**Family Court of Australia**

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| **CaLVIN & MCTIER** | **[2017] FamCAFC 125** |

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| FAMILY LAW – APPEAL – PROPERTY – Treatment of property acquired after separation – Where the husband received a substantial inheritance four years after the parties separated – Whether the trial magistrate erred by including the inheritance among the assets to be divided between the parties – Where the court has the power to make an order in relation to after-acquired property – Where the decision to make an order dividing after-acquired property is a matter of discretion – Whether the trial magistrate erred by ordering the husband to give effect to the property orders within 28 days – Whether the parties were afforded procedural fairness – Where the parties were provided with an opportunity to comment on the form of orders before judgment was delivered – No appealable error established – Appeal dismissed – Husband to pay the wife’s costs of the appeal. |

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| Family Law Act 1975 (Cth) ss 4, 31, 44(3), 75(2), 79(1), 79(2), 79(4) |

*Bishop & Bishop* (2013) FLC 93-553

*Bonnici & Bonnici* (1992) FLC 92-272

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| *Dougherty v Dougherty* (1987) 163 CLR 278Farmer and Bramley (2000) FLC 93-060*Jones & Jones* (1990) FLC 92-143*Norman & Norman* [2010] FamCAFC 66 *Polonius & York* [2010] FamCAFC 228*Singerson & Joans* [2014] FamCAFC 238*Singerson & Joans* [2015] HCATrans 195 *Stanford v Stanford* (2012) 247 CLR 108*Thynne & Madison* [2007] FamCA 558 |

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| **Appellant:** | Mr Calvin |

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| **Respondent:** | Ms McTier |

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| **File Number:** | PTW | 2263 |  | of | 2011 |

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| **Appeal Number:** | WA | 27 |  | of | 2016 |

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| **DATE DELIVERED:** | 12 July 2017 |

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| **Place Delivered:** | Sydney |

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| **Place Heard:** | Perth |

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| **Judgment of:** | Bryant CJ, Ryan & Aldridge JJ |

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| **Hearing date:** | 4 April 2017 |

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| **Lower court jurisdiction:** | Magistrates Court of Western Australia |

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| **lower court judgment date:** | 17 November 2016 |

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| **LOWER COURT MNC:** | [2016] FCWAM 242 |

### REPRESENTATION

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| **COUNSEL FOR THE Appellant:** | Dr Dickey QC |

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| **SOLICITOR FOR THE Appellant:** | Paynes Lawyers |

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| **COUNSEL FOR THE RESPONDENT:** | Mr Rynne |

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| **SOLICITOR FOR THE RESPONDENT:** | Chris Baker & Associates |

# Orders

1. The appeal against the orders made by Magistrate Calverley on 17 November 2016 is dismissed.
2. The appellant pay the respondent’s costs of the appeal as agreed or in default of agreement as assessed.

Note: The form of the order is subject to the entry of the order in the Court’s records.

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

Note: This copy of the Court’s Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

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| THE FULL COURT OF THE Family Court of Australia at PERTH |

Appeal Number: WA 27 of 2016

File Number: PTW 2263 of 2011

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| Mr Calvin  |

Appellant

and

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| **Ms McTier**  |

Respondent

REASONS FOR JUDGMENT

# Introduction

1. Mr Calvin (“the husband”) appeals against orders made by Magistrate Calverley on 17 November 2016 in property proceedings between him and Ms McTier (“the wife”).
2. Central to the proceedings before the trial magistrate and to the appeal before us was the approach that should be taken to a substantial inheritance received by the husband well after the parties separated. The issue his Honour had to determine was whether or not that inheritance should be included amongst the property of the parties that was to be divided by the court.
3. That issue was decided against the husband and the trial magistrate made orders dividing all of the property of the parties, including the inheritance, so that the husband was to receive 65 per cent of the property and the wife 35 per cent.
4. The husband appealed against the trial magistrate’s finding that the inheritance should be included amongst the property to be divided but did not contend that if the inheritance was properly available for division, the percentage division arrived at by the trial magistrate was erroneous.
5. The husband also appealed against the trial magistrate’s finding that the only way there could be an appropriate assessment of the matters pursuant to
s 79(4) of the *Family Law Act 1975* (Cth) (“the Act”) was to include the inheritance in the “calculation of net assets and resources” (at [59]) and also against the time in which he was to comply with the orders for payment to the wife (which was 28 days).

