter and to its background, in support of her application to the Court below to receive further evidence.[13]

16. On 10 December 2014, the respondent sent the appellant an email saying, 'We should proceed with property transfer and renovation. We can't wait for ___ (his ex-wife with whom he was negotiating a property settlement) for our lives to move ahead.'[14]

17. On 14 December 2014 (which was a Sunday), in the very early morning, the respondent asked his conveyancing solicitor whether there was a time (on the following day) which
10 suited him for the appellant to drop in the transfer.[15] At some stage that same day,[16] the respondent went to a private hospital, with some suggestion he might have had a heart attack.[17] Later that day, there were a series of WhatsApp messages[18] between him and the appellant in which he asked her to bring his laptop so he could hook up to work and access his property settlement materials online.[19]

18. On 15 December 2014, whilst the respondent was still in hospital, he sent an email to his conveyancing solicitor saying that it would be a bit difficult to drop in the forms (presumably, the transfer and the Form 9A) to him 'today so we will post them instead.'[20]

19. The proper inference is that before going into hospital, the respondent intended making the transfer.

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[13] See paras 7 to 10 of the appellant's affidavit filed 20 November 2018, AIBFM 63 and 'Exhibit-2' referred to in the said affidavit, AIBFM 63. See also FCAFC [24], CAB 69 and FCAFC [32], CAB 72.

[14] See 'Exhibit-3', 'Exhibit-4' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 77 and79 and [11] and [12] of the said affidavit, AIBFM 64; FCAFC [24], CAB 69.

[15] See 'Exhibit-6' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 87, and [16] of the said affidavit, AIBFM 64; FCAFC [24], CAB 70.

[16] See the appellant's affidavit filed 20 November 2018 at [13], AIBFM 64; FCAFC [32], CAB 72.

[17] See 'Exhibit-5' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 82.

[18] The appellant describes WhatsApp messaging in [6] of her affidavit made 27 November 2018 in support of her application to the Court below, AIBFM 154.

[19] See 'Exhibit-5' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 83 to 84 and [13] to [15], [21] and [22] of the said affidavit, AIBFM 64 and 65; FCAFC [24], CAB 69.

[20] See [16] of the appellant's affidavit filed 20 November 2018, AIBFM 64 and 'Exhibit-6' referred to therein, AIBFM 86; FCAFC [24], CAB 70.

20. The respondent signed the transfer to himself and the appellant as equal joint tenants.[21]

21. The appellant's evidence of the respondent's condition while seeing him in hospital and of the events leading up to the signing of the transfer is contained in evidence which the Full Court refused to receive.[22]

22. In the afternoon the respondent sent an email to the ANZ enquiring about replacing lost credit cards.[23]

23. On 16 December 2014, the respondent left the hospital.[24] He sent an email to the appellant about work to his garden and asked her if he should get another quote.[25] There was another series of WhatsApp messages between him and the appellant in which they (coherently) discussed their future financial needs, duties, and obligations.[26]

24. On 23 December 2014, the respondent sent his conveyancing solicitor an email checking that he (the solicitor) had received the signed transfer in the mail.[27]

25. The transfer was stamped exempt by the State Revenue Office (Victoria) on 13 February 2015[28] and was registered on 27 February 2015.[29] It states the consideration to be the natural love and affection the respondent has for his domestic partner being the appellant.[30] Later that day, the respondent sent the appellant an email commenting, "*We are now joined at the hips*".[31]

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[21] FCAFC [12], CAB 65 to 66; FCAFC [32], CAB 72. See also [23], [24], [25], [27] of the appellant's affidavit filed 20 November 2018, AIBFM 65 and 66.

[22] That evidence is at [21] to [25] of the appellant's affidavit filed 20 November 2018, AIBFM 65 to 66.

[23] See 'Exhibit-8' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 91 to 93 and [18] of the said affidavit, AIBFM 65; FCAFC [24], CAB 70.

[24] See [26] of the appellant's affidavit filed 20 November 2018, AIBFM 66.

[25] See 'Exhibit-10' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 98 to 99, and [20] of the said affidavit, AIBFM 65; FCAFC [24], CAB 70.

[26] See annexure 'Exhibit-1' to the appellant's affidavit made 27 November 2018, AIBFM 157; FCAFC [24], CAB 70.

[27] See 'Exhibit-14' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 120 and 121 and [36] of the said affidavit, AIBFM 67; FCAFC [24], CAB 70.

