Wolters Kluwer

Australian Master Family Law Guide

10th Edition

2019

Product Information

Disclaimer: No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is sold on the terms and understanding that (1) the authors, consultants and editors are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, and the authors, consultants and editors, expressly disclaim all and any liability and responsibility to any person, whether a purchaser or reader of this publication or not, in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication. Without limiting the generality of the above, no author, consultant or editor shall have any responsibility for any act or omission of any other author, consultant or editor.

About Wolters Kluwer

Wolters Kluwer is a leading provider of accurate, authoritative and timely information services for professionals across the globe. We create value by combining information, deep expertise and technology to provide our customers with solutions that contribute to the quality and effectiveness of their services. Professionals turn to us when they need actionable information to better serve their clients.

With the integrity and accuracy of over 45 years' experience in Australia and New Zealand, and over 175 years internationally, Wolters Kluwer is lifting the standard in software, knowledge, tools and education.

Wolters Kluwer — *When you have to be right.*

Enquiries are welcome on **1300 300 224**.

1st edition ..... April 2007

2nd edition ..... August 2008

3rd edition ..... August 2009

4th edition ..... November 2011

5th edition ..... August 2012

6th edition ..... August 2013

7th edition .....April 2015

8th edition ..... September 2016

9th edition..... October 2017

10th edition..... May 2019

ISBN: 978-1-925672-32-9

Wolters Kluwer Acknowledgments

Wolters Kluwer wishes to thank the following who contributed to and supported this publication:

Regional Director – Research and Learning: Lauren Ma

Head of Content Asia Pacific: Diana Winfield

Head of Legal Content: Carol Louw

Deputy Head of Legal Content: Sherika Ponniah

Senior Content Specialist (Family Law): Lydia Lucs

Content Coordinator: Nathan Grice

Cover Designer: Anjali Kakkad

About the authors

Dr Renata Alexander was admitted to practice in Victoria in 1979. She has practised exclusively in family law specialising in family violence, child abuse, children's matters and separate representation of children. From 1980 to 1997 she was an in-house family law solicitor and accredited specialist with Victoria Legal Aid in Melbourne; from 1997 to 2002 she was a deputy registrar with the Family Court of Australia in Melbourne and since November 2002 she has been a member of the Victorian Bar. Dr Alexander has also pursued post-graduate studies and an academic career. She has a Master of Laws by thesis from Monash University (on domestic violence) and obtained a PhD in law from Monash University in 2001 with her thesis "Reflections on gender in family law decision making in Australia". Dr Alexander has been a senior lecturer with the Faculty of Law at Monash University teaching family law and practical skills since 2000. She has written/co-written four books on family law and family violence, and numerous book chapters and articles.

Jacqueline Campbell, BA, LLB, LLM is a partner at Forte Family Lawyers and has been an accredited specialist in family law since 1991. Jacqueline has a Master of Laws from Monash University and a Graduate Diploma in Professional Writing from Deakin University. She is a Fellow of the International Academy of Family Lawyers and an Associate Member of the American Bar Association. She is a consultant editor and contributing author to Wolters Kluwer's *Australian Family Law and Practice* and was involved in the

development of the *Australian Master Family Law Guide*. She helps edit the *Australian Master Family Law Guide*.

Genevieve Dee is an Accredited Family Law Specialist and Partner at Cooper Grace Ward Lawyers. Genevieve has been a contributing author to the *Australian Master Family Law Guide* since it was first published. Genevieve regularly presents on topics relating to family law and has been recognised for her work with both complex property matters and parenting matters. Genevieve is a former councillor of the Queensland Law Society, a former Treasurer of the Women Lawyers Association of Queensland and the immediate past chair of the Queensland Law Society's Specialist Accreditation Board. Genevieve has experience in all aspects of family law, including parenting and property matters, financial agreements, spousal maintenance and child support. Genevieve's focus is on providing clients with practical and strategic advice to assist in the early resolution of matters. Genevieve gratefully acknowledges the assistance of Justine Woods of Cooper Grace Ward Lawyers for her assistance when updating the chapter relating to the use of audio and video recordings in family law proceedings.

Kay Feeney is the Director of Feeney Family Law, a Queensland Law Society Accredited Family Law Specialist and practises exclusively in family law. Kay has been admitted since 1985 and between 1995 and 2006 held a number of tribunal positions. Kay remains very engaged in the discussion of child support issues, and is a member of the Family Law Practitioners Association and the Family Law Section of the Family Law Council of Australia. She has been the Director of Feeney Family Law since 2011. She is passionate in her support of the QUT Learning Potential Fund which provides scholarships to disadvantaged students.

Stephen Mullette is a Principal at Matthews Folbigg Lawyers. He graduated from the University of New South Wales in 1995 with a Bachelor of Laws and Bachelor of Arts (majoring in German Studies). He is a member of the Australian Restructuring Insolvency and Turnaround Association (ARITA) and is a Law Society accredited specialist in commercial litigation, specialising in insolvency. Since 1996, he has been advising clients on various commercial litigation

and insolvency related issues and proceedings. Stephen regularly advises both corporations, individuals and insolvency practitioners in relation to all forms of insolvency administrations, including as they relate to family law. He has been involved in various litigation in relation to the voidable transaction provisions of the Bankruptcy and Corporations Acts. He is a regular presenter on asset protection and insolvency related issues, and has written a number of papers and articles on insolvency and commercial litigation topics which have been published in journals and bulletins such as the Insolvency Law Journal, the ARITA Australian Insolvency Journal, the LexisNexis Insolvency Law Bulletin, and Wolters Kluwer *Corporate News*.

Chris Othen practises exclusively in family law and equity matters as a barrister at Waratah Chambers Sydney. He began his legal career in the United Kingdom, before emigrating to Australia in 2005. Chris became an accredited specialist in family law that year and practised at a leading family law firm in Sydney as a solicitor until September 2011, when he went to the bar. He regularly writes papers and gives seminars for lawyers with the College of Law and other CPD providers.

Anne-Marie Rice Anne-Marie Rice is the director of Rice Dispute Resolution based in Brisbane, Qld. She is an accredited family law specialist and is regarded as one of the Queensland's best mediators and family lawyers. Anne-Marie has been a long term contributor to the Family Law Master Guide and regularly presents at local, national and international conferences and writes for industry and academic publications on wide range of technical and dispute resolution topics. She is the Family Law subject co-ordinator and lecturer at the University of Qld (where she has been nominated for the Excellence in Teaching Award), is the Qld Solicitor Representative on the Executive of the Family Law Section of The Law Council of Australia (the peak national body representing the interests of lawyers nationwide) and is the 2018 WLAQ Leneen Ford Woman Lawyer of the Year. Anne-Marie gratefully acknowledges the contributions to her chapters in this publication from Louise O'Reilly and Erin Shaw of O'Reilly Shaw Family Lawyers, Brisbane.

Preface

The publication of the 2019 edition of the *Master Family Law Guide* is a major milestone, as it is the tenth edition of the Guide. It includes significant new case law and legislative changes since the 2017 edition, and it provides a timely examination of family law in 2019. All chapters have been updated.

A major family law reform since the 2017 edition was the legalisation of same-sex marriages following a postal survey of Australians. In the survey, 61.6% of responses favoured this change. Although responding to the survey was voluntary, the total turnout was an extraordinary 79.5%. Following the survey, the Federal Parliament changed the definition of “marriage” in s 5 of the *Marriage Act 1961* (Cth) to remove the reference to it being between a man and a woman. Marriage now means “the union of 2 people, voluntarily entered into for life”, and the relevant chapters have been updated to reflect this change.

The Commonwealth, States, Family Law Legislation and Courts chapter refers to the proposed restructure of the Family Law Courts by merging the Family Court and the Federal Circuit Court. The Bills for this change did not pass Parliament and lapsed when an election was called on 11 April 2019.

The Divorce chapter has been updated for *Sikander & Vashti* (2018) FLC 93-845. The Full Court allowed an appeal against orders dismissing an application for a nullity after finding that further medical evidence demonstrated that at the time of the ceremony of marriage, the wife was incapable of giving the relevant consent and her consent was not a “real” consent for the purpose of the marriage.

The Legal Practice Matters chapter has been updated to include the requirements in each of the Family Court and the Federal Circuit Court for affidavits, such as number of pages and annexures. The chapter has also been updated to refer to legislation and case law on the use of audio and video recordings.

The Parenting Orders, Plans and Guidelines chapter has been

updated for legislative changes and to include *Re: Kelvin* (2017) FLC 93-809 and *Re: Jaden* [2017] FamCA 269, which deal with stage two treatment for gender dysphoria, whether court approval is required and a finding of Gillick-competence.

The Major Long-Term Issues chapter has been updated with new case law on relocation, particularly *Oswald & Karrington* (2016) FLC ¶93-726, where the Full Court of the Family Court allowed the mother's appeal against a coercive order requiring her and the children to move to a town closer to the father.

The Child Abduction chapter was updated for *Dept of Family* and *Community Services & Magoulas* (2018) FLC 93-856, where the Full Court provided a historical review of the authorities dealing with whether a child is settled in their new environment and the discretionary power, if any, that may exist.

The Order Enforcement and Non-compliance in Children's Cases chapter has been updated to include *Stapleton & Hayes* [2016] FamCAFC 171, where the mother successfully appealed against the imposition of a bond.

The Children and Relationship Factors chapter includes recent statistics on family violence. The three 2018 Acts which amended the *Family Law Act 1975* (Cth) (FLA) in relation to cases involving family violence are explained and the impact of the 2011 family violence changes are explored. The chapter was also updated to include the recommendations stemming from the Australian Law Reform Commission's Final Report, *Family Law for the Future: An Inquiry into the Family Law System Report* 135.

The Surrogacy chapter has been updated for legislative changes and for *Shaw & Lamb* (2018) FLC 93-826, where the Full Court considered parentage and approved the trial judge's recognition that he was bound by the Full Court's decision in *Bernieres & Dhopal* (2017) FLC 93-793.

The Property chapter has been updated to include more case law on the impact of family violence in property settlement cases. A number of recent cases on other aspects of property are included, such as

Wallis & Manning (2017) FLC 93-759 and *Anson & Meek* (2017) FLC 93-816, where the Full Court of the Family Court was critical of the approach taken by the trial judges in looking at comparable cases. Other cases have been included which look at whether it was just and equitable to make an order, the meaning of “property” and how liabilities are taken into account.

The Bankruptcy and Third Parties chapter has been updated with recent case law and legislative amendments including *Needham & Trustees of the Bankrupt Estate of Needham* [2016] FamCA 253, where the court considered the disclosure obligations of a trustee in bankruptcy and *Commissioner of Taxation v Tomaras* (2018) FLC ¶93-874 in which the High Court considered the operation of s 90AE FLA, where the wife sought that a tax debt be assigned to the husband who was bankrupt.

The Taxation Considerations chapter has been updated with new case law and legislative changes, particularly *Ellison v Sandini Pty Ltd v Federal Commissioner of Tax* [2018] FCAFC 44 in which the Full Court of the Federal Court overturned a Federal Court judgment which allowed a trust to benefit from capital gains tax rollover relief where the transfer was purportedly pursuant to an FLA order.

The Property Orders chapter was updated to include *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* (2018) FLC 93-824, where the Full Court confirmed the preferred approach is not to bifurcate s 79A and s 79 proceedings, but to hear them together.

The Superannuation chapter has been updated to refer to the new legislative provisions as Pt VIIIB FLA has been completely renumbered. There is a comparative table setting out the former and current provisions. New cases in the chapter include *Tennant & Tennant* [2018] FamCA 111, where there was a dispute as to how interest on the base amount in a superannuation split should be calculated, and *Bulow & Bulow* (2019) FLC 93-885, where the Full Court of the Family Court found that the trial judge had not considered the nature, form and characteristics of the husband’s defined benefit fund when making a splitting order in favour of the wife.

The Financial Agreements chapter now includes a new section on

Practical Tips. The landmark decision of *Thorne v Kennedy* (2017) FLC 93-807 is explained, where the High Court found that the wife had been subject to undue influence and unconscionable conduct. Another important case was *Jess & Garvey* (2018) FLC 93-827, where the Full Court of the Family Court held that *Anshun* estoppel applied. The wife could not raise new causes of action which she could and should have raised at an earlier stage of the proceedings.

The Child Support and Maintenance chapter has been updated for substantial legislative amendments relating to change of care, the impact of amended tax assessments and the setting aside of child support agreements made before 1 July 2008. This chapter includes the Costs of Children Table for 2019 and updated examples using 2019 figures.

The De Facto Relationships chapter was updated for amendments to s 44(5).