# Background

1. In order to understand the submissions made on the significant issue in the appeal, it is necessary to set out some relevant background facts and key findings made by the trial magistrate.
2. The parties were married on 2 February 2002, separated on 9 April 2010 and were divorced on 2 August 2011. Their relationship lasted some eight years.
3. They have one child, B (“the child”), who was born in 2005. Since separation he has been equally cared for by both parties in a week about arrangement.
4. The wife commenced these proceedings on 21 January 2015 and on 5 March 2015 was given leave pursuant to s 44(3) of the Act to pursue the property claim against the husband.
5. At the commencement of the relationship the wife had nominal assets. The husband owned two properties, a motor vehicle, shares and superannuation entitlements as well as personal effects. The trial magistrate did not make a finding as to the value of these assets but considered that the husband brought significantly more property into the relationship than the wife.
6. During the course of the parties’ marriage the husband’s two properties were sold and properties at Suburb C and Town D were acquired. At the time of the hearing those properties were valued at $619,333 and $72,500 respectively and were subject to a mortgage of $111,115. At the time of the hearing the parties held other assets with an agreed value of $39,099 and superannuation entitlements of $289,816 ($5,606 held by the wife and $186,958 and $97,252 held by the husband).
7. In January 2014, some four years after the parties separated, the husband received an inheritance from his father’s estate. By the time of the hearing the husband had dealt with part of the assets received; however, the wife did not suggest that anything other than the remaining portion of the inheritance should be taken into account. The trial magistrate found that the inheritance was “currently represented by assets in the [husband’s] control totalling $430,686” (at [50]).
8. The trial magistrate found that the net value of the assets and resources to be divided between the parties was $1,340,319, of which, in percentage terms, the remaining inheritance accounted for approximately 32 per cent (at [60]).
9. When assessing the overall contributions of the parties to these assets and to the welfare of the family his Honour found the initial financial contributions of the husband “far outweighed” those of the wife (at [67]), but that, accepting the submissions made by the husband, the contributions made during the marriage under s 79(4)(a), (b) and (c) of the Act were equal (at [70]). His Honour also found that after separation, whilst there had been equal care of the child, the husband had “met a greater proportion of the child’s financial needs … because he had been in a position to do so” (at [72]).
10. Importantly, the trial magistrate turned to the question of the inheritance and said:

73. There is no question that the overwhelming financial contribution post separation into what I have found to be the current net assets and resources, has been the inheritance received by the Respondent from his late father.

1. This led to the husband’s contributions being assessed at 75 per cent and the wife’s at 25 per cent (at [74]).
2. It is sufficient to record that there was an adjustment of 10 per cent in the wife’s favour pursuant to s 75(2) of the Act to reflect, in particular, the disparity in income and earning capacity between the wife and the husband (at [106]). As foreshadowed above, this ultimately led to the husband receiving 65 per cent of the parties’ total property, and the wife receiving 35 per cent.

# The Appeal

## Ground 1 – Should the inheritance have been available for division between the parties?

1. Ground 1 challenges the approach the trial magistrate took towards the husband’s inheritance. It is useful to commence by setting out this ground as it appears in the Amended Notice of Appeal filed on 14 February 2017:

The Trial Magistrate erred in law in holding at [56-59] of his Reasons for Judgment that the inheritance the Husband received from his father nearly four years after the parties had separated was property available for division under section 79(1) of the Family Law Act. The Trial magistrate should have held that the inheritance was, by lack of any evidence to the contrary, totally unconnected with the parties’ marriage or with any circumstances arising from the parties’ matrimonial relationship. He should accordingly have held that the inheritance should not have been available for division under section 79(1).

1. Reading the ground as a whole, it is not clear whether the assertion is that the trial magistrate had no power to make the order or whether he erred in his discretion in including the inheritance amongst the property to be divided between the parties. It is apparent, however, that the crux of this challenge is the degree of “connection” – or, as the ground has it, the lack of connection – between the inheritance and the parties’ matrimonial relationship.
2. It is clear that the court has the power to make an order dividing the inheritance.
3. In this particular matter the jurisdiction of the court flows from definition (ca) of matrimonial cause contained in s 4 of the Act (s 31(1)). That definition, relevantly, is:

***matrimonial cause*** means:

...