[28] See 'Exhibit-11', AIBFM 100; FAFC [32], CAB 72.

[29] FCAFC [12], CAB 65 to 66.

[30] FCAFC [32], CAB 72.

[31] FCAFC [24], CAB 70. See also 'Exhibit-15' referred to in the appellant's affidavit filed 20 November 2018, AIBFM 122.

26. The only evidence relied on by the respondent at trial about the circumstances surrounding the transfer was sufficiently set out by the Court below in its Reasons.[32] He did not disclose any of the other circumstances referred to above; nor did he produce any documents to substantiate his evidence of the relevant circumstances.

27. On March 2015, the parties signed a deed of gift ('the deed').[33] The deed was an exhibit in the trial and part of the Appeal Book in the Court below. The deed assumes considerable importance in the appellant's analysis of the first issue. There was no finding that the deed was entered into by the parties otherwise than voluntarily.

28. The deed appears to have been in contemplation by the parties for several months at least, and the respondent had it drawn up professionally.[34]

29. Relying on evidence from the respondent that the parties had not lived together,[35] the primary Court found (and the Court below accepted)[36] that the relationship was hardly one that would satisfy the criteria for a de facto relationship.[37] The appellant disputes this.[38]

30. On 22 August 2016, the parties married, and on 12 September 2016, they separated.[39]

31. At the time of trial, the parties were still joint tenants of the property, which was valued at $3,070,000. In addition, the respondent had net assets and superannuation of $9.1 million and the appellant had assets of $330,000. The effect of the primary judge's property settlement orders left the appellant with assets of $430,000 and the respondent with in excess of $12 million.[40]

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[32] FCAFC [21], CAB 68.

[33] FCAFC [13], CAB 66.

[34] See [39] to [42] of the appellant's affidavit filed 20 November 2018, AIBFM 68 and 'Exhibit-17' to 'Exhibit-19' referred to in the said affidavit, AIBFM 131, 132, 134 and 136 to 138. See also FCA [54], CAB 16.

[35] FCAFC 33, CAB 72. The Wife had previously denied this; her case was to the contrary: see paras 2, 12, 19, 25(c) to (e), (f), (h) and (i), and 42(b), (e), (g)(i), and (k) of her affidavit filed 14 February 2017 (note that this affidavit of the Wife was not evidence at the trial), AIBFM 21, 22, 24, 25 to 26, 31 to 33 and FCA [25],CAB 12.

[36] FCAFC [7] and [11], CAB 65.

[37] FCA [39], CAB 14.

[38] See [34] of the appellant's affidavit filed 20 November 2018, AIBFM 67. See also 'Exhibit-1' of her affidavit made 27 November 2018, AIBFM 157.

[39] FCAFC [14], CAB 66.

[40] FCAFC [15], CAB 66.

Part VI: ARGUMENT

Appeal grounds 2(a) to (e) (both inclusive)[41]: the correct approach to making a property settlement order as explained in Stanford was disregarded or misunderstood

32. The correct approach to be taken to the analysis of the first issue described in Part II hereof was set out by this Court in *Stanford v Stanford* (2012) 247 CLR 108.[42] The Court said[43] that first, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property.

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

34. What the Court below did was merely to accept the primary Court's finding of pressure, without embarking on the enquiry whether the effect of any pressure was spent by the coming into operation of the deed.[44]

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

36. Even if, as the Court below apparently accepted,[45] the appellant had pressured the respondent to such an extent as to render her joint tenancy voidable, it is thus apparent that the respondent made an election to affirm it. This being so, when and after the property proceedings commenced, the gift of the tenancy was no longer voidable (if it

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[41] CAB 91, 92.

[42] See 247 CLR 108 at [35] to [46] and [51] and [52].

[43] See 247 CLR 108 at [37].

[44] See, for example, FCAFC [78] and [79], CAB 79.

[45] See FCAFC at [69] and [72], CAB 79.

ever had been), and the appellant's joint tenancy was not liable to be set aside. Having regard to the deed, this was the only finding open.

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

38. In *Stanford*,[46] the Court went on to say that the question posed by s79(2) is whether, having regard to the parties' *existing* interests, the court is satisfied that it is just and equitable to make a property settlement order. Hence, it was necessary for the Court below to ask itself, whether having regard to the fact that the appellant's joint tenancy
10 was not voidable, it was just and equitable to make the property settlement orders. The finding of pressure could not make the property settlement orders just and equitable, because it had no bearing on the character or value of her existing interest in the property.