Australian Family Law and Practice is one of Wolters Kluwer's flagship looseleaf services. It was the foundation for the *Australian Master Family Law Guide*. The skill and expertise, hard work and dedication of contributors since its inception must be recognised. Wolters Kluwer is grateful to the following people who have substantively contributed to the *Australian Family Law and Practice* since it was first published:

- Judge Tom Altobelli
- Martin Bartfeld QC
- Juliet Behrens
- Malcolm D Broun QC
- Jacqueline Campbell
- Scott Charaneka
- Peter Crofts
- Chris Crowley
- Anthony Dickey QC
- Tedd Jordan
- Lisa Lahey
- Kathryn McMillan SC
- Sarah Minnery
- Stephen Mullette
- Rachael Murray
- Sally Nicholes
- Damian O'Connor
- Gary O'Gorman

- Paul Doolan
- Hon John Ellis
- Kay Feeney
- Rodger Flynn
- Stuart G Fowler
- Brett Harley
- Maree Henshaw
- Neil Jackson
- Chris Othen
- Graeme Page SC
- Judge Grant Reithmuller
- Anne-Marie Rice
- Hon Peter Rose AM QC
- Geoff Sinclair
- John Wade
- Geoff Wilson

The *Australian Master Family Law Guide* was written by practitioners who contributed their time, dedication, knowledge and expertise. The authors immersed themselves in the challenge of producing and updating a single-volume reference work which a broad range of professionals could use.

I commend to you the tenth edition of the *Australian Master Family Law Guide*.

Jacqueline Campbell, BA, LLB, LLM, Grad Dip PW

Partner, Forte Family Lawyers

3 May 2019

Part A — Family law legal system & practice

COMMONWEALTH, STATES, FAMILY LAW LEGISLATION AND COURTS

Editorial information

Written by the Hon John Fogarty

¶1-000 Introduction

“Family law” is a generic term to describe those laws and courts which regulate what may be broadly described as issues arising out of family relationships. With greater recent involvement of the legislature in many aspects of that relationship, and greater diversity in what constitutes a family, family law is increasingly complex and changing. After years of debate, Australia became the 25th country to recognise

same-sex marriage in 2017. From 9 December 2017, gender no longer affects the right to marry under Australian law. Recognition of same-sex marriage ripples throughout family law.

In a perfect world it would be usual to think of family law as having its source in one or two overall pieces of legislation and being administered by the one court or a connected hierarchy of courts. However, this is far from the case in Australia. The division of legislative powers in this area between the states (previously colonies) and the new federal parliament brought about by the Constitution in 1901, and the history of the administration of those laws through various courts, creates great complexity. They make it necessary to look at the Constitution, a number of statutes and a number of courts to obtain the full picture and to decide which law applies and which court is appropriate. In some cases, the answer to these complexities lies in the Constitution; in others, the answer lies in history.

While one may look primarily at the *Family Law Act 1975* (Cth) (FLA) for the legislation, there are a number of other Commonwealth Acts, and a significant number of state and territory Acts, which apply to some aspects of family law, namely:

- *Federal Circuit Court Act 1999*
- *Child Support (Assessment) Act 1989*
- *Child Support (Registration and Collection) Act 1988*
- *Bankruptcy Act 1966*
- *Marriage Act 1961*
- *Australian Passports Act 2005*
- *Family Court of Australia (Additional Jurisdiction and Exercise of Power) Act 1988*
- *Family Court Act 1975* (WA)
- state and territory adoption legislation

- state and territory child protection legislation
- state and territory domestic violence legislation, and
- state and territory family provision legislation.

A number of courts apply these laws, some concurrently, some exclusively. Those courts are:

- High Court of Australia
- Family Court of Australia
- Federal Court of Australia
- Family Court of Western Australia
- Federal Circuit Court of Australia
- supreme courts of the states and territories
- district or county courts of the states
- courts of summary jurisdiction of the states and territories, and
- children's courts of the states and territories.

¶1-010 Jurisdiction and power

In this chapter, generally, no distinction is drawn between the terms "jurisdiction" and "power". They are often used interchangeably even though there are important distinctions between them.

"Jurisdiction" concerns the authority that a court has over a particular subject matter of litigation, while "power" concerns the ability of the court to make particular orders. A court of limited jurisdiction has only such jurisdiction and power as are granted to it by legislation or by implication. This may mean that from time to time such a court, although acting within its jurisdiction, does not possess the power to make orders that may otherwise seem to be appropriate.

The supreme courts of the states are courts of general jurisdiction. That is, they are presumed to have the jurisdiction and the power to make appropriate orders unless excluded by legislation. Other courts in Australia are courts of limited jurisdiction and have only such jurisdiction as is specifically or by implication given by legislation. This latter circumstance is so even though a number of these courts are referred to in their creating legislation as “superior courts of record”, including the Family Court which also has appellate jurisdiction.

In 2018 Federal Government introduced legislation which, if enacted, would have resulted in a merger of the Family Court and the Federal Circuit Court into a single Federal Circuit and Family Court of Australia with two divisions. This highly controversial and topical reform was the subject of a Senate Inquiry report from early 2019, which recommended that the legislation be passed with some amendments, although the Australian Labor Party submitted a minority report which did not recommend such a reform be considered until after the much-anticipated Australian Law Reform Commission (ALRC) report into family law was published. The ALRC report has now been published, the merger bills ultimately did not pass, and neither of the major political parties has committed to implementing any of the recommendations contained in it. With a federal election called for May 2019, and no political consensus as to the future of the courts, or indeed the current form of the *Family Law Act 1975*, it is impossible to state at date of publication what the family law landscape will appear like in the short- to mid-term.

¶1-020 Constitutional background

In 1901, the Constitution created the Federal Parliament of Australia, which was to exist side by side with the parliaments of the states (formerly colonies), in a federal system. There were then no separate territories. The Northern Territory was part of South Australia, and the Australian Capital Territory was part of New South Wales. The Constitution made provision for their later inclusion.

Prior to 1901, the legislative powers of the colonies in Australia were vested in the British Parliament and in the parliaments of the colonies.

The courts created by the colonies, namely, the supreme courts and the courts of summary jurisdiction (usually now referred to as magistrates courts) administered the laws.

Under the Constitution, legislative power was divided by authorising the federal parliament to exercise designated powers while the states retained the balance. Generally speaking, the states continued to be able to exercise areas of potential Commonwealth power until there was Commonwealth legislation that was inconsistent with the state legislation (see s 109 of the Constitution). This latter circumstance was to be of particular significance in family law.

The powers assigned to the Commonwealth are mainly to be found in s 51 of the Constitution. So far as the broad area of family law is concerned, it was empowered to make laws for the peace, order and good government of the Commonwealth with respect to:

- marriage (s 51(xxi)), and
- divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants (s 51(xxii)).

In addition there are a number of less direct heads of power:

- taxation (s 51(ii))
- bankruptcy and insolvency (s 51(xvii))
- service of process through the Commonwealth (s 51(xxiv))
- immigration and emigration (s 51(xxvii))
- external affairs (s 51(xxix))
- matters incidental to the execution of any power vested by the Constitution in the federal judicature (s 51(xxxix)), and
- the territory power (s 122).

Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court, and in such other

courts as the parliament creates and invests with federal jurisdiction. Section 77 empowers the federal parliament to make laws defining the jurisdiction of any federal court (other than the High Court whose powers are defined in the Constitution) and investing any court of a state with defined federal jurisdiction.

The federal parliament was slow in exercising the principal areas of family law, namely, divorce and marriage. Subject to some minor exceptions, the marriage and divorce powers were not exercised until the introduction of the *Matrimonial Causes Act 1959* (Cth) and the *Marriage Act 1961* (Cth) respectively. Until then the legislation of the states continued to apply in those areas.

The federal parliament readily invested state courts with various heads of federal judicial power. Putting aside the Bankruptcy Court and industrial courts, no federal courts were established until the Family Court of Australia in 1975 and Federal Court of Australia in 1976, to be followed in 1999 by the Federal Magistrates Court of Australia (now called the Federal Circuit Court of Australia).

Until 1975 jurisdiction under the *Matrimonial Causes Act 1959* and the *Marriage Act 1961* were exercised through vested state courts. Once the Family Court came into existence, it exercised the federal marriage and divorce powers assigned to it in all states and territories except Western Australia where the Family Court of Western Australia was established.

The Federal Circuit Court of Australia was established to administer most matters dealt with by the Family Court as well as many aspects of the jurisdiction of the Federal Court.

State courts also continued to exercise these powers or some of them. Some state courts have been phased out while others have continued to exercise some of these federal powers.

¶1-030 Referral of powers

A further aspect of the Constitution which is of importance in these areas is s 51(xxxvii). It empowers the federal parliament to exercise legislative power in relation to matters referred to it by the parliaments

of the states or any of them. That power was exercised in relation to children by all of the states (except Western Australia) between 1986 and 1990.

The terms of the referral were:

> "(a) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (b) the custody and guardianship of, and access to, children".

See, for example, *Commonwealth Powers (Family Law — Children) Act 1986* (NSW).

This was done to overcome an acute problem which had developed by that time. In a series of cases, the High Court had concluded that the Commonwealth marriage and divorce powers applied only to children whose parents were or had been married. This created an unsatisfactory dichotomy, namely, that for children of a marriage, proceedings could only be taken within the federal family law structure. Whereas for ex-nuptial children (including stepchildren and other children who may have formed part of a family household), proceedings could only be taken in a state or territory court.

The powers in relation to adoption of children and child protection were not transferred. There remain overlaps between these two state/territory powers and the children powers of the Commonwealth (see ¶1-180–¶1-190) and, in addition, legislation about domestic violence may be enacted by both the Commonwealth and the states/territories. The latter's family provision legislation and the Commonwealth's property and maintenance legislation create further complications (see ¶1-200).

Western Australia did not join in the referral of powers. Those powers are vested in its state Family Court alongside the powers vested in it under the Commonwealth legislation and other Western Australian family law powers. In practical terms this creates no difficulty in Western Australia, except that appeals from the Family Court when it is exercising state jurisdiction go through the state appeal process. When it exercises Commonwealth jurisdiction, the appeal process is

provided in the *Family Law Act 1975* (Cth) (FLA). Legislation generally ensures that the Western Australian powers apply only within that state. Otherwise, Western Australia has the closest in Australia to an integrated legislative and court structure.

A further matter relating to the referral of powers should be noted at this stage and is dealt with in more detail at ¶1-120. This relates to the "welfare" powers in respect of children which have always been part of the inherent jurisdiction of the state supreme courts.

More recently, most states referred the power with respect to property settlement, spousal maintenance and financial agreements for de facto couples to the Commonwealth. These matters are now primarily dealt with by Pt VIIIAB FLA.

¶1-040 Constitution difficulties

When the marriage and divorce powers came to be exercised by the Commonwealth, difficulties inherent in them became apparent. The marriage power was given a wide interpretation by the High Court in *Attorney-General (Vic) v The Commonwealth* (*Marriage Act* case).[1] The High Court rejected the view that that jurisdiction related only to the circumstances of a marriage and adopted the much wider view that it covered all matters sufficiently connected with a marriage. That includes the powers to make laws with respect to the property and maintenance of the parties to a marriage and about the custody, guardianship and maintenance of children of a marriage.

The divorce power created some difficulties, particularly in relation to what was encompassed by the terms "matrimonial cause", "parental rights" and "infants". Ultimately a series of decisions of the High Court[2] has, over time, created a settled position in relation to the scope of jurisdiction under the *Family Law Act 1975* (Cth). The end result is unsatisfactory, but is incapable of serious change except by amendment to the Constitution or referral of powers by the states (see ¶1-050).

Footnotes

1 *Attorney-General (Vic)* v *The Commonwealth* (1962) 107 CLR 529.

2 *Russell* v *Russell*; *Farrelly* v *Farrelly* (1976) FLC ¶90-039; *Fountain* v *Alexander* (1982) FLC ¶91-218 and *Re F*; *Ex parte F* (1986) FLC ¶91-739.

¶1-050 Family Law Act 1975

The *Family Law Act 1975* (Cth) (FLA) is the central legislative provision relating to family law. Enacted in 1975, it sets out in detail its wide jurisdiction. It provides for the establishment of the Family Court of Australia and for the establishment of state family courts (taken up only by Western Australia). It further provides those courts, and some state courts, and the Federal Circuit Court, with jurisdiction in relation to some or all of its provisions.

The FLA also makes provision for non-court-based services, including the extensive use of reconciliation, mediation, arbitration and family dispute resolution, and the use of family consultants.

Jurisdiction under the FLA is delineated by the definitions of "matrimonial cause" and "de facto financial cause" in s 4 to cover the following:

- divorce and nullity of marriage
- a declaration as to the validity of a marriage, divorce or annulment
- property adjustment
- maintenance of a party
- injunctions, and
- enforcement.

Part VII of the FLA separately confers jurisdiction to make parenting orders and child maintenance orders in cases where the child support legislation is excluded. Part XIIIAA of the FLA confers jurisdiction in proceedings under the Hague Convention on child abduction and other international conventions and agreements.

The courts which may exercise some or all of this jurisdiction are:

- Family Court of Australia
- Family Court of Western Australia
- the Supreme Court of the Northern Territory
- the Federal Circuit Court of Australia, and
- state and territory courts of summary jurisdiction.

The details of the jurisdiction of each court are set out below.