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

arising out of the marital relationship;

...

1. Where the court has proceedings of such a nature before it, s 79(1) of the Act empowers the court to make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them – altering the interests of the parties to the marriage in the property…

1. “Property” is defined by s 4 of the Act to mean:
	* + - 1. 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 …

(Emphasis added)

1. Thus, both the relevant definition of “matrimonial cause” and s 79 refer to all of the property held by the parties at the time of the hearing before the court. All of the property then held by both of the parties or either of them can therefore be the subject of orders under s 79, regardless of when particular assets were acquired. The fact that the court is to take into account the contributions of a party with respect to the acquisition, conservation or improvement of that property or to the welfare of the family makes this abundantly clear (s 79(4)(a), (b) and (c)). Such contributions may, of course, continue long after separation.
2. In this matter, that property could include the inheritance. So much was accepted by senior counsel who appeared for the husband, who also accepted that there is a significant body of Full Court authority to the effect that, in the exercise of the court’s discretion, property acquired after separation can be the subject of division. See, for example, *Jones & Jones* (1990) FLC 92-143 at 77,993; *Thynne & Madison* [2007] FamCA 558; *Norman & Norman* [2010] FamCAFC 66; *Polonius & York* [2010] FamCAFC 228 (“*Polonius & York*”); and *Singerson & Joans* [2014] FamCAFC 238.
3. In conceding that this was so, during the course of oral submissions, senior counsel’s argument ultimately became a contention that while the court had the power to make an order against the inheritance, in this case it should not have, in its exercise of discretion, because there was no clear connection between the inheritance and the parties’ marriage. He submitted that the mere fact that the parties were married was not sufficient to justify the court bringing the inheritance into account.
4. Accordingly, the relevant question before us became one of whether the trial magistrate properly exercised his discretion in including the inheritance in the property to be divided between the parties. In answer to this question, senior counsel identified three propositions of law on which he founded his argument:
* There is no High Court case that says that all of the property owned by the parties is, without more, available for division under s 79.
* That the decision of the majority in Farmer and Bramley (2000) FLC 93‑060 (“*Farmer and Bramley*”) cannot stand in the light of *Stanford v Stanford* (2012) 247 CLR 108 (“*Stanford*”).
* Property acquired by a party after separation is available for division under s 79(1), but only if there is some nexus between the after‑acquired property and the parties’ marriage.
1. Little need be said about the first proposition. The absence of authority on a proposition does not, of itself, establish it; nor does it establish its opposite. In this respect, the legislation speaks for itself.
2. As to the second proposition, the submission was that the long line of authority referred to by us at [25] had been rendered nugatory by the High Court decision in *Stanford*. In particular, senior counsel for the husband relied on the High Court’s statement in that case at [41] that the court must have “a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage” to argue that the court would have to be satisfied that there is a sufficient nexus between particular items of after-acquired property and the parties’ marriage before that property could be included for division between the parties. Thus, it was submitted that the dissenting judgment of Guest J in Farmer and Bramley, whereby his Honour suggested that contributions under s 79(4) must be contemporaneous with the existence of that property, was to be preferred.
3. The husband relied upon *Dougherty v Dougherty* (1987) 163 CLR 278 (“*Dougherty*”) to found the submission that s 79(1) of the Act must be read down so as to apply only to marital property, which he asserted must mean “property acquired during [the] marriage”. In *Dougherty* Mason CJ, Wilson and Dawson JJ did say that s 79 “must be read down” but that it was necessary to do so because the jurisdiction of the court could not extend beyond the relevant matrimonial cause which identifies the court’s jurisdiction. After referring to definition (ca) as quoted above, their Honours continued at [7]:

