To Add Back or Not to Add Back (The treatment of assets which appear to have disappeared)

In **Spencer (No.2) [2014] FCCA 895** Judge Altobelli was confronted with a self-represented husband aged 45 and his 51 year old wife who started living together in 1997 and married in 1999.

However the Judge was also confronted with an issue that commonly arises and which has recently been complicated by the Full Family Court's decision in **Bevan [2013]** which somewhat unhelpfully disavowed the convenient even if superficial 'add back' treatment of property that once existed but no longer does.

By February 2010 the parties had separated and when the case finally came before the Court for six tortuous days in 2014 their two children were aged 13 and 10.

Both children lived with their mother and spent substantial and significant time with their father, each alternate weekend, as well as during school holidays.

There were significant issues about the constitution of the asset pool, with each party asserting that there should be add-backs and each party also contending that there were serious issues of credit, and that the other's evidence should not be accepted by the Court.

While the Full Court in **Bevan** decided in its wisdom that it's no longer appropriate to notionally 'add-back' disposed of property, it may still be a significant issue which needs to be considered as part of the history of the marriage.

Somewhat unhelpfully the Full Court has now said that such disposals must be dealt with 'carefully'.

This apparently requires a careful assessment of the evidence about the disposal of the property which in turn involves attempting to quantify it if this is at all possible, and then assessing its weight whilst neither placing too much, nor too little, weight on it.

But what does that mean in practical terms for lawyers and single court judges working at the coal-face ?

As Judge Altobelli wryly observed, maintaining jurisprudential rigour, transparency and accountability may well be challenging in the era post the demise of the traditional add-back.

However the Judge's frustrations in this case apparently weren't limited to interpreting and applying the esoteric ruminations of his judicial brethren. He was scathingly critical of the parties for having clearly lost any sense of proportionality between what they were arguing about, and the cost of the legal and judicial resources expended in chasing rabbits down numerous holes in their attempts to persuade the Court on this issue.

In the ultimate analysis, the quantification of the dissipated amounts came down to a relatively small figure; perhaps as little as $30,000 in a net pool of approximately $1M.

The Judge observed that in the context of such a pool, it is not in the public interest, nor is it an appropriate application of judicial resources, to systematically trawl through the substantial body of evidence adduced in this instance on this limited topic.

Like so many husbands and wives, each had made different types of contributions over a lengthy period and whilst there is no presumption of equality, ultimately, as is usually the case, there was simply no evidence before the Court that would cause it to assess the value of one spouse's contribution as being greater than that of the other.

Judge Altobelli concluded by observing that this litigation was completely unnecessary and had sensible legal advice been provided and heeded it would have been avoided.

While the wife's lawyer was not spared stern criticism, the Judge concluded by remarking in relation to the husband's solo performance that there is wisdom in the adage that only a fool has himself as a lawyer.