Principles to be applied

Section 43 of the FLA provides that courts exercising jurisdiction under the FLA shall have regard to:

> "(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (ca) the need to ensure protection from family violence; and
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their

relationship to each other and to their children".

In addition, Pt VII provides detailed provisions relating to the objects and principles to be applied in proceedings relating to children.

Delegation

The Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia have extensive powers to delegate most of their powers to registrars.

¶1-060 Further Commonwealth bases of jurisdiction under the Family Law Act 1975

Further bases of jurisdiction under the *Family Law Act 1975* (Cth) (FLA) are or were:

- accrued jurisdiction
- associated jurisdiction
- implied or inherent jurisdiction
- cross-vesting, and
- corporations power.

¶1-070 Accrued jurisdiction

This jurisdiction (at times referred to as the "pendent" jurisdiction) arises from the term "matter" (a justiciable controversy) in s 76 and 77 of the Constitution, relating to the jurisdiction of courts, and the use of that term in the *Family Law Act 1975* (Cth) (FLA) provisions that confer jurisdiction on the Family Court of Australia and on the Federal Circuit Court.

The effect is that, if the Family Court has jurisdiction in a matter, that jurisdiction extends to the resolution of the whole matter embraced by the controversy. It covers matters otherwise outside federal jurisdiction but the resolution of which form an integral part of the resolution of the

federal matter. They are usually issues which are not severable in practical terms and arise out of the same sub-stratum of facts.

The essential element is that there is a sufficiently close connection between the two controversies, this being ultimately a matter of "impression and practical judgment".[3] This jurisdiction is to be contrasted with the associated jurisdiction (see ¶1-080). Accrued jurisdiction relates to an inclusion of a non-federal matter whereas the associated jurisdiction relates to the inclusion of a federal matter.

The decision whether to exercise the power is a matter of discretion involving a number of factors, including the closeness of the issues and the more convenient forum. Where the court takes up accrued jurisdiction it may make such orders as are appropriate and necessary to determine both the family law issues and the accrued issues.

In practical terms, this jurisdiction is largely confined to family law property issues in which a third party has or is claimed to have an interest (a state matter). The determination of both issues is usually necessary to adequately deal with the family law proceedings.

Between 1986 and 1999, this jurisdiction was largely overshadowed by the cross-vesting scheme which was much wider (see ¶1-100). It is important to note, that while the accrued jurisdiction fills part of the void left by the demise of cross-vesting, it is not a substitute for it and is more confined. It should also be noted that it is not a freestanding jurisdiction. There must be a genuine FLA proceeding in existence in the court before a state issue can be attracted.

Footnotes

3 *Philip Morris Inc* v *Adam P Brown Male Fashions Pty Ltd* (1981) ATPR ¶40-197.

¶1-080 Associated jurisdiction

Section 33 of the *Family Law Act 1975* (Cth) (FLA) gives to the Family

Court (and the Federal Circuit Court) jurisdiction in relation to federal matters not within the FLA, but which are sufficiently associated with that court's jurisdiction.[4]

The jurisdiction is limited in a number of respects. First, it is limited to matters which arise under other Commonwealth laws. It does not apply to state laws (which may be picked up by the accrued jurisdiction) and probably not to areas where the Commonwealth could have but has not legislated.

Secondly, the two matters must be sufficiently associated. This is a question of degree depending upon the matters arising out of substantially the same or closely connected facts.

Thirdly, it is not a freestanding jurisdiction. There must be a genuine FLA proceeding in existence which attracts the associated federal matter.

Footnotes

4 Ibid.

¶1-090 Implied or inherent power

All courts, including courts of limited jurisdiction, have, in addition to the powers expressly given to them by statute, powers which are to be implied from their existence as a court or which are inherent in the circumstance that it is a court. The terms "implied" and "inherent" are largely used interchangeably, although it may be that the former is more appropriate to courts of limited jurisdiction.

This jurisdiction involves powers which are incidental to or necessary for the proper functioning of the court as a court, to protect itself from abuse of its procedures, to avoid injustice, or to make its express powers more effective.

It is not possible to define its ambit in absolute terms but the following

examples are illustrative (a number of them are now to be found in express provisions in the rules of the courts):

- granting an adjournment
- granting amendments to an application or pleadings
- setting aside a subpoena
- setting aside ex parte or default orders or orders otherwise obtained in breach of natural justice
- correcting an error in an order which arises from a slip or accidental omission
- dismissing or staying an action as frivolous or vexatious or as not disclosing a reasonable cause of action, or where there is a want of prosecution or a failure to comply with the rules or previous orders
- having regard to pending proceedings in a court in another country where the proceedings in the Australian court constitute a "clearly inappropriate forum" (see ¶1-130), and
- establishing costs, including lawyer and client costs.

Example

***Re Colina; Ex parte Torney* (1999) FLC ¶92-872**

Proceedings for contempt of court, often referred to as part of the implied or inherent power of a court may, so far as federal courts are concerned, have a more specific source. In *Re Colina*; *Ex parte Torney*, several members of the High Court in that appeal, after referring to express statutory provisions in the FLA relating to contempt, said that those provisions "should be read as clarifying an attribute of the judicial power of the Commonwealth which is vested in [the relevant courts] by s 71 of the Constitution".

¶1-100 Cross-vesting

The cross-vesting scheme between the states, territories and the

Commonwealth came into operation in July 1988. With the establishment of federal courts alongside state courts and the increased intrusion by Commonwealth legislation into, in particular, commercial areas, there were issues as to which legislation applied and to what extent and also which court, state or federal, was appropriate. The latter circumstance led at times to proceedings being instituted in both sets of courts.

The problems were mainly in commercial areas but cross-vesting also had relevance in family law, for example, proceedings by non-married couples relating to their children had to be heard under the *Family Law Act 1975* (Cth) (FLA), whereas proceedings relating to their property had to be heard in a state court. In addition, there were significant forum conflicts between the FLA and state and territory child protection legislation.

The Constitution permits the federal government to invest state courts with federal jurisdiction, and there are no particular difficulties about the transfer of proceedings as between federal courts. The problem was whether federal courts could be invested with state jurisdiction. If so, a decision could readily be made as to which was the appropriate law and forum in these problem areas.

The cross-vesting legislation proved very beneficial. In family law it enabled the Family Court to hear not only the ex-nuptial child proceedings but, by transfer from the state courts, the property proceedings at the same time. It also enabled state child protection proceedings to be transferred to the Family Court where that latter court already had proceedings before it relating to the child (although this arrangement was not utilised frequently).

The High Court in *Re Wakim*; *Ex parte McNally*,[5] held unconstitutional that part of the scheme which provided cross-vesting of state jurisdiction to federal courts. This took away the main thrust of the legislation. However, a number of aspects of cross-vesting remain, namely:

- cross-vesting of the jurisdiction of the Federal Court and the Family Court to the supreme courts of each state and territory and to each other

- cross-vesting of jurisdiction between the supreme courts of the states and territories

- cross-vesting of the jurisdiction of the supreme courts of the states and territories to the Family Court of Western Australia, and

- cross-vesting of the jurisdiction of the supreme courts of the territories to the Federal Court and the Family Court.

Given much court business under the FLA is conducted in the Federal Circuit Court, it is important to note that the cross-vesting legislation does not refer the Federal Circuit Court as a court to which proceedings can be transferred. This means that while proceedings in the Federal Circuit Court can be transferred to state supreme courts, the reverse does not apply.

The enactment of the *Corporations Act 2001* (Cth) (see ¶1-110), which vested jurisdiction in both federal and state courts directly, has largely overcome the difficulties in the commercial area.

In addition, the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth) was passed about the same time as the cross-vesting legislation. It provides for the transfer of proceedings from the Federal Court to the Family Court. However, this legislation has rarely been used.

Footnotes

5 *Re Wakim*; *ex parte McNally* [1999] HCA 27.

¶1-110 Corporations Act 2001

This legislation followed the decision of the High Court in *Re Wakim*; *Ex parte McNally*,[6] which held invalid important aspects of the cross-vesting scheme and the *Corporations Act 2001* (Cth) (CA) (see ¶1-100). Following a referral of these powers by the states/territories, the

CA created a uniform national scheme of federal legislation in that area.

That is, the jurisdiction in respect of civil matters arising out of the CA is conferred on the Federal Court, supreme courts of the states, (and lower courts of each state), the Northern Territory and the Australian Capital Territory, the Family Court of Australia and the Family Court of Western Australia.

Under the cross-vesting scheme and the CA, there are quite specific provisions relating to the transfer of these proceedings between various courts. A pending matter in the Federal Court or in a supreme court may be transferred to another court, including the Family Court, where it appears that, having regard to the interests of justice, it is more appropriate for the proceedings to be determined by that latter court.

However, where there are relevant pending proceedings in the Family Court, those proceedings must be transferred to the Federal Court or to a supreme court where the Family Court is satisfied of certain criteria.

Footnotes

6 Ibid.

¶1-120 Welfare jurisdiction and special medical procedures

The supreme courts of the states, as courts of general jurisdiction, have always been able to exercise the welfare jurisdiction in relation to children and other persons with a disability. This arose from the prerogative power of the Crown to intervene to protect a person with a disability. Gradually that power evolved in England to the chancellors and chancery courts and later in Australia to the supreme courts.

This is a wide-ranging jurisdiction, which is difficult to define with

precision. Originally, the *Family Law Act 1975* (Cth) (FLA) contained no welfare power, and it would seem that the state courts continued to have this power over all children. However, the 1983 amendments to the FLA provided that, in addition to its powers in relation to guardianship and custody, the Family Court had jurisdiction in relation to the "welfare" of a child.[7] This was regarded as granting to the Family Court power similar to the welfare power of the supreme courts, except that it only applied to children of a marriage or former marriage. From 1986, the various states (except Western Australia) referred their powers in relation to children to the Commonwealth but in terms confined to "the custody and guardianship of and access, to children" without reference to "welfare".

The consequence was that the Family Court's welfare power continues to be confined to children of a marriage or former marriage. The states' supreme courts continue to have this power in relation to ex-nuptial children, and it remains an uncertain question whether they continue to possess that jurisdiction in relation to children of a marriage or former marriage.

The decision of the High Court in *Minister for Immigration & Ethnic Affairs, Multicultural & Indigenous Affairs* v *B*[8] (a migration case) made clear that the operation of the Family Court's welfare power is confined to areas involving the parental responsibilities of the parents for that child. This is so because the ambit of the jurisdiction that the legislation can provide is defined by the Constitution, namely marriage and divorce. There is no separate welfare head of power. It does not bind third parties. In particular, that decision made clear that in that case the jurisdiction did not extend to the Family Court determining the validity of the detention of a child of marriage or to make orders directed to third parties exercising their duties under the *Migration Act 1958* (Cth).

An important aspect of the Family Court's welfare jurisdiction is the authorisation of special medical procedures. The early cases in Australia related to the specific issue of the sterilisation of intellectually challenged children,[9] but the power can apply to a wide range of complex medical questions, including gender reassignment of a

teenage child, cardiac surgery on a child in the absence of parental consent, and, as UK cases show, surgery to separate conjoined twins.

It seems probable that the major developments in the welfare jurisdiction of the Family Court will be in these areas, although it is subject to the limitations referred to above and does not correspond fully with the ambit of the original welfare jurisdiction.

Footnotes

7 *Secretary, Department of Health and Community Services* v *JWB and SMB* (Marion's case) (1992) FLC ¶92-293 and *P* v *P* (1994) FLC ¶92-462.

8 *Minister for Immigration & Ethnic Affairs, Multicultural & Indigenous Affairs* v *B* (2004) FLC ¶93-174.

9 *Secretary, Department of Health and Community Services* v *JWB and SMB* (Marion's case) (1992) FLC ¶92-293 and *P* v *P* (1994) FLC ¶92-462.

¶1-130 Connection with the jurisdiction

As a matter of comity between nations, the laws of most countries require a connection between that country and litigation in its courts. This is particularly important in family law because decisions in this field can affect the status of the parties and the children, and need to attract recognition in other countries.

The *Family Law Act 1975* (Cth) (FLA) has different criteria for proceedings as follows:

- Proceedings for divorce require that the applicant be:
  - an Australian citizen
  - domiciled in Australia, or

– ordinarily resident in Australia and been so resident for one year immediately preceding the institution of the proceedings.

- Proceedings for a declaration as to the validity of a marriage, divorce or annulment require:
  – either party to the marriage to be an Australian citizen
  – either party to be ordinarily resident in Australia, or
  – either party to be present in Australia.

At the time an application for a declaration of the existence of or duration of a de facto relationship is made for the purposes of a de facto financial cause under the *Family Law Act 1975*, the court must be satisfied that one or both of the parties were ordinarily resident in a participating jurisdiction when the primary proceedings were commenced (s 90RG). In proceeding of a de facto financial cause, a declaration as to property rights or an order as to the alteration of property interests requires the geographical requirements of s 90SK(1) to be met. Similarly, a maintenance order can only be made if the court is satisfied that the geographical requirements of s 90SD (repetitive of s 90SK) are met (s 90SD(1)). The requirements are:

- either party was ordinarily resident in a participating jurisdiction when the declaration or order was made, and
- either or both parties were ordinarily resident in participating jurisdictions during at least a third of the relationship or the applicant made substantial contributions in relation to the de facto relationship under s 90SM(4)(a) to (c) in one or more participating jurisdictions.