This paragraph requires that proceedings between the parties to a marriage with respect to property should arise out of the marital relationship. By this means a limit is imposed upon the jurisdiction of the Family Court to make an order under s. 79 where the parties are parties to a marriage. Proceedings of that kind which do not arise out of the marital relationship do not constitute a matrimonial cause in relation to which jurisdiction is vested in the Family Court. It may be that this limitation sufficiently confines the operation of s. 79 in relation to proceedings between the parties to a marriage with respect to property and obviates the need to read the section down in its application to such cases. In any event, whether the exercise is undertaken for the purpose of applying par. (ca) or reading down s. 79, it should be comparatively easy to ascertain whether or not a claim by a party to a marriage for an alteration of property interests is based upon circumstances arising out of the marital relationship. Claims grounded solely in contract or tort or equity or otherwise arising by reason of a relationship, for example of partnership, where the marriage relationship is purely coincidental are not likely to attract the power. But leaving aside matters such as those there will not be wanting occasions where the Family Court may find it just and equitable to alter the respective property interests of the parties inter se for reasons associated with and finding their source in the marriage relationship.

1. In his submissions senior counsel accepted that *Dougherty* was a case that concerned the constitutional issue of whether definition (ca) of “matrimonial cause” permitted an adult child to intervene in property proceedings between his parents and to seek orders for his own benefit. He also accepted that *Dougherty* did not suggest that s 79 of the Act should be read down so as to exclude after-acquired property or that such property was to be treated differently.
2. He suggested, then, that what flowed from *Dougherty* was that the words of s 79 of the Act cannot be taken literally and that it was necessary to turn to *Stanford* to find support for his argument.
3. Before turning to *Stanford* it is helpful to note some further concessions, made by senior counsel for the husband in the course of oral submissions, as to the nature of the enquiry that the court should undertake. The first, as discussed above, was that even if the enquiry was whether the after-acquired property had a sufficient connection with the marriage to permit it to be divided, that decision was one which involved the exercise of a discretion. The second was that such a consideration would only be necessary if the owner of the after-acquired property objected to that property being subject to division.
4. In our opinion, *Stanford* does not support the submissions of the husband. That case was concerned with the conditions to be satisfied before the court should consider altering the parties’ interests in their property. It is necessary first for the court to determine that it is just and equitable to do so. This is made clear in the following passages:

35. It will be recalled that s 79(2) provides that “[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order”. Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made under the section. The requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order.

36. The expression “just and equitable” is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds. And while the power given by s 79 is not “to be exercised in accordance with fixed rules”, nevertheless, three fundamental propositions must not be obscured.

37. **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.** So much follows from the text of s 79(1)(a) itself, which refers to “*altering* the interests of the parties to the marriage in the property” (emphasis added). The question posed by s 79(2) is thus whether, having regard to those *existing* interests, the court is satisfied that it is just and equitable to make a property settlement order.

38. Secondly, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In *Wirth v Wirth*, Dixon CJ observed that a power to make such order with respect to property and costs “as [the judge] thinks fit”, in any question between husband and wife as to the title to or possession of property, is a power which “rests upon the law and not upon judicial discretion”. And as four members of this Court observed about proceedings for maintenance and property settlement orders in *R v Watson; Ex parte Armstrong*:

“The judge called upon to decide proceedings of that kind is not entitled to do what has been described as ‘palm tree justice’. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down.”

39. Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is “just and equitable” to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that “[c]ommunity of ownership arising from marriage has no place in the common law”. Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be “decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses”. The question presented by s 79 is whether those rights and interests should be altered.

40. Thirdly, whether making a property settlement order is “just and equitable” is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised “in accordance with legal principles, including the principles which the Act itself lays down”. To conclude that making an order is “just and equitable” *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act.

41. Adherence to these fundamental propositions in exercising the power in s 79 gives due recognition to “the need to preserve and protect the institution of marriage” identified in s 43(1)(a) as a principle to be applied by courts in exercising jurisdiction under the Act. If the parties have made a financial agreement about the property of one or both of the parties that is binding under Pt VIIIA of the Act, then, subject to that Part, a court cannot (s 71A) make a property settlement order under s 79. But if the parties to a marriage have expressly considered, but not put in writing in a way that complies with Pt VIIIA, how their property interests should be arranged between them during the continuance of their marriage, the application of these principles accommodates that fact. And if the parties to a marriage have not expressly considered whether or to what extent there is or should be some *different* arrangement of their property interests in their individual or commonly held assets while the marriage continues, the application of these principles again accommodates that fact. These principles do so by recognising the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. **The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.**

42. In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common *use* of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).

