Family Law Developments

Richard Maurice, Barrister, Edmund Barton Chambers, Sydney

"These are my principles, and if you don't like them .... well, I have others."
Groucho Marx

The second decision in **Bevan & Bevan,** which involved the Full Court re-exercising its discretion, was handed down on 19 February 2014. The outcome reflects to a great extent the recent fundamental alteration of the approach to property settlement applications referred to below.

A lot has been written about **Bevan & Bevan** and the High Court decision that preceded it, namely **Stanford & Stanford** (2012) FLC ¶93-518 as they have to a large extent transformed previous thinking about how to approach property settlement applications. There are two areas in particular. Firstly, the four step process of determining applications under section 79 that dates back more than 20 years has, at the very least, been significantly modified although not completely discarded. Secondly, the long-standing practice of using "add backs" to include "notional property" in the balance sheet will in my view for the most part come to an end.

STANFORD'S EFFECT ON PROPERTY APPLICATIONS

To understand what the Full Court said in **Bevan and Bevan** we have to analyse the effects that **Stanford** has had on previous thinking about how to approach a Family Law property settlement application.

Section 79 (1) empowers the Court to:

> *" make such order as it considers appropriate altering the interests of the parties in the property, including an order for a settlement of property and substitution of any interest in the property and including an order requiring either or both of the parties to make, for the benefit of either or both of the parties ... such settlement or transfer of property as the court determines.''*

Sub-section (2) is equally general, although phrased in negative terms, namely that the Court shall not make an order,

"unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."

It is to sub-section (4) of sec 79 that attention previously was usually directed in identifying the criteria by which this wide discretion was to be exercised. That sub-section provides that in considering what order (if any) should be made the Court "shall take into account" the disparate matters set out in paras (a) to (g), including a reference to sec 75(2).

I will not set out those factors here as they are so well-known.

The previous framework (aka: the 4 stage process)

Of the steps to be undertaken previously, firstly the Court was required to ascertain the property of the parties at the time of the hearing, and secondly it had to consider the "contributions" of the parties within paras (a) to (c) of sec 79(4).

Thirdly, it had to consider the matters in paras (d) to (g), more especially paragraph (e) which takes up by reference the provisions of sec 75(2) (so far as they are relevant) and which are generally referred to as the "section 75(2) factors": see such cases as Pastrikos (1980) FLC ¶ 90-897; Lee Steere (1985) FLC ¶ 91-626, Napthali (1989) FLC ¶ 92-021, and Dawes (1990) FLC ¶ 92-108, in some of which this is referred to as the "dual exercise" under sec 79; see also the comments of Gibbs, CJ in Mallet (1984) 156 CLR 605 at 608, (1984) FLC ¶ 91-507 at 79,110.

Fourthly, the Court in terms of sub-section 79(2) had to ensure that the orders it made were just and equitable. This was neatly encapsulated in a short passage from G and G (1984) FLC ¶ 91-582 per Nygh, p 79,697 urging us not to:

"... mistake the trees for the forest, i.e. add up their individual items without standing back at the end to review the overall result in the light of the needs of the parties."

Since the Full Court's decision in Hickey and Hickey (2003) FLC ¶ 93-143 the just and equitable requirement in sec 79(2) became more commonly known as the "fourth step" and in many decisions thereafter assumed more prominence than it had prior to that.

The new pathway

In **Stanford**, the High Court did not directly consider the four step process (in fact their Honours seem largely to have ignored it) and instead devised an entirely different approach. In summary, the new 3 stage pathway is:

Step 1 - Identify interests

Identify the parties' existing legal and equitable interests as they currently stand by looking at their separate entitlements rather than the collective concept of "property of the parties" referred to in sec 79(1) and sec 79(4). The High Court majority, at the beginning of their judgment, referred to the definition of "property" in sec 4 of the Act per se as there is no definition of "property of the parties" in the Act . The only of definition of "property" is:

"In relation to the parties to a marriage or either of them — means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion."

The previous approach had largely identified only assets legally owned by the parties and their "financial resources". However, beneficial interests created via trusts or other equitable relief such as promissory estoppel, choses in action in common law, arising out of contracts and torts now have to be included.