In the alternative, the geographical requirement is met if the parties were ordinarily resident in a participating jurisdiction as at the date the de facto relationship came to an end.

Two or more people can make a Pt VIIIAB financial agreement as long as the parties are ordinarily resident in a participating jurisdiction when they make the agreement (s 90UA).

In proceedings relating to children, the FLA has particular requirements, namely that:

- the child is present in Australia
- the child is an Australian citizen or ordinarily resident in Australia
- a parent of the child is an Australian citizen or is ordinarily resident in Australia or is present in Australia
- a party to the proceedings is an Australian citizen, is ordinarily resident in Australia or is present in Australia, or
- where in accordance with a treaty, arrangement or the common law rules of private international law, it is appropriate for a court to exercise jurisdiction.

Thus, the connection with the jurisdiction for proceedings relating to children is wide. But a particular limitation is that a court of the Northern Territory must not hear such proceedings unless at least one of the parties was ordinarily resident in the territory at the time the proceedings were instituted. The Family Court of Western Australia is confined to hearing proceedings involving children located within that state.

Any other proceedings (other than some ancillary proceedings) require a party to be:

- an Australian citizen
- ordinarily resident in Australia, or
- present in Australia.

However, the above is subject to the following:

- Parenting orders may be made in favour of a person who is not a party to the proceedings.
- Proceedings under the Hague Convention on Child Abduction are instituted in Australia by the Central Authority which is in effect

acting for the relevant parent but who is not a party to those proceedings and is usually overseas.

- There is a “clearly inappropriate forum” principle. This relates to proceedings that have been validly instituted in Australia, but where there are existing or anticipated proceedings on the same subject matter in the court of another country. If the Australian court considers that it is a clearly inappropriate forum (essentially because the proceedings have a much closer connection with the court of the other country), it may stay or dismiss its proceedings. The decision of the High Court in *Henry* v *Henry*[10] is a striking example. The High Court ordered the stay of Australian divorce proceedings instituted by the husband who was domiciled in Australia because there were anticipated proceedings relating to divorce and property in European courts to which the parties were more closely connected.

- A court may decline to exercise jurisdiction where it considers that it would be futile to act. Common examples include proceedings relating to property which is, or a child (other than a convention child) who is, in another country and where Australian orders will not be efficacious.

- The FLA gives power to courts under the FLA to transfer proceedings to another Australian court having jurisdiction under that Act where there is a pending proceeding relating to the same subject matter.

- A court has power to stay or dismiss proceedings that it considers to be frivolous or vexatious or which disclose no reasonable cause of action or where there has been a want of prosecution or a failure to comply with rules or previous orders.

Footnotes

10 *Henry* v *Henry* (1996) FLC ¶92-685.

¶1-140 Marriage Act 1961

The *Marriage Act 1961* (Cth) (MA) is largely directed to uniformity in relation to marriages in Australia. Up to the time of the MA's enactment in 1961, each state and territory had its own legislation. On 7 December 2017, the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* was passed and came into effect on 9 December 2017. This changed the definition of marriage in the MA to "the union of two people to exclusion of all others, voluntarily entered into for life" and so legalised same-sex marriage in Australia.

In addition, the MA covers the following:

- marriageable age
- void marriages
- legitimation of children, and
- offences.

Certain judges and magistrates are empowered to exercise powers within these areas — judges of the Family Court of Australia and the Family Court of a state, a judge of the supreme court of a territory and certain state/territory magistrates.

Their jurisdiction involves the following:

- A person who has attained the age of 16 years but has not attained the age of 18 years may apply for an order authorising him or her to marry a person of marriageable age. The circumstances must be exceptional or unusual.
- A minor may apply for consent to marry in place of the consent of a relevant person.
- A person may apply for a declaration as to the legitimacy.

In addition:

- The MA defines the grounds upon which a marriage is a nullity. It

abolishes the previous distinction between a void and a voidable marriage. The proceedings are brought under the *Family Law Act 1975* (Cth) (FLA).

- The FLA also provides for applications for a declaration of the validity of a marriage, divorce or annulment.

¶1-150 Child support

A major aspect of family law is the maintenance of children (more recently referred to as “child support”). Historically this jurisdiction was regulated by the laws of the states and administered by the courts of summary jurisdiction (except when associated with a divorce of that child’s parents).

The *Family Law Act 1975* (Cth) (FLA) made provision for child support, but that jurisdiction was confined to children of a marriage or former marriage. It is only with the referral of powers relating to children by the states to the Commonwealth (except Western Australia), from 1986, that the Commonwealth child support legislation can cover all children (subject to the exceptions referred to below).

Shortly after that, the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Child Support (Assessment) Act 1989* (Cth) (the Assessment Act) were passed and significant amendments were made to the FLA.

The Assessment Act is the major Act. It provides the basis for the determination of child support for most children. The *Child Support (Registration and Collection) Act 1988* (Cth) is largely concerned with the registration of assessments and agreements and their enforcement. The FLA covers those children who do not fall within the scope of the Assessment Act (predominantly the maintenance of stepchildren and adult children. Adult children usually must be students completing a course of tertiary study or adult children with a disability to be eligible for adult child maintenance). There is a prohibition at s 66E of the FLA against child maintenance orders being made if an application for an assessment under the Assessment Act can be made.

The Assessment Act provides for the assessment of child support administratively by the application of a formula that has regard to, inter alia, the cost of raising children, the number of children and the income of the parties. It also provides for the acceptance of child support agreements.

Liability under the Assessment Act is confined to the parents of the child, including an adopted child and a child born as a result of an artificial conception procedure. The Assessment Act covers all children other than the following:

- a child over the age of 18 years
- a child who is otherwise not an eligible child (as defined)
- a child making an application for child support, and
- a stepchild.

These categories are picked up by the FLA.

Involvement of courts is limited and confined to the following matters:

- entitlement to assessment
- incorrect assessments
- departure orders
- child support other than by periodic amounts
- setting aside child support agreements
- urgent maintenance in very limited circumstances relating to the process of obtaining an assessment, and
- enforcement, including enforcement of child support agreements, and arrears of child support registered for collection by the Commonwealth.

The courts which may exercise this jurisdiction are:

- Family Court of Australia
- Family Court of Western Australia
- Federal Circuit Court
- Supreme Court of the Northern Territory, and
- state and territory courts of summary jurisdiction.

Application for an assessment must be made by an “eligible carer”. At the time the application is made the child must be present in Australia, an Australian citizen or normally resident in Australia. The liable parent must be resident in Australia.

Family Law Act 1975

Once the child support scheme came into operation, the jurisdiction in relation to child maintenance under the FLA was confined to categories which could not be conveniently provided for by the Assessment Act formula. Those categories are referred to above.

The primary liability relates to the parents of the child; however, the FLA provides a limited category where an order may be made in respect of a stepchild.

An application for child support under the FLA may be made by:

- either or both parents
- the child
- a grandparent, and
- any person concerned with the care, welfare or development of the child.

The jurisdiction may be exercised by:

- Family Court of Australia
- Family Court of Western Australia

- Supreme Court of the Northern Territory
- Federal Circuit Court, and
- the courts of summary jurisdiction of the states/territories.

Child Support (Registration and Collection) Act 1988

The *Child Support (Registration and Collection) Act 1988* (Cth) is mainly concerned with administrative matters — the registration and collection of child support liabilities. The registrar is given a wide range of collection powers and is required to make a wide range of decisions.

The registrar may make a departure prohibition order that prevents a child support payee who is in default in payments from leaving Australia.

Reviews and appeals of child support decisions

The Assessment Act has an internal review process of decisions. If not satisfied with the review by a senior officer, reviews of some decisions go to the Administrative Appeals Tribunal as a hearing *de novo*.

Appeals from administrative review decisions go to the Federal Circuit Court but on a question of law only.

¶1-160 Australian Passports Act 2005

The *Australian Passports Act 2005* (Cth) (the Passports Act) regulates the issue of passports for Australian citizens. In relation to a child, this can intercept with family law. There may be a family dispute about the child, especially a risk of unlawful removal, or a wrongful refusal by a person to consent to the other parent obtaining a passport.

The Passports Act provides that the minister shall not issue an Australian passport to a child unless:

> "(a) each person who has parental responsibility for the child consents to the child travelling internationally; or

(b) an order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally" (s 11(1)).

In addition, the *Family Law Act 1975* (Cth) (FLA) empowers courts within its jurisdiction to grant an injunction restraining a child from being taken overseas or obtaining a passport, or it may order a party to consent to the issue of a passport for the child or otherwise provide for that to occur. The FLA also provides that, where there is a possibility or threat that a child may be removed from Australia, a court may make an order that the passport of the child or any other person concerned be delivered to the court.

The FLA also imposes obligations on the owners of aircraft and ships to aid in the prevention of a wrongful removal of a child.

¶1-170 Bankruptcy Act 1966

A number of conflicts arise from the interplay of the *Family Law Act 1975* (Cth) (FLA) and the *Bankruptcy Act 1966* (Cth) (BA) — essentially a clash in priorities for claims on the bankrupt's estate between the bankrupt's creditors and the non-bankrupt spouse.

These include the nature of any claim by the non-bankrupt spouse to an interest in property (which may be in the name of the bankrupt and has, as a result of the bankruptcy, vested in the trustee in bankruptcy), arising out of equitable or other interests or contributions to that property during the marriage whether under the general property law provisions or the FLA or otherwise.

These problems may also include the reverse, namely claims by the trustee in bankruptcy that property had been transferred to the non-bankrupt spouse by the bankrupt so as to defeat the provisions of the BA.

The *Bankruptcy and Family Law Legislation Amendment Act 2005* amended the BA and the FLA to address some of these problems. (These matters are dealt with in more detail in Chapter 15.) Some of the more significant changes include:

- An act of bankruptcy is committed if the debtor becomes insolvent

as a result of the transfer of property under a financial agreement under the FLA to which that debtor is a party.

- The Family Court of Australia has jurisdiction in bankruptcy where there are family law and bankruptcy proceedings at the same time and involving the same parties. The Federal Circuit Court already had joint jurisdiction with the Federal Court of Australia under the BA.

- The general rule that the property of a bankrupt vests in the trustee in bankruptcy is subject to any order which a court may make under Pt VIII of the FLA in relation to property settlement or spousal maintenance.

- The definition of "matrimonial cause" and the property provisions have been amended to provide that, in property proceedings, the court may make an order altering the interests of parties to the marriage in property and also altering the interests in property vested in the trustee in bankruptcy.

- In property or maintenance proceedings, the bankruptcy trustee has a wider right to be joined as a party.

- In making an order for maintenance or property, the court must have regard to the effect of any proposed order on the ability of a creditor to recover the creditor's debt.

The BA was amended by the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007*, which provides for the recovery of superannuation contributions made with the intention to defeat creditors. (This is dealt with in more detail in Chapter 15.)

The courts which may exercise jurisdiction in proceedings involving a bankruptcy issue are:

- the Family Court of Australia under the 2005 amendments, or as part of its associated jurisdiction

- the Family Court of Western Australia under the 2005

amendments to the FLA

- the Federal Circuit Court under its general bankruptcy jurisdiction, the 2005 amendments or associated jurisdiction, and

- the Federal Court of Australia under the BA provisions.

¶1-180 Adoption

Legislation relating to the legal adoption of children was introduced into the states over a number of years from the 1880s. From the 1960s it has largely been uniform. There was never any contemplation at the time of the Constitution that this power would be assigned to the Commonwealth, but there remain important overlaps between state/territory adoption law and Commonwealth family law which need to be noted (see Note box below).

Note

Overlaps between state/territory adoption law and Commonwealth family law

- Section 122 of the Constitution empowers the Commonwealth to make laws about, inter alia, adoption for the territories. It has not exercised that power, and both the Australian Capital Territory and the Northern Territory have their own adoption legislation.

- Section 31 of the *Family Law Act 1975* (Cth) (FLA) confers jurisdiction on the Family Court only with respect to the "adoption of children".

- The effect of an adoption order is that the child becomes the child of the adoptive parents and ceases to be the child of the birth parents. Other than in exceptional circumstances, an adoption order cannot be discharged. Subject to one exception, referred to hereunder, the effect of the adoption

order is to bring to an end any previous parental orders relating to the child. In contrast, parenting orders under the FLA have no effect on the parental relationship, are not final, and are capable of variation or discharge.

- The FLA defines a “child” to include an adopted child. Once adopted, a child attracts the full jurisdiction of the FLA in the same way as would the birth of a natural child to those (adopting) parties. A consequence is that applications for parenting orders for that child must be made under the FLA. Usually this would be between the adoptive parents themselves, but an application can be made by any person having a relevant interest in the child, which may include a birth parent or a relevant state department.