(Emphasis added in bold) (Citations omitted)

1. The first sentence in [37], emphasised by us, refers to the identification of the parties’ existing property. This is consistent with our earlier analysis of the relevant provisions and with the longstanding authorities in this Court. In this case, the existing property included the inheritance.
2. The last sentence of [41], emphasised by us, points to the need for the court to find a principled reason for interfering with the existing legal and equitable property rights of the parties. How that is to be done is made clear by [42]. There is nothing in *Stanford* to indicate that after-acquired property is to be treated in a different way and that a specific and separate determination as to its inclusion is required. Indeed, the closing words of [41] apply to all of the property of the parties. As we have said, the trial magistrate undertook this express consideration.
3. In short, the question in *Stanford* was whether there should have been an order for property division at all. It was not concerned with the nature of the actual order that was made because it was held that the primary judge and the Full Court should not have advanced to that step. The decision therefore does not require that there be a principled reason to interfere with, as senior counsel put it, “individual assets of the parties”.
4. We turn then to the third proposition of senior counsel outlined above at [27]. Shorn of those aspects of the argument which are plainly not supported by authority and taking into account the many concessions made in oral submissions, we understand the third proposition ultimately to be as follows: where there is after-acquired property and the owner of that property objects to its inclusion in the property to be considered for division under s 79(1) of the Act, there must be a separate and specific consideration as to whether there is a principled reason for its inclusion and division.
5. Senior counsel submitted that such principled reasons could include a direct contribution to the after-acquired asset (such as, in the case of an inheritance, caring for the donor) or by making contributions to the family that were out of the ordinary, and that in the absence of such a direct connection between the marriage and the property there would be no basis for including the after‑acquired property for division. We repeat, that is contrary to longstanding authority.
6. As was accepted by senior counsel for the husband, another way of framing this challenge was that the trial magistrate gave inadequate reasons for including the inheritance in the property to be divided because there was no such consideration as to whether there was a principled reason for its inclusion.
7. His Honour said:

61 I have little difficulty in concluding that it would be just and equitable to make a property settlement order.

62 The parties have now been separated since April 2010. Their circumstances in my view, fall within the type of case identified by the High Court in *Stanford* as I have previously referred to.

63 In those circumstances, I find that it is just and equitable to make a property settlement order.

1. Senior counsel accepted that these were adequate reasons for embarking on a property division, but suggested that they were inadequate or “too slight” as to the inclusion of the inheritance because there was no finding that there was a clear connection between it and the parties’ marriage.
2. Whether there is an obligation on a trial judge to make a finding that there is a sufficient connection between the after-acquired property and the marriage depends on the success of submissions being put by the husband. We have already considered and rejected the first two fundamental propositions put by senior counsel.
3. Nor do we accept the third proposition. As the first two propositions advanced by senior counsel do not succeed, the third proposition is left without support. It is difficult to see how it could then be accepted. It is contrary to the extensive weight of authority referred to above.
4. It remains to deal with two matters relevant to the third proposition, although strictly, as was made clear by senior counsel for the husband, they only arose for consideration if he was successful on the first and second propositions.
5. The first is senior counsel for the husband’s assertion that the dissenting judgment of Guest J in *Farmer and Bramley* correctly states the law in relation to property acquired by a party after separation. Neither the authorities decided before that decision nor those that followed support that submission. We do not consider that there is any basis for reconsidering that decision and are content to adopt the following words of Finn J in that case:

56. First an issue has arisen in this appeal as to whether an entitlement based on contributions made to the welfare of the family can only be satisfied out of property available to the parties at the time the contribution was made. In my view, there is nothing in s 79(4)(c) or indeed else in the Act, or in the authorities to date, which would justify such a limitation. Again in my view, if such a limitation were to be applied in any particular case, its justification would have to be found in the generally worded limitation in s 79(2) that a court shall not make an order under s 79 “unless it is satisfied that in all the circumstances it is just and equitable to make the order”.