39. In response to the contention that the primary Court had fallen into error by overlooking the significance of the deed[47], the Court below held[48] that the primary Court was aware of the terms of the deed and had set out the text of one of its clauses, and that there was no basis to suggest that the primary Court failed to take the deed into account. But this was no answer to the criticism that the primary Court had failed to take into account the *significance* of the deed, in confirming the appellant's joint tenancy.

40. We now turn to the second part of the first issue.

20 41. In *Stanford*,[49] this Court held that the power under s79 to alter existing property rights should be exercised only if there is a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their assumptions and agreements about property interests during the marriage. This need for a principled reason accommodates cases where the parties have expressly considered, but not put in writing in a way that complies with Part VIIIA of the Act (which deals with financial agreements), how their property interests should be arranged.[50]

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[46] 247 CLR 108 at [37].

[47] See Ground 3A of the Notice of Appeal to the Court below, CAB 56 to 57.

[48] At [70] and [72] FACFC, CAB 79.

[49] 247 CLR 108 at 120 to 122, esp. at [42].

[50] *Cf. Stanford* at [41], where the Court made observations about arrangements during the continuance of a marriage.

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

43. It was for the respondent to prove that having regard to the appellant's interest in the property, it was just and equitable to deprive her of all or part of its value.[51]

44. In *Stanford*,[52] the Court explained that, in many cases, the principled reason for interfering with the existing legal and equitable interests of the parties to the marriage will be found in the end of the marriage, because in those circumstances, what underpins the assumptions and agreements about property interests during the marriage, no longer applies.

45. Pressure as a principled reason for depriving the appellant of her joint tenancy having been superseded by the deed, it is submitted that what was required in this case to justify the making of such an order was some express or implicit assumption of the parties which underpinned her joint tenancy having been brought to an end by their divorce.[53] No such assumption, however has been identified. Indeed, the parties' intention (as revealed by the deed) was that the appellant should not lose her joint tenancy by reason of separation or divorce. The orders depriving her of that interest both ignore and override that intention, despite there being no basis for doing so.[54]

46. The approach of the Court below was diametrically opposed to what we have said above in our analysis of the application of s79 to the facts of this case. This is nowhere better demonstrated than in the Court's statement that, 'The focus of the appellant's submissions, which were about the circumstances in which the appellant obtained the 40 per cent interest in [the property] and [the deed] are distractions.'[55]

47. The ensuing comments[56] of the Court below about what the primary Court was bound to do, show that the Court below conflated the requirements of s79(2) and (4) of the Act, which is what the Court in *Stanford* said[57] should not be allowed to happen.

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[51] See *Stanford* at [37] and [60].

[52] 247 CLR 108 at 122 to 123 at [42 to 45].

[53] Adopting language used in the judgment of the majority in *Stanford* at [42].

[54] As to which, see *Stanford* at [41] and [49].

[55] FCAFC at [29], CAB 71.

[56] *Ibid* and see also, FCAFC at [73], CAB 79, and FCAFC [83], CAB 80.

48. The Court below also seems[58] to have referred to the inability of the deed to oust the Court's jurisdiction to exercise its powers under s79: however, this does not answer the criticism that, absent pressure as a ground of avoidance of the transfer, there is simply no basis for making the property settlement order. The principles upon which the appellant contends that this appeal should be decided are quite separate from Part VIIIA of the Act.

49. For all these reasons, there was no real consideration by the Court below whether in the circumstances of *this* case and having regard in particular to the terms of the deed, the just and equitable requirement had been established by reason of the parties' divorce. The exercise of the discretion under s79 miscarried and the appeal should have been allowed.

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Appeal grounds 2(f) to (h) (both inclusive)[59]: the further evidence should have been allowed

50. The Justices of the Court below justified their refusal to receive the further evidence about pressure, by their determination that they were not satisfied that the admission of the evidence would have produced a different result, and would not demonstrate that the primary Court erred in making the property settlement order.[60] They justified their refusal to receive the further evidence about whether the parties lived together on a genuine domestic basis, by their determination that they were not satisfied that the evidence would produce a different result, nor that justice would be served by admitting
20 the further evidence.[61] They also determined that the admission of the further evidence would not demonstrate that the primary Court erred in making the property settlement order.[62] It may well be that they made a determination that admitting either category of further evidence would not be in the interests of justice.[63]

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[57] At [35].