- Side by side with that is the circumstance that, under the state/territory adoption legislation, an adoption order may include rights of contact between the child and the birth parents (or others); or the court may refuse the adoption order but make a guardianship order. Putting aside the question of the validity of that latter provision, there is obvious scope for conflicts of jurisdiction between those orders and orders made under the FLA.

- Particular provisions in the FLA relate to step-parent adoptions. In such a proposed application (to the relevant state/territory court), the FLA enables (but does not compel) such persons to apply to the Family Court, the Supreme Court of the Northern Territory or the family court of a state for leave to commence those adoption proceedings. If the court grants leave and an adoption order is made, the FLA provides that the child ceases to be a child of the former marriage, and any existing parenting orders cease. If leave is not granted the child continues to be a child of that former marriage, and any parenting orders continue.

The courts in Australia which may make adoption orders are:

- some of the supreme courts of the states/territories
- county/district courts of most states
- Youth Court of South Australia
- Magistrates courts of Northern Territory and Tasmania, and
- Family Court of Western Australia.

¶1-190 Child protection

Legislation on child protection was first enacted in the colonies in the latter part of the 19th century, but the possibility of the federal parliament being involved was not discussed in the debates leading up to the Constitution.

Section 122 of the Constitution empowers the Commonwealth to make laws about child protection for the territories. It has not exercised that power, and is unlikely to do so; both the Australian Capital Territory and the Northern Territory have enacted their own child protection legislation.

Once the *Family Law Act 1975* (Cth) (FLA) and the Family Court came into operation, it was inevitable that there would be both legal and practical clashes between the two sets of legislation and courts.

Essentially, the state/territory child protection legislation operates when the relevant department considers that a child is “at risk” with his or her family or other carers. If the relevant court (in most states, a specialised children’s court) is satisfied that this is so, it may order the child’s removal into the guardianship of the relevant state or territory department. The department may place the child with foster parents or in other forms of care. Alternatively, that court may grant guardianship or make orders in relation to the child to one parent (exclusive of the other) or to a third party. Orders for time and communication between the child and the parents may be made.

That regime will obviously cut across any previous orders under the FLA about that child and may represent a barrier to subsequent FLA orders.

The critical issue is the question of the conflict of jurisdictions. Its resolution is to be found in the Constitution. The states have jurisdiction in relation to this matter but may be overruled by Commonwealth legislation provided that the Commonwealth legislation is valid — that is, within constitutional power.

The legislation of the states/territories contains no provisions which deal with these difficulties. The Commonwealth, by a series of enactments and amendments to the FLA, sought to give to FLA courts power to make some orders in relation to a protected child. However, each attempt was invalidated by the High Court as not being a law with respect to marriage or divorce but being a general law relating to children. A court having jurisdiction under the FLA must not make an order in relation to a child who is under relevant state care unless the order is expressed to come into effect when the child ceases to be under that care or with the written consent of the state/territory department (s 69ZK FLA).

The state/territory child protection legislation contains mandatory reporting provisions — a legal obligation on nominated persons to report their belief that a child is at risk. These provisions apply to persons who are litigants under the FLA, as with anybody else, but they cannot compel federal courts to provide that information. However, the FLA now requires or allows designated officers of the FLA courts to provide that information to appropriate welfare authorities.

On the other hand, provisions in state/territory legislation dealing with the confidentiality of notifications to the relevant state or territory department have usually prevented the FLA courts obtaining that information.[11] Amendments to the FLA by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* seek to address that by empowering courts under the FLA in child-related proceedings to require a prescribed state or territory agency to provide a wide range of information and documents. These include notifications,

assessments and reports. The legislation provides that state or territory laws to the contrary have no effect. This would enable a much wider transfer of information than has previously been permissible.

Footnotes

11 *Northern Territory* v *GPAO* (1999) FLC ¶92-838.

¶1-200 Domestic/family violence

There has been a greater recognition in recent times of the pervasiveness of domestic violence, and its impact on families and society.[12] There is both state/territory and federal legislation on this topic, and this can give rise to conflicts of jurisdiction and power.

Each of the states and territories has extensive legislation relating to this topic as part of its general law and order powers. The legislation is generally wide sweeping and encompasses a number of relationships and situations beyond the “family”. Its powers are wide, including restraining a party from being in or approaching the former home or other places.

The provisions of the *Family Law Act 1975* (Cth) (FLA) cover less extensive ground. Section 68B of the FLA empowers the court to grant such injunctions as it considers appropriate for the welfare of a child or a parent of a child, including an injunction for the personal protection of the child or other relevant person, and an injunction restraining a party from entering upon or remaining at particular places including the place of residence.

Obviously significant areas of conflict can arise out of this dual system. The first is inconsistency between the orders themselves relating to personal protection and the like, and the second is inconsistency between state/territory protection orders and federal orders relating to a child spending time with a party.

Section 109 of the Constitution provides that, in the event of such an

inconsistency, the federal legislation prevails. However, there are a number of reasons why the federal parliament has sought to maintain as far as possible the integrity of the state/territory system, and to avoid inconsistency. In particular, proceedings under the state/territory legislation are much quicker and less expensive, are more readily available, and are much more frequently used. Also, enforcement is easier, more efficient and cheaper.

The FLA has sought to meet this problem of conflict in two ways. First, s 114AB seeks to avoid any inconsistency with the state/territory legislation and, in particular, to avoid a situation where there are applications under both state and federal legislation.

In relation to child-related injunctions, new provisions were introduced in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments. Their purpose was to resolve inconsistencies between the different legislation and achieve the principles set out in the FLA, namely, ensuring that a child has a meaningful relationship with both parents and ensuring that the child is protected from harm.

This is done in two ways. Where a court makes an order under the FLA providing for a child to spend time with a person, and that order is inconsistent with a state order, obligations are imposed on the court to explain to the parties the effect and consequences of its order and how it will be complied with (s 68P).

Secondly, if an application is made for a state/territory family violence order, that state court is empowered to amend an existing parenting order if it is necessary to give effect to the family violence order (s 69ZW).

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* commenced on 7 June 2012. It amended the FLA to provide better protection for children and families at risk of violence and abuse, including a significant extension of the definition of family violence.

In the 2017/18 Budget, the government announced a trial of Domestic Violence Units (DVUs) in legal centres around Australia. Six new DVUs have been set up over two years at a cost of $3.4m. The

2018/19 Budget has no additional domestic violence services funding.

Footnotes

12 Refer to Chapter 11, Children and Relationship Factors, for detailed commentary.

¶1-210 Family provision

Each state and territory has its own family provision legislation. When a person dies, and an eligible person claims that the deceased's will or the intestacy failed to make adequate provision for that person, a state or territory court may order further provision or a different provision. The term "eligible person" (or similar term) has a wide meaning in the various legislative provisions.

In 1983, s 79 of the *Family Law Act 1975* (Cth) (FLA) was amended by the *Family Law Amendment Act 1983* to provide that where property proceedings under s 79 have been instituted, but not completed, and a party to the marriage dies, those proceedings may be continued for or against the legal personal representative of the deceased person. If the court is of the opinion that it would have made an order if the deceased had not died, and that it was still appropriate to make an order, it may do so.

The validity of this provision was upheld by the High Court in *Fisher* v *Fisher*[13] and in *Smith* v *Smith*,[14] where the High Court held that there was no inconsistency between the state/territory and the federal provisions, and that the state/territory provisions could not form part of the accrued jurisdiction of the Family Court.

Thus the two provisions continue to exist side by side. Sections 79 and 90SM of the FLA are confined to proceedings between spouses; but, in that case, the surviving spouse may continue the property proceedings or institute family provision proceedings.

Footnotes

Footnotes

13 *Fisher* v *Fisher* (1986) FLC ¶91-767.

14 *Smith* v *Smith* (1986) FLC ¶91-732.

¶1-220 De facto property and maintenance

The powers of the Family Court to make orders by way of property settlement and maintenance have applied from 1 March 2009 to all de facto couples who have separated on or after that date and who meet the various jurisdictional and qualifying conditions (set out in ¶1-120 above), with the exception of de facto couples in South Australia, where the powers have applied from 1 July 2010, and Western Australia. The result is near uniform law across Australia (Western Australia's *Family Court Act 1997* is for all intents and purposes identical to the *Family Law Act 1975* (Cth) (FLA)).

De facto couples have similar property and maintenance rights to married couples under the FLA.

Section 4(1) of the FLA defines "de facto relationship" as having the meaning set out in s 4AA(1). A de facto relationship is defined in s 4AA(1) as:

> "A person is in a **de facto relationship** with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family (see subsection (6)); and
>
> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis".

The circumstances considered under s 4AA(1)(c) may include any or all of the factors referred to in s 4AA(2):

> “(a) the duration of the relationship;
>
> (b) the nature and extent of their common residence;
>
> (c) whether a sexual relationship exists;
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
>
> (e) the ownership, use and acquisition of their property;
>
> (f) the degree of mutual commitment to a shared life;
>
> (g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
>
> (h) the care and support of children;
>
> (i) the reputation and public aspects of the relationship”.

No particular finding of any circumstance is necessary in deciding the existence of a de facto relationship (s 4AA(3)). In determining whether a de facto relationship exists, a court is entitled to have regard to, and attach weight to, any matters that seem appropriate to the court in the circumstances of the case (s 4AA(4)). Under s 4AA(2)(g), the registration of a relationship under a state or territory relationship register is not definitive. The relationship must be within the definition of a de facto relationship for Commonwealth purposes and this definition may be narrower than the state or territory requirements.

A de facto relationship can exist between two persons of different sexes or between two persons of the same sex. A de facto relationship can exist even if one person is legally married to someone else or in a concurrent de facto relationship (s 4AA(5)).

Section 4AA(1)(b) excludes persons who are related by family from the definition of a de facto relationship. Persons are related by family if one is the child of the other (including an adopted child), one is the

descendant of the other or they have a common parent (s 4AA(6)).

¶1-230 Family Court of Western Australia

The *Family Law Act 1975* (Cth) (FLA) contains provisions enabling the establishment of federally funded state family courts. Western Australia was the only state to take up this invitation. Under the *Family Court Act 1997* (WA) (the WA Act), the Family Court of Western Australia was established. Its jurisdiction covers both federal family law matters and state family law matters. In relation to the former, appeals from that court go to the Family Court of Australia, whereas appeals from the latter go to the Supreme Court of Western Australia.

As a consequence of having a state Family Court, Western Australia did not join the other states in the referral of powers relating to children to the Commonwealth and most of the other states and territories in referring powers with respect to de facto property disputes.

The WA Act contains the same provisions as are contained in the FLA in relation to reconciliation, mediation, arbitration, and family dispute resolution. Similarly, there are extensive provisions relating to the transfer of proceedings between it and other relevant courts in relation to federal and non-federal family law. Its federal jurisdiction is confined to Western Australia, and, in the same way, the jurisdiction of the Family Court of Australia and the Federal Circuit Court do not encompass Western Australia.

In federal family law, the Western Australian Family Court's jurisdiction is coextensive with that of the Family Court of Australia under the FLA, the *Marriage Act 1961* (Cth) and the child support legislation, and it also has accrued jurisdiction (but not associated federal jurisdiction).

Its non-federal family law jurisdiction includes:

- ex-nuptial children and de facto property and maintenance
- adoptions, and
- child protection (although rarely exercised).

¶1-240 Federal Circuit Court of Australia

The Federal Circuit Court (FCC) was established by the *Federal Magistrates Court Act 1999* (Cth) (now called the *Federal Circuit Court of Australia Act 1999*) and was named, up to 2013, the Federal Magistrates Court. Its prior establishment had been delayed by doubts whether the appointment of federal magistrates (now referred to as judges) would comply with Ch III of the Constitution. The jurisdiction of the FCC involves not only family law, but a wide range of federal powers exercised by the Federal Court of Australia.

The initial aim seems to have been to provide a court for the hearing of what may be described as less complex matters. But the FCC has developed rapidly since, and its jurisdiction now is very extensive.

In the area of family law, its jurisdiction under the *Family Law Act 1975* (Cth) FLA is co-extensive with that of the Family Court of Australia except for applications as to the validity of a marriage, divorce or annulment, and adoption, including applications for leave to commence step-parent adoptions. It enjoys the same jurisdiction as that court under the *Marriage Act 1961* (Cth) and under the child support legislation, with the addition that it may hear appeals against various Administrative Appeals Tribunal decisions made under the child support legislation and departure prohibition orders made under the *Child Support (Registration and Collection) Act 1988* (Cth) (a jurisdiction otherwise vested only in the Federal Court). It also has the same jurisdiction as the Family Court in relation to the amendments to the FLA made by the *Bankruptcy and Family Law Legislation Amendment Act 2005*, as well as otherwise having coextensive bankruptcy jurisdiction with that of the Federal Court.

The FCC's family law jurisdiction applies throughout Australia (except Western Australia).

It also has powers similar to those of the Family Court in relation to reconciliation, mediation, arbitration, and family dispute resolution. It has similar powers to delegate nominated powers to registrars.