The High Court held that interests may only be "altered" under sec 79(1) if the court first determines what those interests are, so that these may in some instances include interests that arise independently of the marriage relationship.

However in line with previous jurisprudence, the High Court majority rejected any reliance on the "moral" claims of a party finding that the rights of spouses must be "determined according to the law" and not by reference to other non-legal considerations.

Step 2 - Just and equitable

Before proceeding further, following the imperative in sec 79(2) the court must decide whether it is "just and equitable" to make the order altering those interests. Whilst there is no presumption that all parties are entitled to sec 79 orders, if the parties are already separated the sec 79(2) requirement will be "readily satisfied as the parties no longer have mutual use of property".

If the parties are not separated, the sec 79(2) requirement will have a greater focus and although sec 79 is a broad power, the High Court said that it is not exercised according to unguided judicial discretion and is not "palm tree justice". In short, there is therefore no starting assumption that a party has "any right" to a property settlement.

In **Watson & Ling** (2013) FLC ¶93-527 the Full Court considered the application of the just and equitable requirement in **Stanford**. Murphy J considered that it applied equally to de facto property claims. His Honour said at paragraphs 14 to 16 of the decision:

> *"As Stanford makes plain (see, especially at [39]), the breakdown of a marriage (or de facto relationship as defined in the Act) does not bring, as an automatic consequence, an alteration of existing legal and equitable interests. Just as, if an order is to be made, equality is neither to be assumed nor is a starting point (Mallett v Mallett (1984) 156 CLR 605), so too, the making of an order at all is not to be assumed.*
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> *The emphasis by the High Court in establishing the existing legal and equitable interests of the parties as a precursor to answering the question required by s 79(2)/s 90SM(3) can be seen to derive from the fact that s 79/s 90SM is concerned with rights in property which '… have their source in [the] relationship …' but which '… are created by curial order …'; '… orders made under s 79 [cf s 90SM] … perform a dual function by creating and enforcing rights in one blow, so to speak …' (per Mason and Deane JJ, Fisher at 453). Given that the relationship does not itself create interests in property, due recognition must be given to existing legal and equitable interests because, as Macrossan CJ said (in a different context) in Turner v Dunne [1996] QCA 272 '[i]f it were otherwise, it might have to be concluded that ordinary categories of legal ownership could be not much more than provisional in all domestic relationships.'*
>
> *Given the circumstances of the current proceedings, and the intersecting relationships of those within them, it is also important to bear in mind not only that the claim is that of Mr Watson, but also that his claim, now being pursued by his estate, is '… not answered by pointing to moral obligations'; '[t]he rights of the parties [are] to be determined according to law, not by reference to other, non-legal considerations …' (Stanford at [52])."*

Anecdotal evidence suggests that the annunciation of these principles subsequent to **Stanford** has encouraged some practitioners to try to raise as a threshold issue whether the court ought to entertain a property settlement at all; in other words to ask the court to embark on a preliminary determination of whether a property settlement is required. However as will be discussed later, though the Full Court does not consider that it is to be treated as a threshold issue in this way.

Step 3 - assess contributions and sec 75(2) factors

The final step is that the High Court then urges us to apply the criteria in sec 79(4), namely the factors in sec 75(2). This is similar to applying the first 3 steps of the previous 4 step process.

BEVAN (No.1)

BEVAN & BEVAN (2013) FLC ¶93-545; [2013] FamCAFC 116 (8 August, 2013)

In the first decision of **Bevan** the Full Court considered an appeal by the wife against orders for property settlement. The primary issue in the appeal was whether the trial judge erred in concluding that it was just and equitable to alter existing property interests when the parties had largely lived apart for 18 years and the husband had told the wife many years earlier that he would not ever make a claim on her assets. The trial judge had determined it was just and equitable to make an order. To cut a long story short, the Full Court in their second judgement overturned the original decision and declined to make any property settlement order.