[58] FCA [82], CAB 80.

[59] See CAB 92.

[60] FCAFC [30], CAB 71.

[61] FCAFC [37], CAB 73.

[62] *Ibid.*

[63] See FCAFC [47], CB 74.

51. It appears that they placed great weight on their finding that the evidence had been available to the appellant at the time of trial, and that the appellant had failed to avail herself of the opportunity to rely on it at trial.[64]

52. This Court's reasoning in *CDJ v VAJ*[65] requires a weighing up and balancing of all relevant considerations to see if the admission of the evidence under s93A(2) of the Act would serve the demands of justice.[66]

53. The Court below failed to take into account a number of relevant considerations.

54. It failed to take into account the respondent's obligation to disclose the further evidence to the primary Court,[67] and his failure at any time to attempt to rebut the evidence, or to justify his non-disclosure.

55. It failed to take into account the fact that the evidence cast a shadow over the respondent's credit and proved that the primary Court's confidence in the reliability of his evidence in proceeding with the trial in the absence of the appellant and in making findings against the appellant and in favour of the respondent was misplaced.

56. It failed to take into account the relevance of whether or not there was pressure to the question whether a property settlement order should be made avoiding, in effect, the transfer to the appellant of her interest as joint tenant and depriving her, in effect, of more than 4/5ths of her interest in the property.

57. The findings affected by one or more of these errors are the finding that the respondent had complied with his duty of disclosure,[68] that the respondent should be permitted to proceed at trial on his own unchallenged evidence which seemed plausible and which the

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[64] FCAFC [19], CAB 67 and FCAFC [47], CAB 74.

[65] (1998) 197 CLR 172.

[66] *Ibid* at [111].

[67] See as to the respondent's obligations to make disclosure and discovery, Orders made by Federal Circuit Court on 14 February, 2017, AIBFM 18, and Rules 13.01, 13.04, 13.07, 13.14 and 13.15 of the *Family Law Rules 2004*; and *Pelerman v Pelerman* [2000] FamCA 881 at [75] and [78]. The further evidence referred to by the Court below in FCAFC at [38] and [39], CAB 73 prove that the respondent failed to discover any of the documents constituting unadmitted evidence. See also See *Taylor v Taylor* (1978-1979) 143 CLR 1 at 14 and *In the Marriage of Krebs* (1976) 27 FLR 13 at page 21.

[68] See FCA at [21], CAB 11.

primary Court had no reason to disbelieve,[69] the finding that the parties had not lived together (and other findings to similar effect),[70] and the finding of pressure.[71] All the findings were left undisturbed by the Court below.

58. The respondent's evidence about pressure gave an incomplete and misleading account of the circumstances. The further evidence proving his intention, for a considerable time, of making the transfer both before he went into hospital and after he left it, and the further evidence of his competence while in hospital demonstrate this.

59. The respondent's evidence that the parties had not lived together[72] contradicted his representations to the revenue that he had. The appellant's further evidence about their relationship is referred to and described by the Court below.[73]

60. If his evidence to the primary Court about their relationship were true, it seems that, on *his* evidence, he made a false and misleading statement to the revenue, so that the transfer would be exempt from duty. That must be a matter going to his credit as a witness generally.

61. The holding of the Court below that it needed to be satisfied that the further evidence would have produced a different result if it had been available at the trial was erroneous. In cases where an error of law arises from an allegation of malpractice, it is not necessary to conclude that the result would have been different.[74] It is a question of the Court's assessment, in all the circumstances, of the interests of justice.[75]

62. The discretion under s93A(2) raises at its core, the very nature of judicial power which has been described to include the following proposition that:

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[69] See FCA at [23], CAB 12, FCA [32], CAB 13 and FCA [84], CAB 20.

[70] See FCA at [48], CAB 15, FCA [62], CAB 17, FCA [67], CAB 18, FCA [104], CAB 23 and FCA [105], CAB 23.

[71] See FCA at [51], CAB 15, FCA [84], CAB 20 and FCA [104], CAB 23.

[72] Living together is an essential requirement of being in a de facto relationship with another person: see s4AA(1)(c) of the Act.

[73] See FCAFC at [18(b)], CAB 67.