Its non-family law jurisdiction is very extensive, including:

- administrative law
- bankruptcy
- copyright
- industrial law
- migration, and
- trade practices/corporations law.

There are also protocols between the Family Court of Australia and the FCC which record agreements between the courts where specific kinds of matters are to be determined in one court. This protocol is available on the courts' websites. It currently provides that generally proceedings are to be commenced in the Federal Circuit Court but that the following kinds of matters would usually be heard in the Family Court of Australia:

- international child abduction
- international relocation
- disputes as to whether a case should be heard in Australia
- special medical procedures (of the type such as gender reassignment and sterilisation)
- contravention and related applications in parenting cases relating to orders which have been made in Family Court of Australia proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing
- serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court

- complex questions of jurisdiction or law, and
- if the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.

¶1-250 Supreme courts of the states and territories

Prior to the *Family Law Act 1975* (Cth) (FLA), the supreme courts exercised extensive federal family law jurisdiction. This was continued under the FLA but was gradually phased out so that none of those courts (except the Supreme Court of the Northern Territory) has any jurisdiction under the FLA, child support legislation or the *Marriage Act 1961* (Cth).

For practical reasons (namely, the absence of a continual presence of the Family Court or Federal Circuit Court in the territory), the jurisdiction of the Supreme Court of the Northern Territory under the FLA has continued (but is usually only exercised in matters of urgency or on an interim basis). Similarly, it has jurisdiction under the child support legislation, but, in both cases, it is subject to the limitation that one of the parties must be ordinarily resident in the territory.

All state and territory supreme courts have the usual non-federal family law jurisdictions, namely:

- de facto property and maintenance
- family provision
- adoption, and
- welfare jurisdiction, at least in relation to ex-nuptial children.

¶1-260 Courts of summary jurisdiction

These courts (now usually designated magistrates courts) have traditionally exercised federal jurisdiction in a large number of areas including family law. This has continued in relation to family law subject to a number of restrictions. They continue to exercise

jurisdiction under the *Family Law Act 1975* (Cth) except:

- divorce (other than designated courts of summary jurisdiction in the Australian Capital Territory and Western Australia in respect of undefended divorce proceedings)
- nullity
- declaration as to the validity of a marriage, divorce or annulment, and
- step-parent adoptions.

In reality, these extensive powers are not readily exercised, especially since the expanding presence of the Federal Circuit Court; and, in any event, they are subject to a number of important limitations, such as:

- the property jurisdiction is limited to property not exceeding $20,000 in value (except by consent)
- jurisdiction in relation to children is limited to non-contested proceedings (except by consent), and
- in territory matters, the parties must be ordinarily resident in that territory.

Courts of summary jurisdiction also have important areas in non-federal family law jurisdiction, namely, domestic violence and child protection (the latter through children's courts).

¶1-270 Summary of the jurisdiction of courts in Australia in family law (federal and non-federal)

No one court in Australia has what might be described as jurisdiction in family law generally. A substantial number of courts, both state and federal, have jurisdiction in respect of one or more aspects of family law. This creates an unsatisfactory situation of overlapping and, at times, conflicting legislation and jurisdictions.

This has largely been brought about by the initial constitutional limitations together with historic developments since. The former has meant that legislative power in this area was divided between the Commonwealth and states/territories. The latter has meant that the Commonwealth's powers were not exercised for a long period of time, and both before and after that state courts had been used. Finally, there is the more recent development of federal family law courts — the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court.

Summary

Family law jurisdiction of each court

In summary form, the jurisdiction of each court having jurisdiction in a significant aspect of family law is as follows.

High Court of Australia

The High Court of Australia is the final court of appeal in relation to all litigation in Australia. However, appeals to that court require the special leave of the High Court and that is normally confined to constitutional issues and issues of general public importance.

Family Court of Australia

- *Family Law Act 1975*
- *Marriage Act 1961*
- child support legislation (other than appeals against departure prohibition orders), and
- *Bankruptcy Act 1966*.

Family Court of Western Australia

Its federal jurisdiction is the same as that of the Family Court of Australia. Its non-federal family law jurisdiction includes:

- ex-nuptial children and de facto property and maintenance
- adoptions, and
- child protection.

Federal Court of Australia

- appeals from departure prohibition orders under the *Child Support (Registration and Collection) Act 1988*, and
- *Bankruptcy Act 1966*.

Federal Circuit Court of Australia

- *Family Law Act 1975*
- child support legislation (including appeals from departure prohibition orders)
- *Marriage Act 1961*, and
- *Bankruptcy Act 1966*.

Supreme courts of the states and territories (other than the Northern Territory)

- family provision
- adoption
- welfare jurisdiction at least in relation to ex-nuptial children, and
- appeals in relation to courts of summary jurisdiction relating to domestic violence and child protection.

Supreme Court of the Northern Territory

In addition to the above, it has jurisdiction (usually only exercised in cases of urgency on an interim basis):

- under the *Family Law Act 1975*
- under the *Marriage Act 1961*
- in child support (but not appeals from departure prohibition orders), and
- in bankruptcy.

Courts of summary jurisdiction

- *Family Law Act 1975* (subject to a number of exceptions and limitations)
- child support (other than departure prohibition orders), and
- *Marriage Act 1961*.

In the non-federal family law field jurisdiction includes:

- domestic violence, and
- child protection (usually through a specialised children's court).

County court — district courts

The original jurisdiction of most of these state courts includes:

- adoption, and
- financial provision.

In addition, they usually have appellate jurisdiction by way of rehearing from decisions of courts of summary jurisdiction in family law matters, namely, domestic violence and child protection.

LEGAL PRACTICE MATTERS: CLIENT INTERVIEW AND DRAFTING AFFIDAVITS

Editorial information

Written by Genevieve Dee

¶2-000 Introduction

Affidavits prepared on behalf of a client are of paramount importance in matters before both the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC). The affidavit contains all of the evidence upon which the client intends to rely, and is filed in the place of oral evidence.

Subject to r 4.02 of the Family Law Rules 2004 (Cth) (FLR), a party filing an Application in a Case or a Response to an Application in a Case in the Family Court must file an affidavit setting out the evidence in support of the client's application or response. The affidavit document should contain all the evidence a practitioner intends to rely upon to persuade the court as to the merits of their client's position.

In the FCC, r 4.05 of the Federal Circuit Court Rules 2001 (FCCR), provides a person filing an application or response, whether seeking final, interim or procedural orders, must also file an affidavit stating the facts upon which the applicant or respondent intends to rely. Rule 5.03 of the FCCR details the evidence which must be deposed to in an affidavit that accompanies an application in an urgent case, pursuant to r 5.01. Evidence in support of an urgent application can only be lead orally with leave of the court, pursuant to r 5.03(1).

Before preparing and filing any affidavit, practitioners should read the relevant rules which apply to the proceedings, whether an interim or final hearing, to ensure all relevant and admissible evidence the court requires has been included. Not reading the rules before preparing your affidavit, even as an experienced practitioner, means you risk excluding vital evidence the court requires before making any decision.

Given the importance of the affidavit, practitioners should take time when drafting the document to ensure it contains the best evidence available to support the client's position; careful and skillful drafting will give your client the best chance of securing the outcome they want.

This chapter will also suggest some practical ways to improve affidavit drafting by discussing the rules relating to the presentation and admissibility of affidavits in both the FCA (see ¶2-080) and the FCC (see ¶2-090).

This chapter also contains a detailed review of legislation covering the gathering of, and then use of, evidence obtained by way of audio and video recordings particularly where the recording is made without the knowledge or consent of the other person.

CLIENT INTERVIEWS

¶2-010 The initial interview

One of the most important skills a legal practitioner will to develop is the ability to ensure their initial meeting with a new or potential client is a positive one. It is crucial for a practitioner to develop a good rapport with each client. This is particularly relevant in the family law jurisdiction, where clients are required to divulge very personal information about themselves, their family, finances, and their children very quickly after meeting their lawyer.

This chapter discusses the various elements comprising the initial client interview, and suggests ways to enhance the interview so practitioners may develop techniques to build rapport with their clients (see ¶2-020–¶2-060). The better your interviewing skills, the more productive your client meetings will become.

Preparation is the key to ensuring a successful initial client interview. Taking time for basic preparation will ensure both the client and the practitioner get the most out of the interview.

The good news is that with repetition, preparing for an initial interview becomes easier. Over time, practitioners will develop their own unique interviewing style and the initial interview is less daunting. The individual nature of each client, the way each client interacts with the practitioner and how quickly the practitioner is able to build rapport with the client, will guide an interviewer’s technique. Nevertheless, the general structure of the interview will usually remain somewhat predictable.

There are a number of distinct parts to a client interview. They can be identified as follows:[1]

1. preparation (see ¶2-020)

2. opening (see ¶2-030)

3. initial problem identification (see ¶2-040)

4. narrowing — identifying the scope of the issues to be discussed with the client (see ¶2-040)

5. advising, and

6. closing (see ¶2-050).

Footnotes

1 H Twist, *Effective Interviewing*, BPCC Wheatons Ltd, Exeter UK, 1992, pp 45–46.

¶2-020 Interview preparation

Administrative staff

Administrative staff can provide immeasurable assistance to a practitioner when making new appointments, and helping to make the client feel at ease. By creating some simple intake procedures, administrative staff can assist the practitioner to manage the client's expectations.

At the time of making an appointment for a new or potential client, the administrative staff member should gather some basic information from the client which will assist the practitioner.

This information should include:

- client's name, contact telephone number, email and the date on which they contacted the firm

- nature of the client's legal problem, and whether they have

received any legal advice in the past

- whether the client has any safety concerns for themselves, their former partner, or their children
- whether the client considers if they need urgent assistance, such as help with a recovery order, urgent domestic violence assistance or a referral to a welfare agency for housing support
- if there any existing orders, agreements or parenting plans
- whether the client has identified any time limitations or filing dates which are of importance
- name of the other person or persons in the legal dispute
- whether the client has any special needs or requirements for the appointment
- whether the client has advised if anyone else will be attending the appointment with them
- if the client is bringing any information/documents with them to the interview
- confirmation the support staff member has advised of the firm's policy with respect to fees which may be levied for the initial interview, payment options available to the client and whether the client will have to pay at the end of the interview, and
- the date and time for the interview.

The above information may be used as a checklist for administrative staff when making appointments for new clients. The information provided by the client can be provided to the practitioner as a file memo prior to the interview. When preparing the file memo, the administrative staff member should address the following in writing, for the practitioner's reference:

- if there is urgency, ensure the matter is brought to the attention of the practitioner immediately
- confirm the support staff member has conducted a conflict check, and that there is no conflict before the practitioner meets with the client
- bring any safety concerns to the attention of the practitioner
- if necessary, confirm a meeting room has been booked for the interview (this will avoid having to arrange a meeting room with the client, in front of the client/s at the reception desk prior to the commencement of the interview)
- confirm the appointment has been recorded in the practitioner's diary to avoid time conflicts
- if the interview is to be conducted over the telephone, confirm whether the client will call the practitioner at a nominated time, or whether the practitioner is to contact the client, and
- indicate whether the support staff member will call the client the day before to confirm the appointment.

The practitioner can then refer to the file memo prior to meeting to avoid the client having to provide the basic information again.

When making appointments in the practitioner's diary, the practitioner and administrative staff should ensure there is sufficient time between appointments to allow for any urgent steps which need to be taken and proper time recording or dictation of any diary notes about the interview. By taking time to review their notes from the interview promptly, practitioners will increase the accuracy of their file notes and ensure any necessary follow up actions and compliance dates are identified and recorded.

Compliance and filing dates represent an area of professional risk for practitioners. It is important to ensure you have a system in place to record any important dates in a notification system to ensure there is

no loss of entitlements.

It has become very common now for clients and potential clients to complete an online questionnaire providing some basic details about the parameters of any dispute. If your firm has this technology, you should ensure you have read the online profile and the answers provided by the client prior to the meeting.

Environment

Some practitioners have interview rooms available to them which are separate from their offices. Often, this means you can't review the physical environment where the interview will occur prior to the interview. Where possible, review the interview room before greeting your client to make sure it is appropriate for the meeting.

The interview room, or the office in which the interview will be conducted, should be uncluttered, professional and tidy. It should make the client feel at ease, and allow the client and the practitioner privacy in their discussions. Given the sensitive nature of the instructions clients provide in family law matters, the client should feel they can speak freely and confidentially to the practitioner, without fear of interruption or a breach of their privacy.

Practitioners also need to be conscious to protect the privacy of other clients. When meeting with a client in your office ensure there are no identifying details of other clients and their matters on the desk or in view of the client.

The pace of life for practitioners and clients alike has certainly increased in recent years. This means both the client and the practitioner are likely to have a handheld electronic device with them during the meeting. To ensure your client feels they have had your undivided attention, turn your phone to silent and disable alerts and notification sounds to avoid the device buzzing or making noise which may be distracting.

