

The Issue of "Add Backs" in Family Law Property Disputes



Prior to the Family Court determining how the matrimonial assets will be divided between two people in a marriage or de facto relationship after they separate, the Court has to first establish the following:

1. What are the assets available for division?
2. The contributions of the parties, both financial and non-financial to the acquisition, improvement and conservation of the assets.
3. The parties current circumstances and their future needs.
4. Is the result just and equitable?

Whilst there is little difficulty in attributing a value to liquid assets like bank accounts and share portfolios and tangible assets such as houses, land, cars and chattels, which often need to be valued, a challenging area for the Courts relates to monies which existed at separation, but have been spent by one of the parties since the parties separated.

In the past, it was the view of the Courts that those assets should be notionally added back to the pool as an asset which that particular party had already received and benefited from.

The following are the three major categories of add backs:

1. Legal fees – noting that the Family Law Act 1975 provides that each party should pay their own legal costs. Establishing the source of funds used to pay the legal fees of either party may result in the other party's legal fees being "added back" to the pool.

2. Waste – if a party has acted recklessly or negligently in respect to assets and caused a reduction in the asset pool, the wasted monies can be considered in determining the outcome.
3. Spending money/disposing of assets – if one party spends monies existing at separation, or disposes of and receives money for an asset that existed at separation and thus reduces the asset pool, the value of the asset or monies as at separation, can be attributed as having been received by that party.

The Courts took the approach that if a party had deliberately or recklessly behaved in such a way which minimised the value of the property pool, then the amount wasted could be added back on a notional basis. In other cases, the Court found that money not spent on normal living expenses could represent a partial property settlement being attributed to the spouse who had spent the money.

The Full Court in *Omacini and Omacini* [2005] rejected the notion that "the mere fact that a party has expended money realised from the disposition of assets that existed at the date of separation, will result in that expenditure being added back ... "as being too simplistic".

Later, the High Court in *Standford v Stanford* [2012] indicated that there was doubt as to as whether add backs were warranted. The High Court took the view that property settlements related to the alteration of parties' existing current legal and equitable interests in property. This then resulted in add backs not being held to form part of the property pool as the parties no longer had an existing interest in that particular asset.

In *Bevan v Bevan* [2013] the Court held 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 is thus not amenable to alteration under Section 79.

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What is critical is an assessment of the reasonable or otherwise of the expenditure. After separation parties are entitled to continue to provide for their own support. Whether any expenditure so incurred is reasonable or extravagant is a matter to be determined by the Trial Judge.

Following *Standford*, *Bevan*, and many other cases since, funds or assets used or spent by one party, even without the consent of the other, post separation, are difficult to add back to the property pool.

For this reason, it is advisable for parties to commence settlement negotiations after separation sooner rather than later to avoid assets which existed at the date of separation being dissipated before the Final Hearing.

Contact Us

If you have any questions about which approach is best for you, feel free to contact any of our family lawyers on (03) 8621 2888.

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