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2025 Family Law Conference

ACT LAW SOCIETY

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Addbacks and Property settlements Recent developments

Practical considerations



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— FAMILY MEDIATION —

The death of addbacks

- ▶ **Omacini and Omacini [2005] FamCA 195**
- ▶ 3 clear categories of where property may be notionally added back
 - ▶ 1. Where the parties have expended money on legal fees;
 - ▶ 2. Where there has been a premature distribution of matrimonial assets;
 - ▶ 3. Where there has been waste, reckless, negligent or wanton dissipation of assets as outlined by Baker J in **Kowaliw and Kowaliw [1981] FamCA 70**
- ▶ **Shinohara and Shinohara No.2 [2025] FedCFamC1F 126**
- ▶ *The categories identified in Omancini pre amendment that were notionally added back are to be considered in ensuring a just and equitable outcome either by way of historical contributions or by way of their relationship to and impact upon the current and future circumstances at the section 79 (5) stage.*
- ▶ *The use of addbacks is unduly simplistic and a conceptually dubious practice*

Jakobsson and Jakobsson (No 2) [2025]FedCFAM1A 137

s79(3)(a) directs the court's attention to the existing rights and interests of the parties in property- which must by reason of its definition exclude the concept of an addback.

Notional property is an artificial construct used in the achievement of a just and equitable outcome.

The task of assessing contributions is holistic and part of the wider or further holistic determination of what is just and equitable.

Addbacks/notional property are to be dealt with in the context of s79(4) or s79(5).

Waste

Waste is a separate s79(5) factor - s79(5)(d) - the effect of any material wastage caused **intentionally or recklessly** by a party to the marriage of property or financial resources of either of the parties to the marriage or both of them.

Consider Kowaliw-[1981] FamCA 70 “if a party has embarked on a course of conduct designed to reduce or minimise the effective value of worth of the matrimonial assets OR by acting recklessly **negligently or wantonly** with matrimonial assets the overall effect of which has reduced or minimised their value - the economic consequences can be taken into account.

Be prepared to dig in and do your research, waste is rarely conceded.

Two steps - prove the waste and then identify the effect of the waste on the pool.

Family violence s79(4)(ca) and s79(5)(a)

s79(4)(ca)

The effect on the ability to make contributions.

S79(5)(a)

The effect on current and future circumstances.

Causal connection.

Will you need expert evidence? From whom? Single expert? Treater?

Detailed and thorough evidence required. No room for vagueness.

More defended ADVO's???

Legal fees

Is Chorn and Hopkins [2004] FamCA 633 dead in the water?

Consider the impact on your client's case of how they fund their legal fees.

Possibly the most difficult aspect of Shinohara to manage going forward???

Practical implications

- ▶ DON'T PANIC
- ▶ Think about crafting your case around s79(4) or (5) - can you pivot if you have to. Can you argue your case in the alternative.
- ▶ Convincing a court to make an adjustment in favour of your client will be about clear and well drafted evidence.
- ▶ Impress upon your client the need for good record keeping - don't just accept their word for what happened to the property and where it went.
- ▶ Consider whether you need to make an application seeking an interim injunction restraining a party from dissipating assets, will there be more of these applications?
- ▶ Do you more robustly defend an application for partial property settlement?
- ▶ Obtain evidence to quantify the proportion of the property retained or disposed of against the pool that exists.
- ▶ Just how deep are we going into the weeds of the bank accounts.
- ▶ Consider settlement options to avoid court and uncertain outcomes

Questions

From your client's perspective, what outcome is just and equitable?

What is the contributions assessment under s79(4) and what are the relevant s79(5) factors?

Is Jane gambling her aunt's inheritance waste? If the money came from Peter's family would that make it any different?.

What is the difference in outcome for the parties between the old law, and the new amendments?

How do you treat the unfair dismissal payout and legal fees. Is it waste by the person who controlled the company?

Does Jane's loan to her father for legal fees stay in as a liability?

Can you establish that the family violence perpetrated on Jane is a relevant factor for the court and what evidence will you need?

If it is a factor you contend should be considered by the Court, pursuant to Section 79(4) or (5), what is the percentage adjustment you seek (and how will you argue that in Court?)

More questions ...

How do we factor in the \$100,000 that Peter received as part property settlement.

The lawyers are obviously charging at different rates, is it relevant that one party's fees are double the other party's fees?

Is Peter's post separation lifestyle relevant?

Any urgent/interim applications you want to make?

If you're mediating – do you take a different approach to your case, what concessions will you /



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