Research

If the preliminary information gathered by administrative staff indicates the client wants to discuss an area of law with which the practitioner is not familiar, or the practitioner wishes to review any recent

developments, this should be done prior to the interview. At the very least, the practitioner should ensure they are able to identify any limitation dates, or relevant filing dates, which may apply to the area of law so they can be discussed at the initial meeting.

Punctuality

Whenever possible, the practitioner should avoid keeping a client waiting for any extended period of time. This is a common courtesy we all appreciate when keeping appointments. It may sound somewhat obvious, but practitioners should ensure appointments are only made at times mutually convenient to both the client and the practitioner. The client and practitioner should both have appropriate time available to fully participate in the interview.

Practitioners should be aware of any diary issues or time constraints which may impact upon the interview, so they can be explained to the client at the outset of the meeting. The client should be informed at the start of the interview if the practitioner has limited time due to another matter, or if the practitioner anticipates being interrupted during the interview for any reason. This will prepare the client for the interruption. It may mean the client is less likely to feel they are not being given the appropriate level of attention by the practitioner. Remember, the client wants to feel they are important and that you are taking their matter seriously.

However, where possible, avoid being interrupted. Any interruption may affect your ability to build a rapport with the client.

Some practitioners might find it useful to give their client a general information sheet to complete while they wait. This not only occupies the client in the event you are delayed, but also minimises the time during the interview which is spent obtaining general personal details which were not obtained when the appointment was first made.

¶2-030 Opening the interview

Making the client feel at ease

It is to be expected the client may feel anxious or nervous prior to and

during the initial interview. The client will generally be coming to see the practitioner because they are experiencing a personal or family crisis which requires a legal solution. The client may feel uneasy about divulging personal information to a stranger — regardless of their having initiated the contact with the practitioner.

To help to make the client feel at ease, it is often helpful to engage the client with some general non-legal conversation before the interview commences. There are no rules about what to talk about, and not all practitioners will be at ease with this part of the interview themselves. The process will get easier with repetition.

Engaging the client in general conversation helps to initiate communication between the client and the practitioner. While general conversation may put the client at ease, an astute practitioner will also be able to make valuable observations about the client during this time, even before the client is aware the interview has commenced.

For example, a practitioner may observe how a client is likely to respond to questions, whether the client is focused, anxious, or quick to divulge information. These observations will assist the practitioner to guide the interview accordingly. Being alert to a client's non-verbal cues, such as posture, facial expressions and gestures, will also guide the practitioner during the interview.

Some practitioners may find the use of a checklist or pro-forma intake sheet to be a useful way of moving the general conversation onto the formal interview. By having the client provide general information in a "question and answer" format indicates to the client the interview has commenced so they may focus on the issues they want to discuss. Obviously the client will be aware they have to talk about whatever legal problem they have come to see you about. However, by gently introducing some non-confrontational questions at the start of the interview, the client can prepare themselves to talk to you about their legal issues. You should also advise the client if you intend to make any notes during the interview so they do not feel anxious about what you may be recording.

Checklists

Client

☐ Client’s full name (and any other name previously used)

☐ Client’s postal address

Note: Practitioners should clarify with the client if it is safe to use a client’s home address for any correspondence which is to be sent to them after the interview and if not, then confirm an alternate contact address which is safe to use.

☐ Client’s residential address

☐ Client’s telephone numbers

☐ Is it safe to contact the client on the above numbers?

☐ Client’s email address

☐ Is the email address confidential?

☐ Client’s facsimile numbers

☐ Preferred method of contact

☐ Client’s current occupation

☐ Client’s date of birth

☐ Client’s place of birth

☐ Safety concerns and / or urgent circumstances?

☐ Are there any existing orders, parenting plans or agreements?

Other party

- ☐ Other party’s full name (and any other name they may have used)
- ☐ Other party’s address
- ☐ Other party’s telephone numbers
- ☐ Other party’s occupation
- ☐ Other party’s date of birth
- ☐ Other party’s place of birth
- ☐ Other party’s solicitor and address (if applicable)

Children

- ☐ Children’s names, dates of birth, age, sex and details of who the child/children live with
- ☐ What time the child/children spend with the other party
- ☐ Children’s schools, grade and progress
- ☐ Full name of the child/children’s mother and father (if not the parties detailed previously)
- ☐ Who else lives in the house with the children when they are with you?
- ☐ Who else lives in the house with the children when they are with the other party?
- ☐ Are there any health issues or developmental issues affecting the child/children?
- ☐ Are the children on any medication?
- ☐ Has there been any involvement of the police or child welfare authorities in relation to the child/children in the past?

☐ Is there any current involvement of the police or child welfare authorities in relation to the child/children?

☐ Do you have any current concerns in relation to the children's welfare or development?

Relationship

☐ Date of cohabitation (if applicable)

☐ Date of marriage (if applicable)

☐ Date of separation

☐ Date of divorce

☐ Has cohabitation recommenced for any period?

☐ Have there been any previous court proceedings about family law matters? If yes, when and where?

☐ Does the client have copies of any orders that have been made?

☐ Are there prospects of reconciliation?

☐ Has either party ever applied for a domestic/apprehended violence order? If yes, date and place.

☐ Is there a domestic/apprehended violence order? If yes, date and place.

☐ Are there any current court proceedings? If yes, date and place.

☐ Does the client have a copy of their marriage certificate?

☐ Does the client have a copy of the child/children's birth certificate/s?

☐ How was the client referred to the firm/practitioner?

Advice

☐ Have you consulted with another solicitor about these matters? If yes, date and place.

☐ Have you had any other advice about these matters? If yes, from whom?

☐ What issues are most important for the client today?

Costs

The practitioner must ensure they address the issue of costs with the client during the interview. While it is often uncomfortable to discuss costs, particularly for junior practitioners, the practitioner must ensure the client is aware of any fees which will be charged for the initial appointment, and what arrangements and facilities are available to the client with respect to payment.

This should be the second time the client has been advised of the practitioner's fees, as it will have been explained to the client at the time the appointment was made. A notation to that effect should be contained in the memorandum provided to the practitioner by the support staff member who made the appointment, or noted in a diary note if the practitioner spoke with the client directly.

Each state and territory has different requirements in relation to costs agreements and costs disclosure for clients. The practitioner must be aware of the requirements which apply to them in the state(s) in which they practice. However, the practitioner should also be aware of the requirements as to costs set out in the FLR.

Given that working in family law can mean our clients have concerns for their safety, it is always important to check the address and contact details you have for the client can be used when sending correspondence including any invoices. If the client is unsure whether

they can receive letters or emails from you safely using their primary contact details, then an alternate address or email contact should be provided.

The issue of costs is discussed in more detail at Chapter 25.

Family Law Act 1975 (Cth) and obligations on advisers

It may also be helpful to provide the client with some general information for them to review after the interview. This may include information about family dispute resolution, parenting plans and the courts. The information may also include contact details for the Family Relationship Centre in the client's local area and other social services or professional and community support referrals which may be of benefit to the client. The FCA has fact sheets available on their website which may be of assistance.

Practitioners should also be mindful of their obligations under the *Family Law Act 1975* (Cth) (FLA). Section 12E of the FLA provides:

1. A practitioner consulted by a person considering instituting proceedings under the FLA **must** (emphasis added) give the person documents as prescribed by s 12B (as to non-court based family services and court processes and services), s 12E(1).

2. A practitioner consulted by, or representing, a married person who is party to proceedings for a divorce order or financial or Pt VII proceedings, **must** (emphasis added) give the person information prescribed in s 12C (about reconciliation), s 12E(2).

3. A practitioner representing a person in proceedings under Pt VII of the FLA must give the person documents prescribed by s 12D (about family counselling services available to assist parties and any children to adjust to consequences of orders under Pt VII), s 12D(2).

In addition, s 60D provides obligations on advisers (this term is defined at s 60D(2) and includes a legal practitioner) in respect of advice given in relation to a child or proceedings under Pt VII of the FLA including:

- The advisor must:
  - inform the person they should regard the best interest of the child as the paramount consideration (s 60D(1)(a))
  - encourage the person to act on the basis the child's best interests are met by:
    - having a meaningful relationship with both parents (s 60D(1)(b)(i))
    - being protected from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence (s 60D(1)(b)(ii)), and
    - greater weight will be given to consideration of the matters identified in subsection (s 60D(1)(b)(ii)).

Section 63DA details a number of obligations on advisers (this term is defined at s 60D(2) and includes a legal practitioner) including:

- Where an adviser gives advice or assistance to people in relation to parental responsibility for a child after the breakdown of a relationship, the adviser **must** (emphasis added):
  - inform them they could consider entering into a parenting plan (s 63DA(1)(a))
  - inform them about where they can get further assistance to develop a parenting plan (s 63DA(1)(b)).

If a practitioner gives advice about the making of a parenting plan, they must also advise the client as to the matters detailed in s 63DA(2) in respect of making arrangements for the child/children.

Practitioners should ensure they are familiar with s 60I(1) of the FLA which provides that all persons who have a dispute about matters which may be dealt with under Pt VII (Children) of the FLA make a genuine effort to resolve the dispute through family dispute resolution before applying for an order in relation to the children.

All applicants for parenting orders, regardless of whether previous orders have been made or the matter has otherwise been before the court in the past, must file a s 60I certificate unless an exemption can be obtained in accordance with s 60I(9) and (10).

The term “family dispute resolution” is defined in s 10F of the FLA. The term “family dispute resolution practitioner” is defined in s 10G of the FLA and in terms similar to the definition of “family counsellor” in s 10C. The definition does not, in its current form, include legal practitioners. That does not mean a legal practitioner cannot undertake the necessary accreditation process to become a registered family dispute resolution practitioner. The accreditation rules for family dispute resolution practitioners are contained in the Family Law (Family Dispute Resolution Practitioners) Regulations 2008. Professionals who have become accredited and who fall within the strict definition in s 10G of the FLA are the only persons entitled to give a certificate pursuant to s 60I(8).

¶2-040 Identifying a client’s legal problem

By this stage of the interview, the legal practitioner should have made the client feel at ease, gathered some preliminary details and discussed the issue of costs with the client. The practitioner should offer the client the opportunity to talk about their legal problem, in the client’s own words.

While the practitioner may already have an idea of the legal issues the client wants to discuss, it is appropriate for the client to now assume the primary role in the interview. The client should be invited to communicate their story to the practitioner, and should do the majority of the talking. It is the practitioner’s role to guide the conversation where appropriate including asking questions of the client to obtain further information.

Warning

Be mindful not to assume you have identified the scope of the

client's problem too early. If you assume you know the issues the client is facing, and you direct the interview to address those issues only, you may in fact miss other issues which impact the client. This could inadvertently expose you to a professional claim later in the matter. Be deliberate in asking open and probing questions (as discussed below) at the start of the interview, so you have the best opportunity to respond to all of the relevant issues impacting the client.

Types of questions

There are a number of types of questions, including:

- open questions
- closed questions
- probing questions, and
- leading questions.

A practitioner will need to be able to recognise which type of question will be most beneficial at a particular point during the interview. An effective client interview will require the practitioner to use a mixture of the different types of questions. This will allow the interview to flow well and give the practitioner the information they need to be of assistance to the client.

When a practitioner is trying to understand a chronology or sequence of events, it is more appropriate to use open and probing questions. When a practitioner is trying to obtain specific details or clarify events, then the use of closed and leading questions is appropriate.[2]

There are advantages and disadvantages in the asking of each type of question which is why practice is the most effective way for a practitioner to identify the type of question to ask at a particular point during an interview.

Open questions

An open question, simply, is one which cannot be answered with a “yes” or “no”. The question invites the client to respond with some detail, in their own words.

Examples

- “Tell me how we can help you today?”
- “What happened next?”
- “What is it you would like to discuss?”
- “Tell me what the problem is”.

Practitioners should avoid asking closed questions, being ones that can be answered with a “yes” or “no”, at the start of the interview. You want to encourage discussion, not stifle it.

Open questions can be of benefit at the start of the interview, when the practitioner is trying to build rapport with the client. The practitioner should be careful to keep the client focused on relevant issues which can be a difficult skill. Often, if you interrupt the client too early, you may not have been provided with all of the relevant information, and risk not having all of the facts before you start offering advice.

However, if the client provides too many irrelevant details, this can waste both the client’s and the practitioner’s time. Practitioners should ensure they allow the client enough time to answer each question, and that they have all of the information they feel they need from the client, before moving on with the next question.

To exercise some control over the client and their narrative, the practitioner must listen to the answers the client is giving. For this reason, the environment in which the interview takes place is so important. Both the client and the practitioner need to be able to interact without being distracted. Again, practice is the most effective learning tool, and a practitioner’s interviewing skills will improve with preparation and repetition.

If possible, a new practitioner should be given the opportunity to observe experienced practitioners and the way they conduct interviews. This will assist newer practitioners to identify and respond to the different ways in which clients and practitioners interact.

Closed questions

A closed question is a question which may be answered with a “yes” or “no”, or a date, a specific time or place. A closed question does not afford the client the same latitude when answering as an open question.