57. Secondly, if it was to be determined that a majority of the community considered that one spouse should, as a general rule, have no entitlement to share in property either by good fortune or good management acquired after separation by the other spouse, then the Act would need to be amended to make this clear. As the Act currently stands, the jurisdiction conferred by s 79(1) to alter the interests of spouses in property extends without limitation to all the property which either spouse is entitled “whether in possession or reversion” (s 4).

1. We would also point out that similar submissions in support of the dissent of Guest J were expressly rejected by the Full Court in *Polonius & York* at [119]. We do not accept the submission that the reasons in *Stanford* require reconsideration of *Farmer and Bramley* or any of the other authorities to the same effect.
2. Finally, the husband sought to draw support from the following passages in *Bonnici & Bonnici* (1992) FLC 92-272 (“*Bonnici*”) at 79,019 – 79,020:

39. However, the problem that presently faces the Court is as to whether a finding that the parties had contributed equally can be justified given the very substantial assets that came into the husband’s hands shortly prior to the end of the marriage.

40. We have no doubt that his Honour was correct in rejecting the submission that these assets were a “resource” and not property. They clearly were property and came into the parties' hands during the subsistence of the relationship. Indeed, if they had come into their hands subsequently, they would still have retained their character as property. The expression “resource” is and should be confined to those interests which do not fall into the definition of property as such to which the parties have a present entitlement.

41. The more difficult issue in this case is as to whether the same should be treated differently from other types of property in which the parties clearly have an interest.

42. The answer, we consider, must depend upon the circumstances of individual cases. If, for example, in the present case, there had been no other assets than the husband’s inheritance, but the wife had, as his Honour found, clearly carried the main financial burden in the support of a family and also performed a more substantial role as a homemaker and parent than the husband, then it would clearly be open and indeed incumbent upon a Court to make a property settlement in her favour from such an inheritance.

43. A property does not fall into a protected category merely because it is an inheritance. On the other hand, if there are ample funds from which an appropriate property settlement can be made and a just result arrived at, then the fact of a recently acquired inheritance would normally be treated as an entitlement of the party in question.

44. The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances. Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect a property. See *James and James* (1978) FLC 90-487. But there was no evidence of this in the present case despite submissions by counsel for the wife to the contrary. Accordingly, we think that in the present case the moneys received by the husband from the sale of the freehold and from his uncle’s estate should not be brought into account.

1. The passage is redolent of the discussion of the exercise of a discretion. In *Bonnici*, the question of whether after-acquired property should be included in the property available for division was said to depend very much on the circumstances in each matter and the exercise of the discretion of the court. The court in *Bonnici* was, however, principally concerned with the reasons of the primary judge in that case and, in particular, the reasons why there had been a finding of equality of contributions by the parties notwithstanding the receipt of a significant inheritance by one of the parties after separation. The point being made was that if the inheritance was to be included in the property for division the introduction of that property would need to be reflected in the findings as to the parties’ financial contributions.  *Bonnici* was not concerned with submissions akin to those made in this matter.
2. The husband particularly relied upon the first sentence of [44] of *Bonnici* above. We do not agree that in that sentence their Honours were purporting to lay down a guideline as to the approach the court should take to inheritances received after separation. It is clear from reading the passage as a whole that they were not doing so. Whilst the court did indicate that in the case before them it would have been simpler for the primary judge to have dealt with the inheritance separately from the other property, it expressly said that there was nothing wrong with a global approach (i.e. dividing just one group of assets, including the inheritance), provided there was an explanation as to how the division was arrived at (at [46]). See also *Bishop & Bishop* (2013) FLC 93-553 at 87,421.
3. In short, we consider that the court retains a discretion as to how to approach the treatment of after-acquired property. The trial magistrate could have included the inheritance amongst the property to be divided or dealt with it separately. The trial magistrate was not obliged to follow one course or the other. The submissions of the husband are no more than an invitation to “pok[e] around in the entrails of discretion” (to adopt the remarks of French CJ, which his Honour made during the unsuccessful application for special leave in *Singerson & Jones* [2015] HCATrans 195).
4. It is worth repeating that it was not submitted that any error said to have arisen from the inclusion of the inheritance for division led to a result which, after consideration of the contributions and the s 75(2) factors, was inappropriate. Rather, the submissions were directed to the process.
5. We are therefore not satisfied that there is any merit in the husband’s submissions under this ground.

