

Vanishing assets may still be part of the matrimonial asset pool (including those spent on legal fees)

In **AJO & GRO [2005] FamCA 195** the Full Court observed that there are three clear categories of cases where it is appropriate to notionally add back to the pool of assets, assets which no longer exist.

They are where:

- the parties have expended money on legal fees (see below);
- there has been a premature distribution of matrimonial assets; and
- financial losses have been incurred during the relationship as a result of one party:
 - embarking upon a course of conduct designed to reduce or minimise the effective value or worth of the parties' assets; or
 - acting recklessly, negligently or wantonly with assets of the relationship, the overall effect of which has reduced or minimised their value.

Adding Legal Fees Back into the Pool

In the recent case of **Mikono & Perez [2012] Fam CA 761** Murphy J adopted the approach taken by the Full Court in **Chorn & Hopkins (2004) FLC-204** where it confirmed that while the treatment of legal fees, within the context of a financial settlement application, is ultimately a matter within the discretion of the trial judge, the following principles are applicable to the exercise of that discretion:

- If the funds used existed at separation and are such that both parties can be seen as having an interest in them (ie by having made a direct or indirect contribution in their accrual) then such funds as are expended should be added back as a notional asset of the party who has had the benefit of them;
- If funds used to pay legal fees have been generated by a party post-separation from his or her own endeavours or received in his or her own right (ie by way of a gift or inheritance) they would generally not be added back as a notional asset, nor would any borrowing undertaken by a party post-separation to pay legal fees be taken into account as a liability in the calculation of the net property of the parties; however
- Funds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement will likely be treated differently from other post-separation income or acquisitions.

Consistent with this approach, outstanding legal fees are not generally taken into account as a liability.

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