[74] See *Clone Pty Ltd v Players Pty Ltd (In Liquidation)* (2018) 264 CLR 165 at [50].

[75] *Ibid.* The discretion is one which serves the overarching purpose of the demands of justice: see D J Galligan "*Discretionary Powers: A Legal Study of Official Discretion*" (1986) Clarendon Press Oxford at page 45 – "*...in judicial decision-making, the main justification for discretion is that it is important in certain situations if justice in the particular case is to be done.*"

"a court cannot be required or authorised to proceed in any manner... which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."[76]

63. It is submitted that the respondent's non-disclosure constituted malpractice. The Court below was in error in not recognising it as such.

64. Even if, however, this case does not fall into that category, it suffices if there was a real possibility that a different result would have been produced by the further evidence.[77]

65. For the reasons given below, it is submitted that the Court below erred in denying or failing to identify such as possibility.

10 66. The gravity of the allegation that the appellant had pressured the respondent was relevant to the measure of proof required.[78] That increases the likelihood that the admission of the further evidence about pressure would have produced a finding that there was no pressure. If the first issue described in Part II hereof (arising from *Stanford*) is determined against the appellant, the finding of pressure was critical to the property settlement orders depriving her of her joint tenancy and a finding of an absence of pressure would have produced a different result.

67. There is also a real possibility that the respondent's evidence to the primary Court misrepresented the facts about whether they lived together, if not other facts about the nature and extent of the parties' relationship. Under s75(2)(k) and (o) of the Act[79]
20 findings about the parties' relationship[80] were relevant to the question of whether any property settlement order should be made and, if so, what should be its terms.[81] Thus,

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[76] See *Nicholas v The Queen* (1998) 193 CLR 173 at [74]; *Re Nolan and Anor; ex parte Young* (1991) 172 CLR 460 at 497 and *Kable v DPP* (NSW) (1996) 189 CLR 51 at 107.

[77] See *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134, 142, 143.

[78] See s140 of the *Evidence Act 1995* and *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[79] Which must be taken into account under s79(4)(e) of the *Family Law Act 1975*.

[80] At [7], [8], [11] of FCAFC, CAB 65. It appears from FCA [7], that the Court below misunderstood or misread the primary Court's findings at FCA [62], CAB 17, which was not a finding that the parties lived together, only that they were at times, 'together'.

[81] It was part of the respondent's case that he and the appellant had not been in a de facto relationship: see fn35 *supra*.

there is a real possibility that different findings about the parties' relationship, such as that they had lived together, would have produced a different result.

68. There is also a real possibility that different findings about the reliability of the respondent's evidence would have produced a different result. The findings that the respondent had complied with his duty of disclosure, and to the effect that there was no reason to disbelieve his evidence at trial was highly relevant to the question whether any property settlement order should have been made, and if so, in what terms. Particularly in this case, because the only evidence at trial was the respondent's, his credit was a matter of the utmost importance.[82]

10 69. The Court below should not have ignored the significant possibility or probability that disclosure of the further evidence would have caused the respondent to alter or modify his evidence about pressure and the parties' living arrangements, resulting in different findings being made from those referred to above.

70. It should be inferred that the disclosure of the evidence would likely have had an adverse effect on the respondent's case at trial.[83]

71. All these matters suffice to demonstrate that the Court below was in error in not being satisfied that justice would be satisfied by admitting the evidence. There was a mis-exercise of the discretion under s93A(2) by the Court below.

Appeal grounds (f) to (h)(both inclusive)[84]: the admission of the evidence requires a retrial
20 ***in which the appellant is given the opportunity to adduce evidence***

72. The Court below correctly held that the admission of the further evidence would require a new trial.[85]

73. Section 79A of the Act shows that there can be a miscarriage of justice by reason of failure to disclose relevant information or any other circumstance, giving the court a

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[82] See *Taylor v Taylor* (1978-1979) 143 CLR 1 at 14 and *In the Marriage of Krebs* (1976) 27 FLR 13 at page 21.

[83] *Cf. Southern Cross Exploration N.L. v Fire & All Risks Insurance Co. Ltd* (1985) 2 NSWLR 340 at 357. The appellant made repeated attempts to get orders for further disclosure, without success. See FCA at [3], CAB 8, FCA [12], CAB 9, FCA [16], CAB [10], FCA [19], CAB 11, FCA [21], CAB 11 and FCA [23]ff., CAB 12ff. The respondent consistently denied any lack of disclosure: see FCA [3], CAB 8.