## Ground 2 – Was the only way to make an appropriate assessment of the s 79(4) factors to include the inheritance in the net assets and resources to be divided?

1. We accept that in the second sentence of the following passage of the trial magistrate’s reasons, his Honour erred:

59. Despite the inheritance being received nearly four years after the parties’ separation, I propose to include what remains of the inheritance in my calculation of the net value of the assets and resources. Without doing so I do not consider that I can appropriately assess the matters that I am required to, pursuant to section 79(4).

1. Had the inheritance been treated separately, the assessment of the s 79(4) matters could still be undertaken, although there would need to be a separate consideration of all relevant matters in relation to each group of property leading to, most likely, different findings in relation to each group.
2. However, we do not need to take this further as this ground was properly accepted to be an adjunct to ground 1 and, in the absence of success on that ground, was not productive of any material error.

## Ground 3 – Did the trial magistrate err in requiring the husband to comply with the orders within 28 days?

1. The trial magistrate’s orders required the husband to pay the wife $459,397 and to cause her to be released from the mortgages over the properties within 28 days.
2. The husband submitted that this time period was wholly unreasonable, as the orders had the effect of him having to borrow at least $100,000 to comply with them (or, it may be supposed, to sell one of the properties). This was because, at best, the husband only had $359,726 in readily realisable assets.
3. However, as the oral argument developed it became clear that the point was essentially that there was lack of procedural fairness in the making of the orders. It was said that this was because the trial magistrate indicated that he would give the parties the opportunity to comment on the proposed orders before they were made but then did not do so.
4. In his reasons, his Honour prefaced the orders he proposed to make with the words “[s]ubject to any comment from Counsel, I propose to make the following orders…” (at [113]).
5. In support of the submission we were taken to the transcript of 17 November 2016, which was the date of the delivery of the judgment. That transcript records that the trial magistrate made the orders immediately upon coming on to the bench, thus not giving the husband the opportunity to make submissions as to their form.
6. In his submissions, counsel for the wife said that the usual – and to his recollection, invariable – practice of magistrates in Western Australia is for the reasons to be made available to the parties for their consideration prior to the reasons being delivered and orders made in open court. He said that he had no reason to believe that this practice had not been followed on this occasion. This practice of making the reasons and proposed orders available to the parties prior to their formal delivery affords the parties the opportunity to identify any aspect of the proposed orders upon which they wish to make submissions.
7. In his submissions in reply, senior counsel for the husband accepted that this was indeed the practice and did not suggest that it was not followed in this instance.
8. As it appears that the husband was, in fact, given the opportunity to comment on the orders before they were made, no procedural unfairness has been identified.
9. We would also add that it was always expected that the husband would have to refinance the mortgages so as to remove the wife as a borrower. Indeed, he prepared a draft order to that very effect and provided it to the trial magistrate, but without proposing a time frame for compliance. The husband also must have envisaged that there was, at the least, a possibility that the wife would obtain orders for the payment of such a sum and that he would thereby be required to borrow funds. Prudence would have dictated that the husband approach his bank well prior to the delivery of the reasons to prepare for either eventuality.
10. The period of 28 days was short, but in the light of these matters and the very significant equity held in these properties which enable the husband more readily to borrow the funds, we do not consider that period to be unreasonably short.
11. This ground does not succeed.
12. It follows that the appeal will be dismissed.

# Costs

1. The appeal has been wholly unsuccessful. Accepting this to be so, senior counsel for the husband submitted that there should be no order as to costs because “the main legal matter was a matter that deserved reventilation in light of *Stanford*”.
2. We do not agree that it is such a matter. In any event, even if it was, we do not see why the wife should have to bear her costs of its unsuccessful “reventilation”.
3. The husband will be ordered to pay the wife’s costs of the appeal as agreed or, in default of agreement, as assessed.

I certify that the preceding seventy one (71) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Bryant CJ, Ryan & Aldridge JJ) delivered on 12 July 2017.

Legal associate:

Date: 12 July 2017