# Weighing up initial contributions

SECTIONS 79 AND 90SM OF THE FAMILY LAW ACT REQUIRE THE COURT TO EXERCISE ITS DISCRETION IN CONSIDERING WHAT WEIGHT TO ATTRIBUTE TO CONTRIBUTIONS IN A MARRIAGE OR RELATIONSHIP. THIS IS PARTICULARLY INTERESTING IN RELATION TO SIGNIFICANT INITIAL FINANCIAL CONTRIBUTIONS.

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**SNAPSHOT**

- The weight to be attributed to initial contributions by a party under ss79 or 90SM of the Family Law Act has long been considered by family law courts, particularly the weight given to significant initial financial contributions in long relationships.
- The issue of significant initial contributions was considered at length in *Jabour* and has since been considered the gold standard on this issue.
- *Jabour* and the cases that follow show that the court will consider significant initial financial contributions, even in long relationships. Ultimately, the court has wide discretion and the weight afforded to initial financial contributions will be determined on a case by case basis.

## Introduction

The weight to be attributed to initial contributions by a party under ss79 and 90SM of the *Family Law Act 1975* (Cth) is an issue that has long been considered by the family law courts. It can be a particularly vexed issue, where one party makes a significantly greater contribution at the commencement of the relationship. It is often said that significant initial contributions are afforded greater weight in a shorter relationship than in a longer relationship, and it is commonly assumed that contributions are approximately equal after a long relationship.

Regardless of relationship length, it is clear from the authorities considering this issue that significant initial contributions made by one party need to be given proper consideration. Likewise, proper consideration needs to be given to the contributions holistically made during the relationship when determining a "just and equitable" property alteration.

## Early authorities

The length of the marriage or de facto relationship is an important factor to consider when determining the weight to be attributed to greater initial contributions by one party. In short relationships, it is often the case that greater initial contributions by one party will be given significantly more weight than in longer relationships. This is because less time has passed since the commencement of the relationship and there has been less opportunity for contributions during the relationship to offset the initial contributions.

An analysis of the authorities considering the weight to be given to initial contributions demonstrates that the Family Court of Australia (FCA) (as it then was) has been at pains to attribute the correct weight to initial contributions.

Early authorities considering the impact of the length of a relationship on initial contributions often referred to the concept of initial contributions having been "eroded" by subsequent contributions during the relationship. In *Money & Money*[1] Fogarty J stated "an initial contribution by one party may be 'eroded' to a greater or lesser extent by the late contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party". This approach was adopted in *Bremner & Bremner*.[2] The Full Court in *Pierce & Pierce*[3] subsequently adopted an approach similar to *Jabour & Jabour* [2019] FamCAFC 78 (*Jabour*). The Full Court emphasised that "it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution".[4]

## Jabour & Jabour

Most recently, the Full Court of the FCA (as it then was) considered authorities on this issue in *Jabour*. At the commencement of cohabitation, the husband owned an interest in a block of land. Twenty-two years after the commencement of the relationship, the block of land was rezoned to allow it to be used for residential purposes. The land was worth more than $10 million at the time of the trial. The primary judge assessed the parties' contributions as 66 per cent to the husband and 34 per cent to the wife. This was primarily due to the husband's initial contribution of the land.

On appeal, the Full Court considered *Williams & Williams* and held that the Court had "somewhat overstated the importance of the increase in value of a piece of property at the expense of "the myriad of other contributions that each of the parties has made during the course of the relationship".[5] The Full Court referred to *Pierce & Pierce* and stated "the weight to be attached to an initial contribution must be assessed against the rubric of all of the contributions, both financial and non-financial, made by the parties over the course of their relationship".[6]

The Full Court found that the primary judge had erred in seeking a nexus between contributions and a particular item of property when assessing contributions holistically over a long marriage. This had the result that the primary judge overlooked joint decisions the parties made regarding the properties and minimised the myriad of other contributions that were made in the course of a long marriage. The Full Court considered the decisions of *Zappacosta and Zappacosta*[7] and others and established that a sudden increase in the value of an asset unrelated to the effort of the parties results from the contributions from both parties of the relationship or from neither.