Bevan was the first appeal decision of the Full Court delivered after Stanford. To paraphrase what the Full Court considered, it was the following:

- The correct approach to determining a sec 79 application.
- What is the relevance of the existing legal and equitable interests of the parties to a property settlement?
- How is the requirement that a property settlement must be just and equitable applied in practice?
- Can or should "notional property" be treated the same way as tangible property for the purposes of a property settlement?

No threshold test

The majority specifically rejected the notion there was a threshold issue by way of an enquiry into whether it was "just and equitable" to make an order. The first step rather was a determination of the legal and equitable interests of the parties. This of course makes sense as the court cannot proceed further until the subject matter of a property settlement has been identified.

The four step process

The Full Court noted that the High Court neither approved nor disapproved the four step process. The majority appeared to conclude that the four step process is still useful although they emphasised that the approach was not itself contained within the legislation; ie: it was not enshrined in law. They described it as more a "shorthand distillation" of the words of a statute, which, according to the High Court, has as its first requirement that no orders should be made unless it is just and equitable to do so.

The relevance of the existing legal and equitable interests of the parties

The majority in **Bevan** (Bryant CJ and Thackray J) did not express a concluded view about any requirement in sec 79 proceedings to decide whether, as between the parties, the legal title to their property reflects their respective interests. Rather their Honours said that if it is just and equitable that orders for property settlement be made it is not necessary to "complicate matters" by determining in the first instance if one party has an equitable interest in the property of the other. Finn J. in her minority judgement concurred.

An example of the relevance of considering existing interests might be where one of the parties brings into the relationship an asset in their sole name which becomes and remains the only asset of real significance of the parties. Upon breakdown of the relationship years later, the court is very likely to conclude that the use of sec 79 is required in order to effect a just and equitable division of the property of the parties as one of them holds at law practically the entirety of their combined accumulated wealth.

How is the requirement that it must be just and equitable that a property settlement be made to be applied in practice?

Step 2 of **Stanford** (the just and equitable "test") seems to be one that is causing practitioners the most trouble.

From my perspective it is not enough to apply the previous 4 step process in reverse. Whether it is just and equitable to make orders cannot be assessed simply by reference to all of the criteria in sec 79(4).

That is not to say that it is of no assistance to evaluate the range of entitlements of the parties might have by reference to section 79(4). In other words you could still consider the first 3 steps of the previous 4 step process in order to assess whether there is any merit in adjusting the property

interests of the parties based on their contributions and future needs, but on its own it is no longer enough.

The Full Court in **Bevan** reaffirmed that unless the justice and equity requirement, distinct from the matters in section 79(4), is satisfied, the court must not make proceed to make property settlement orders. So how precisely will the court decide whether it is justice and equitable? Contributions for the purposes of section 79(4) are not the same as contributions applied in equity. The former do not have to be connected to any specific property. Domestic and parenting contributions need only relate to the welfare of the family. A just and equitable outcome could reflect these types of contributions alone or it could in theory be based entirely upon sec 75(2) factors.

Considering sec 79(2) separately though does include things such as promises, representations; reliance and conduct based on those promises or representations; nor the effect on a party (or family member) of the sale of the family home. These facts might dictate how an order might be framed, or indeed whether or not to make any orders at all.

There are no objects and principles in Part VII specifically to assist with its interpretation. However it is commonly understood that section 79 was designed to compensate, as far as possible, for the economic consequences of separation. In so doing special emphasis is placed on the value of raising children and the need to protect their welfare in the future. These considerations must be at the centre of a just and equitable outcome.

<u>The effect on the presentation of property settlement cases</u>

When structuring advices and presenting property settlement applications to the court it is now necessary to work within the framework of **Stanford** and **Bevan**. It means that you must consider initially whether it is just and equitable for orders to be made, if at all, and thereafter follow the last 2 steps of the new 3 step pathway that I have referred to above.

<u>The end of Notional property ?</u>

Bevan is also important in relation to the treatment of "notional property" commonly called "add backs". Prior to the decision in **Stanford**, where a party had deliberately or recklessly wasted matrimonial property or whether there had been a premature distribution to one of the parties, the property almost routinely was "added back" into the pool of assets and treated as if it was property still in existence. Whilst it was discussed only in passing by the High Court, the majority in **Bevan** dealt more fully with the on the ongoing practice

of adding back notional property dissipated or wasted by a party to the marriage.