[84] CAB 92.

[85] FCAFC [37], CAB 73, FCAFC [25], CAB 70 and FCFA [47], CAB 74.

discretion to set aside an order made under s79 and to make another order under s79 in substitution for the order so set aside.

74. In this case, the miscarriage of justice constituted by the failure to disclose relevant information warrants a retrial, which should afford the opportunity to the appellant of putting her case. Such a trial need not revisit the question of whether a property settlement order should be made in favour of the respondent (he has put his case at trial), nor need it revisit the question of what order should be made to adjust interests in the property (that is, G Street) if, as the appellant urges, this Court orders a retransfer to her of her interest therein or something equivalent in consideration thereof.

10 ***Costs at 1st instance***

75. Notwithstanding that the orders and Reasons of the primary Court as to costs[86] may not have been before the Court below, the appellant in her Further Amended Notice of Appeal[87] in that Court did seek an order for the costs[88] supported by grounds[89] and the Court below ruled on the matter.[90] In its Reasons,[91] it is apparent that the primary Court placed some reliance on the fact that offers of settlement made by the respondent exceeded his property settlement in the appellant's favour. The appellant contends that if this Court decides that the further evidence should have been received, as a matter of justice, the primary Court's order for costs[92] should be set aside and the respondent be ordered to pay the appellant her costs at first instance.

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Part VII: ORDERS SOUGHT

76. That the appeal be allowed with costs.

77. That the orders of the Full Court of the Family Court of Australia ('the Court below') made on 5 March 2019 appealed from be set aside, and in lieu thereof, it be ordered:

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[86] CAB 31ff.

[87] CAB 44ff.

[88] Further Amended Orders Sought at [8], CAB 59.

[89] Further Amended Grounds of Appeal at Ground 6, CAB 58.

[90] FCAFC [89], CAB 81.

[91] Reasons of the Primary Court (on costs), CAB 30 at [13], [17] to [19], [24], [26], [27], [33], CAB 35ff.

[92] CAB 32.

(i) that the respondent pay to the appellant 50% of the current value of G Street, Suburb H, such value to be determined in such manner as the Court thinks fit;

(ii) that the appellant be solely entitled to the exclusion of the respondent to all superannuation and other property (including choses in action) owned by her or in her possession;

(iii) that each party do all such things and sign such documents as may be necessary to give effect to these Orders;

(iv) that the application to adduce further evidence filed by the appellant in the Court below on 20 November 2018 be allowed;

(v) that there be a retrial or alternatively a retrial confined to the question of whether there should be any order altering the interest of the respondent in his property[93] by conferring it or an interest therein on the appellant and that in either case the appellant be given a further opportunity to file affidavits containing the evidence on which she will rely at the trial;

(vi) that paragraphs 2 to 9 (both inclusive) of the Orders of the Court at first instance made 19 June 2018 be set aside;

(vii) that the respondent pay the appellant's costs at first instance;

(viii) that the Orders of the Court at first instance made 29 October 2018 for costs against the appellant be set aside;

(ix) that the respondent pay the appellant's costs of the appeal in the Court below.

[93] Meaning all or any of his property, not just his interest in G Street.

Part VIII: ESTIMATE FOR HEARING

It is estimated that something like one and 1/2 hours will be required for the presentation of the appellant's oral argument in chief and some 20 minutes in reply.

Dated: 5 December 2019

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Annexure

Family Law Act 1975

No 53 of 1975

Compilation No. 89

Note Sch 6 (items 42-47, 47A, 47B, 47C, 48-52, 52A, 53-55) of the *Civil Law and Justice Legislation Amendment Act 2018* and *Family Law Amendment (Family Violence and Cross-examination of Parties Act) 2018* do not apply. None of these provisions touch on the provisions of the principal Act which are relevant to this case.

Registered: 8 May 2019

Family Law Rules 2004 (C'th)

Statutory Rules No. 375, 2003

Compilation No. 34

Registered: 2 January 2019

Evidence Act 1995 (C'th)

No 2 of 1995

Compilation No. 33

Registered: 6 November 2018

Duties Act 2000 (Victoria)

No. 79 of 2000

Version No. 104

Effective from: 13 February 2015

Relationships Act 2008 (Victoria)

No. 12 of 2008

Version No. 007

Effective from: 7 January 2015