## Post Jabour

Several cases have considered the issue of significant initial contributions since *Jabour*. The recent case of *Aldrin & Celona*[8] involved a relationship that was less than four years in duration, with no children from the relationship. The primary judge made a final order adjusting the parties' property interests 70/30 per cent in favour of the husband. This was on the basis that the primary judge had found the parties' initial contributions to be 40 per cent to the wife and 60 per cent to the husband. Subsequent adjustments were made for contributions made during the relationship and for future needs. It is clear that the greater initial contributions of the respondent husband held their weight in the context of a short relationship.

In contrast, where the relationship is longer in duration more time has passed which commonly means that there is greater opportunity for contributions during the relationship to diminish the weight to be attributed to the greater initial contributions by one party. However, it is clear from the judgments of the cases considering this issue that a long marriage or de facto relationship does not by itself erode a greater initial contribution by one party.

In the case of *Barnell v Barnell (Barnell)*[9] the relationship was one of about 22 years. At the commencement of cohabitation, the husband had $58,000 equity in the matrimonial home and a parcel of land referred to as B property which had a value of approximately $110,000. The primary judge found the parties had made equal contributions throughout the relationships in their respective roles as breadwinner and homemaking and parenting. The primary judge also found that the initial contributions were 62.5 per cent to the husband and 37.5 per cent to the wife and ultimately ordered a division of 55 per cent to the husband and 45 per cent to the wife.

This decision was subsequently appealed, and the appeal was allowed on the basis that the primary judge had isolated the B property and given discrete consideration to that contribution. In doing so, the primary judge had fallen into the same error as was made at trial in *Jabour*. This had the effect of "according a subsidiary role to the wife's contributions"[10] throughout the relationship.

*Jabour* and *Barnell* both involved successful appeals on the basis that initial contributions had ultimately been attributed a greater weight at trial than was justified when considering the subsequent contributions made during the relationship. However, it also follows from *Jabour* and *Barnell* that initial contributions can endure and must be considered even in circumstances where the relationship spans more than 20 years.

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It is prudent to consider any subsequent contributions made during the relationship against the significant initial contributions to avoid falling into the error of the primary judges at trial in *Jabour* and *Barnell*. These include both financial and non-financial contributions made by the parties, and that a party need not show they have made a direct contribution towards the asset of significance brought into the relationship by the other party.

## Conclusion

Sections 79 and 90SM of the *Family Law Act 1975* (Cth) confer broad discretion on trial judges to assess the contributions made by each party and the weight that should be attributed to those contributions. In *Fisher and Fisher*[11] it was said that "the rights are created by virtue of a judicial discretion which necessarily takes account of consideration arising out of the marital relationship". When taking into account those "matters", the court must consider what is "just and equitable".[12] In considering what is just and equitable in the application of ss79 or 90SM, the majority in *Standford*[13] defined just and equitable as "a qualitative description of a conclusion reached after examination of a range of potentially competing considerations".[14]

As with any power inferred on the judiciary, the discretion should be wielded judiciously and in consideration of the standards of society. Given that many individuals now start a marriage or relationship with assets, it will be interesting to see if the considerations of the Court will continue to adapt with community standards because "as public policy changes, and so that pattern of decisions may change, this is all part of the evolutionary process".[15] ■

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1. *Money & Money* (1994) FLC 92-485.
2. *Bremner & Bremner* (1995) FLC 92-560.
3. *Pierce & Pierce* (1999) FLC 92-844.
4. Note 3 above, at 85,881.
5. *Williams & Williams* [2007] FamCA 313 at [46].
6. Note 5 above, at [55].
7. *Zappacosta, AP and Zappacosta*, IC (1976) FLC 98-089 and Ors.
8. [2021] FedCFamC1A 16.
9. (2020) FLC 93-961.
10. *Barnell & Barnell* (2020) FLC 93-961
11. (1986) 161 CLR 438 per Mason and Deane JJ at 453.
12. See *Mallet & Mallett* (1994) 156 CLR 605, per Gibbs CJ at 609, per Wilson at 636 and per Dawson J at 647; see also *Norbis v Norbis* 161 CLR 513 per Mason and Deane JJ.
13. [2012] HCA 52.
14. *Stanford v Stanford* [2012] HCA 52 at [36].
15. Lord Denning MR in *Ward and James* [1966] 1 QB 273 at 295 as cited in the judgment of Brennan J in Norbis at p538.