The majority in paragraph 79 noted:

We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage — and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property.

Sand & Sand (2012) FLC ¶93-519

Although those words were only obiter dicta, in an earlier decision of Coleman J. sitting as the Full Court of **Sand & Sand** (2012) FLC ¶93-519 His Honour decided that "notional property" did not fall within the definition of property in sec 4 of the Family Law Act.

In that case, the property in respect of which the Federal Magistrate (as he then was) made orders pursuant to sec 79 was represented entirely by "notional" property which had been "added back" to the pool as a result of a finding that the husband had deliberately "disposed of "the sale proceeds of the former matrimonial home and other matrimonial assets. The Federal Magistrate ordered the husband to repay the wife her notional property entitlement by instalments out of his income.

On Appeal, the husband argued successfully that as there was no "property of the parties or of either of them" as defined in the Act, there could be no "matrimonial cause" and therefore no jurisdiction to make property settlement orders. His Honour was satisfied that jurisdiction could not be enlivened where the only "property of the parties" was "notional".

Reading the comments made in **Bevan** as obiter dicta combined with the reasoning of Coleman J. in **Sand & Sand**, the inevitable conclusion is that as notional property does not fall within the definition of "property" in the Act, it ought not and cannot be included in the balance sheet

As a result it is more likely that wasted or premature dissipation of assets will in future be considered under Section 75(2)(o) rather than in the balance sheet. It means therefore that the practice that has developed of, for example, adding back paid legal costs, or money wasted on gambling into the schedule

of assets is likely to come to an end. It is my understanding that this change is filtering through to cases but it appears not yet to have reached the stage where the use of "add backs" has been eliminated entirely.

An examination of post **Bevan** decisions, particularly those made by judges in the Federal Circuit Court does suggest that this is what is happening. The change has not been immediate and widespread as the impact of these very significant decisions has yet to be fully felt. However, you need to take note when preparing cases in future that the previous cases relating to "add backs" and "notional property" now are probably out of date.

BEVAN (No.2)

BEVAN & BEVAN [2014] FamCAFC 19 (19 February, 2014)

When the Full Court handed down its second decision following the re-exercise of its discretion pursuant to sec 79, the original trial judge's orders were discharged and the husband's application for property settlement was dismissed. Integral to the Full Court's reasoning was the long delay by the husband in bringing his application. The parties had largely separated their lives and their finances nearly 20 years before the husband brought his claim. That delay meant that would not be just and equitable to there to be a property settlement.

The Full Court went on though to emphasise that the consideration of delay in this particular case did not create a new hurdle for property settlement applicants and consideration of these sorts of factors would be on a case-by-case basis.

NORTON & LOCKE (2013) FLC ¶93-567 (18 December, 2013)

In this case a Federal Circuit Court judge made an interim injunction to exclude a party from a home. The parties were not married and the existence of a de facto relationship was in issue. The appellant argued in the Full Court that the lower court lacked jurisdiction to make the injunction as there as yet had been no declaration of the existence of a de facto relationship.

The Full Court rejected the argument that sec 114(2A) (the general injunction power) provides the *sole* source of power to grant injunctions in a de facto financial cause.

Their Honours concluded that the court did not have power to make an interlocutory injunction of the type sought pursuant to sec 114(2A) of the Act but this depended upon establishing that there was a "de facto financial

cause". In this case it was dependent upon resolving fact in dispute about the existence or otherwise of a de facto relationship.

The power to grant such an injunction pursuant to sec 114(3) or sec 90SS of the Act was found to be subject to the same limitation as each is dependent upon establishing the same jurisdictional criteria referred to above.

For these reasons the Full Court considered that the Federal Circuit Court had the power to determine whether there was a de facto relationship and had power to "control its own process" and prevent an abuse of same which extends, in "compelling circumstances", to an order maintaining the status quo pending a determination regarding jurisdiction. Within that jurisdiction and within the ambit of powers the court has the power to make what this court has described as "holding orders" pending the determination of the jurisdictional facts necessary to found jurisdiction.

However this power was limited and did not extend to the type of injunction that had been made by the trial judge.

DOHERTY & DOHERTY [2014] FamCAFC 20 (18 Sept, 2013)

The facts of this parenting case rather are rather complicated however it is not necessary to set them out here for the purposes of discussing the issues below. In a broad ranging decision the Full Court in this case dealt with the following matters of importance:

Whether the trial judge failed to have any or any proper regard to the provisions of sections 61D and 65DAC of the Family Law Act.

The Full Court found that the trial judge was not correct in saying that the sec 61DA presumption "is capable of being rebutted" by findings of child abuse or family violence. The legislation makes plain the seriousness with which each must be treated by the court by rendering the presumption *inapplicable* if those relevant findings are made and, by contrast, rebuttable if relevant findings as to best interests are made. The distinction is underscored by each being the subject of different subsections of the Act (sec 61DA(2) and (4) respectively).

Importantly the Full Court noted that sec 65DAC (which deals with effect of a parenting order that provides for shared parental responsibility) applies whether parental responsibility in respect of a long-term issue is shared equally or otherwise. Secondly, and importantly, the section's use of the singular and the definition of "parenting order" in sec 64B is each indicative of the fact that parental responsibility for some long term issues may be shared

while others may not and, additionally, that parental responsibility for some issues might be shared equally while others are not shared equally or not shared at all. Finally, the fact that the presumption is rendered inapplicable or rebutted has an effect upon the process required by sec 65DAA, but it does not affect the nature of the orders that can be made, including orders that attribute parental responsibility in respect of some of the "powers, duties, responsibilities and authority which, by law, parents have in relation to children" (see: sec 61B).

Whether the trial judge failed to give any or any adequate reasons for the orders made by her

The Full Court examined the arguments of the Appellant closely and came to the conclusion that there was no appealable error.

Whether, as there had been a significant delay in the delivery of judgment, the trial judge should have invited further submissions from either party on any changed circumstances before delivering judgment – where the appeal is dismissed.

Lengthy delays between the completion of submissions and delivery of judgement present many problems for practitioners and clients alike. This aspect of the decision provides some helpful guidance from the Full Court.

The Appellant argued that the trial judge erred in failing to discharge the onus imposed on the court by a delay of over 19 months from the date of the last submission to the Court which onus required the disclosure of all of the evidence before the court giving rise to each of the findings made by the Court.

So at paragraph 52 of the judgment the Full Court quoted the following decisions:

> *In Rollings & Rollings (2009) 230 FLR 396 the Full Court said:*
>
> > *65. In McCrossen the Full Court (Bryant CJ, Finn and Coleman JJ) said at 80,848, that in Monie Hunt AJA at [43], with whom Giles and Bryson JJA agreed, "summarised the approach taken". We do not propose to repeat all of what Hunt AJA said, however he did say:*
> >
> > > *[44] It must, however, be emphasised that delay between taking evidence and the delivery of judgment does not, in itself, justify upholding an appeal against the judgment given. Error must still be established on the part of the trial judge warranting either a reversal of the judgment or the grant of a new trial. Delay may assist an appellant in establishing such error because, as the approach identified by the Full Federal Court*

> *demonstrates, the inference will more readily be drawn that a trial judge's failure to deal in a significantly delayed judgment with particular matters on which the appellant relied in contradiction of the findings made in that judgment resulted from those matters being overlooked by the judge — either because of the time which has passed or because of the pressure on the judge in the end to complete the judgment. …*
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> *66. In McCrossen the Full Court, referring to R v Maxwell and NAIS, at [94] said that "[w]hilst careful scrutiny is called for by the Appellate Court, subject to that scrutiny … delay is not itself a ground of appeal". It is for this reason that in relation to the first ground of appeal the Husband did not submit that the appeal could be upheld solely based upon a delay between the end of the hearing and the date of the judgment.*
>
> *67. The authorities thus establish that if there is a delay between the conclusion of the hearing and judgment, presumably with contemporaneity of reasons, the delay is not in itself a ground of appeal and it is not, as argued in McCrossen, a denial of a fair trial and/or a miscarriage of justice. However the delay does mean that on appeal there has to be greater scrutiny of the findings made by the trial judge. As Giles JA said in Monie at [3]: "extensive delay may cause an appellate court to take a more stringent approach in determining whether error has been demonstrated in the trial judge's findings or whether the trial judge's reasons are adequate".*

The Appellant also argued that as reference had not been made in the judgment to some written submissions about the evidence of an expert, the trial judge must have overlooked them with the passage of time. The Full Court's response was that just because they were not specifically mentioned does not necessarily mean that they were overlooked. This ground was rejected.

<u>Whether the trial judge failed to provide to the appellant (who was self represented) with notice of various procedural issues:</u>

The asserted failures by the trial judge were summarised by the Appellant for the Full Court as follows:

- Failed to advise the appellant that in order to produce documents from a witness it was necessary that a subpoena to that witness require production of defined documents;
- Failed to advise the appellant of his right to apply to rely upon evidence given at earlier proceedings before the same judge; and
- Failed to advise the appellant that he was entitled to make submissions as to proposed directions for the cross examination of witnesses.

The trial judge was found to have erred in failing to provide the appellant with access to the expert's notes on more than one occasion; however the Full Court found that there was no injustice demonstrated by that failure and therefore that ground was dismissed.

The expert did not give evidence because a convenient time could not be arranged despite quite some effort being employed over the course of the hearing to organise it. It was submitted for the Appellant that the trial judge ought to have extended the hearing to enable Dr L, the expert, to be called or to make some other arrangement that would have enabled Dr L's evidence to be taken. However the Full Court noted that such an application was not made to the trial judge. Further the appellant could not point to any matter or point on which he wished to ask Dr L questions or even the subject matter of any questions he wished to ask and nor did he argue that the failure to afford him the opportunity to ask those questions operated to his disadvantage.

At page 105 of the judgement the full Court discussed the nature of parenting proceedings and how they are to be conducted:

> *"Section 69ZN of the Family Law Act 1975 (Cth) ("the act") imposes a number of mandatory obligations upon the Court in exercising powers in child-related proceedings. Included among them is the specific mandatory instruction to "actively direct, control and manage the conduct of the proceedings'*
>
> *(s 69ZN(4)) and to do so within the context of a mandatory instruction to conduct proceedings "… without undue delay" and "with as little formality and legal technicality and form as possible". It can be expected that experienced trial judges will have these mandatory conditions in mind and, in any event, the passages of the transcript earlier quoted, and the whole of the transcript more broadly, indicate that these matters were clearly in her Honour's mind*".

The appeal on this ground also was dismissed.

FINAL THOUGHTS

It is not enough just to be familiar with new authorities, if you wish to use them in court here are my suggestions about the best way to do it:

- Read the whole case (including minority judgments).
- Don't trust the headnote - it can be wrong!
- Check to see if the decision has been upheld in other authorities.
- Make sure the decision has not been overruled in whole or part.
- Hand up a copy for the judge and give one to your opponent.

- Mark or highlight the relevant passages for the judge.
- Make sure the facts are broadly relevant to the legal issue you are arguing.
- Ensure you understand and distinguish between comments made obiter from the ratio of the decision.

Richard Maurice
10 March, 2014

DECISIONS REFERRED TO IN THIS PAPER

a. Stanford & Stanford (2012) FLC ¶93-518

b. Hickey and Hickey (2003) FLC ¶ 93-143

c. Sand & Sand (2012) FLC ¶93-519

d. Watson & Ling (2013) FLC ¶93-527

e. Bevan & Bevan (2013) FLC ¶93-545

f. Bevan & Bevan [2014] FamCAFC 19

g. Norton & Locke (2013) FLC ¶93-567

h. Doherty & Doherty [2014] FamCAFC 20

i. Rollings & Rollings (2009) 230 FLR 396

About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he has practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate. He also works as a Mediator in Family Law financial and parenting matters.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like Pierce and Pierce (1999) FLC 92-844 and Black v. Black (1991) DFC ¶ 95-113 and Jonah & White [2011] FamCA 221 and more recently Sand & Sand [2012] FamCAFC 179.

www.richardmaurice.com