Examples

- “On what date did you and your husband start living together?”
- “Do you have any children?”
- “When did you and your wife separate?”

Closed questions are generally easier to answer, and can assist a practitioner to get a client and an interview back on track if there has been a lot of general information provided. If a client has given a narrative of events without many specifics or details, closed questions may be of assistance to get the client’s recollection of events focused and precise.

By using closed questions, the practitioner is able to manipulate the speed of the interview. Closed questions are not beneficial at the start of the interview as they do not allow the client to elaborate on details, or encourage a rapport with the practitioner. An over reliance on closed questions can mean the practitioner does not get enough information from a client to fully appreciate the scope of advice the client needs. Further, where the client is asked a number of closed questions, they may not feel like they have had the opportunity to tell their story.

Probing questions

A probing question is one which is used to clarify information already

provided by the client. By asking a probing question, the practitioner demonstrates they have been listening to the client's responses. A probing question allows the practitioner to focus on points or details which they consider will be of assistance when providing advice.

Examples

- "Why did you stay at your parents' place that night?"
- "Can you tell me why the children were crying?"
- "How do you know that?"

Warning

On the downside, a probing question may make a client feel attacked or interrogated, or that the practitioner has not understood them or is questioning their version of events. If you observe the client reacting to a probing question in a negative way, it may be helpful to explain why you are asking the question or why the extra level of detail is important.

Leading questions

A leading question is a question which suggests an answer. Asking a leading question can be of benefit if a client appears unwilling to divulge personal or sensitive information or is failing to engage with the practitioner. Leading questions can be a useful tool to demonstrate you have understood the client's concerns while also trying to gently nudge the client to share personal information.

Examples

- "So you are concerned about the amount of maintenance you will have to pay?"
- "Are you saying that after you picked the children up from school, you went straight home?"

- “Did you leave work at 2.30 pm because you had to collect the children from school?”

However, practitioners need to be aware when asking a leading question, they are in fact suggesting the answer. Be careful not to put facts or words into the client’s mouth, as this may lead to inaccuracies in the client’s statement or version of events which may then appear inadvertently in affidavit material filed on behalf of the client.[3] Asking leading questions can be useful when summarising information already provided by the client, or when attempting to move a client to another area of discussion.[4]

Warning

Be careful not to introduce leading questions too early thereby cutting off other enquiries you might otherwise make about issues the client is dealing with and, importantly, legal options available to them.

Paraphrasing

When the practitioner is satisfied they have had enough information from the client to understand the advice the client needs, a useful way to progress the interview is to provide a summary of the client’s problem. Essentially, you are repeating the client’s legal problem back to the client in your own words, and, in doing so, are demonstrating to the client that you were listening to them and have understood their problem. This technique is often called paraphrasing.

Example

Client: “After we separated things were ok for a while, but it’s started to get really tough recently. I used to be able to see the kids whenever I wanted, but now she has said she thinks it’s not good for them to spend so much time after school with me — like somehow I get in the way of them doing their homework. Because of the hours that I

work I hardly ever get to see them now, and it's all about her. She isn't thinking about the kids. They love coming to my place to see me after school. My youngest, Jack, he and I kick the footy in the backyard and then we all have some afternoon tea. I was never late taking them home, and I always made sure they had had a bath and some dinner when I took them back. But now she says it's too disruptive for the kids".

Practitioner: "So if I've understood you correctly, you want to be able to spend time with the children during the week, and have something in place so that you and the children can get used to a routine? Is that correct?"

The practitioner may find it helpful to use paraphrasing at the end of each section of the interview, to confirm the information they have obtained from the client is correct and that they have identified the issues which are most important for the client.

Another benefit of using paraphrasing is the practitioner engages with the client regularly; this helps the client to feel like they are being listened to and understood by the practitioner. When the client feels heard and supported, it encourages the development of rapport with the practitioner. The practitioner is more likely to elicit the necessary information to get to the core of the client's legal problem if the client feels comfortable and understood.

Expressing empathy

"Empathy" can be defined as understanding or being aware of, and sensitive to, the feelings, thoughts and experiences of another.[5] "Empathy" is not the same as "sympathy", which can be defined as sharing in the experiences or feelings of another.[6]

An effective interviewer will be able to demonstrate that they are listening and understand how the client is feeling.[7] This does not mean the practitioner must have had the same experiences as the client. Rather, it is demonstrating to the client that the practitioner has listened to what the client has said, and understands how a situation has made the client feel.

Practitioners can do this by using encouraging words and gestures, such as:

- saying "I see" or "that would have been very upsetting"

- using phrases like, “I appreciate this is very difficult for you to talk about”, and

- nodding when a client makes it clear that something in a particular part of their narrative was very important.

Building an empathetic relationship with the client is an essential part of a practitioner’s role.[8] By incorporating the use of paraphrasing, the practitioner will demonstrate they were listening, have understood and empathised with the client, and have taken note of how important or distressing a part of the narrative was to the client. These skills make a client feel important.

Use of language

The language and words used by an interviewer are an integral part of the interviewing process. It is important for the practitioner to ask clear and concise questions. The practitioner should not assume the client is proficient with legal terminology, and should avoid the overuse of legal terms and phrases.

In the event the practitioner wants to incorporate legal jargon into the conversation, then the terms used should be adequately explained to the client the first time they are adopted. This will ensure that the client does not feel like the practitioner is talking down to them, or failing to make an effort to explain themselves properly.

As with the questions asked by the practitioner, the language used to explain legal concepts should be clear and concise. The practitioner should speak slowly and clearly and watch for non-verbal signals that the client is not listening, or is having trouble understanding what is being said. Rather than simply restating the law, the practitioner should explain to the client, in language the client can readily understand, how the law relates to their individual circumstances and what action the client should take.

Active and passive listening

During the interview, the practitioner should be interacting with the client, both verbally and non-verbally. By engaging with the client during the interview, the practitioner demonstrates they have

understood the client's narrative and have accurately recorded the details. This process is often referred to as active listening. Using the paraphrasing technique is an example of active listening.

Passive listening is where the practitioner takes a less active role in the interview. Asking open-ended questions and listening to the client's narrative without interruption is an example of passive listening. A good interviewer will use a combination of active listening and passive listening techniques.

Notetaking

It will be important for practitioners to strike a balance between taking excessive notes during an initial interview, and not taking note of the essential facts in dispute. It can be comforting, particularly as a new practitioner or someone who is not yet comfortable with their own interviewing technique, to try to take copious amounts of notes during an interview.[9]

However, trying to make notes of everything a client tells you means you may lose eye contact with the client, and don't get the chance to observe valuable verbal and non-verbal cues from the client about the information they are imparting to you.[10] Excessive notetaking in an interview can also waste time. In the initial interview, the practitioner should be concentrating on building rapport with the client and understanding the basic facts about the client's narrative before identifying the issues they need to advise on.[11]

If a practitioner chooses to take notes during the interview, the notes should be concise and written in such a way that the practitioner can understand them when the notes are reviewed after the interview. The practitioner should accurately record any filing or limitation dates which may apply, and ensure they have an accurate timeline of events.

Where limitation or compliance dates are identified in the interview, practitioners need to ensure there is an appropriate system in place to record those dates in a bring-up system or register, so they are not overlooked. In the event a client does not instruct you to undertake any work for them after the initial interview, a letter confirming the

practitioner will not take any steps in relation to the time limit or limitation date should be sent without delay; this is often referred to as an “off-risk” letter. It is advisable to record in writing if the client is to be solely responsible for complying with the limitation date rather than relying on verbal advice given during an initial client interview where the client may be vulnerable or distressed.

Barriers to communication

Practitioners have to work just as hard to prevent creating barriers to communication during interviews as they do generating good communication. There are a number of verbal and non-verbal ways practitioners can negatively impact communication with the client.

Warning

Practitioners need to be aware of their body language, and should avoid:

- using judgmental language towards the client
- sighing or frowning during the interview
- jumping to conclusions or debating with the client
- disagreeing with the client’s narrative
- making assumptions, or not requesting clarification from the client.

There is more to listening than simply hearing what is being said.[12] The practitioner needs to be actively involved in the interview process if the practitioner is to be of any assistance to the client.

Telephone/electronic interviews

Often, practitioners may be required to conduct an initial interview over the telephone, video conference, Skype, or another electronic video format. This can present its own unique challenges, as the practitioner is not able to respond to the physical cues which can be observed clearly when interviewing a client in person.

This means it is even more important to ensure the interview is scheduled at a mutually convenient time, and that the practitioner can conduct the interview without interruption from outside the office. Just because the interview is being conducted over the telephone or by way of an electronic face-to-face connection, does not mean the information which is being relayed by the client is any less important or that the client does not want to feel listened to and understood.

The practitioner should prepare as if the interview were being conducted in the office, and be able to direct the client through the different stages of the interview. The practitioner will have to actively listen and take their cues from the client's tone of voice, pitch and pace of speech if they cannot see them. The basic interviewing techniques, however, remain the same.

Practitioners should ensure they have all of the client's contact details recorded, make notes about any time limitations or filing dates which may apply, safety concerns, and record a postal address if the practitioner intends to follow up the advice given with correspondence or by sending additional information.

Footnotes

2 Lauchland and Le Brun, *Legal Interviewing — Theory, Tactics and Techniques*, Butterworths, Sydney, 1996, p 54.

3 Ibid, at p 55.

4 Ibid, at p 56.

5 *The Australian Pocket Oxford Dictionary*, Griffin Press, Melbourne, 1992.

6 Ibid.

7 H Twist, *Effective Interviewing*, BPCC Wheatons Ltd, Exeter UK, 1992, at p 5.

8 Ibid.

9 Ibid, at p 42.

10 Ibid.

11 Lauchland and Le Brun, *Legal Interviewing — Theory, Tactics and Techniques*, Butterworths, Sydney, 1996, at p 101.

12 H Twist, *Effective Interviewing*, BPCC Wheatons Ltd, Exeter UK, 1992, at p 14.

¶2-050 Ending the interview (closing)

It is important the practitioner spend just as much time planning how the interview will end as they did planning how it was to begin. The practitioner should summarise what the client has told them, and then the advice they have given to the client, if any at that stage.

If the practitioner were simply to tell the client the allocated time is over, and rush the client out of the door, the practitioner will risk undoing all the positive work which was done establishing rapport. The client will want to know, before they leave the office, what is happening next, and anything they need to do.

The practitioner should be clear about what both the client and the practitioner have to do once the interview is over. The client should know:

- if they have to give the practitioner any further information before any advice can be finalised
- whether there will be a costs agreement sent in the mail or by email and any pre-payment that is required before the practitioner will commence work
- if there are any time limits which the client must consider and whether the practitioner is to remind them of those dates, and
- what role the practitioner will play in progressing matters for the client.

The practitioner should be very clear about what they are going to do and the timeframe in which any response or advice will be available. It is not beneficial to the relationship if a practitioner promises an advice or document will be prepared by a particular date, and then fails to deliver it on time.

The practitioner should aim to meet or better any time limit they have communicated to the client. This way, the client will be satisfied with the response from the practitioner as it has met their expectations. The practitioner should leave enough time before the end of the interview for the client to ask any questions they may have arising from advice or observations from the practitioner.

¶2-060 Follow up after the interview

The practitioner should review the notes taken during the interview as soon as possible, note any specific issues which arose during the interview that require follow up, and have the administrative staff open any files or note any further appointments in the practitioner's diary. If the practitioner has promised the client a letter of advice, or a document or draft response, then the date the advice is to be sent to the client should also be noted so it can be provided on time.

It is good practice to make a file note each time a practitioner is engaged in work on a client's file. In the event a file is not yet open, or a practitioner is unsure whether the client's matter will turn into an

active file, it is still crucial a good idea, that you keep an accurate file note so that the practitioner has something to refer to in the event that the client contacts the practitioner again and advises that they wish to proceed with an action or other matter. These general notes can be filed in a miscellaneous office file until needed.

If the client has been advised the advice given is to be confirmed in writing, then the written advice should contain at least the following:

- the facts upon which the advice is based, which will generally be a summary of the facts the client relayed to the practitioner during the initial interview
- any assumptions which were made for the purposes of providing the advice, or details of any additional information needed before the practitioner can fully advise the client
- the legislative framework upon which the advice is based
- a summary of the advice given to the client, including any time limits or limitation periods that apply
- confirmation of whether the practitioner will remind the client of the limitation dates or if the client is to manage those dates themselves
- if there are a number of options available to the client, the advantages and disadvantages of each option, and the course of action the practitioner has advised the client to follow
- a costs agreement and retainer, together with details on how the client can pay any pre-payment that has been requested,
- the scope of the work that will and will not be done for the client, and
- a clear indication of what will happen next.

The practitioner should also ensure all important time limits and filing

dates, if any, are recorded in their diary. There should be a reminder system to alert practitioners several weeks or days in advance, to make sure the practitioner is alerted to the impending time limit. There are few things less professional than calling a client on the day paperwork is to be filed and having to make hurried and urgent arrangements for documents to be prepared and signed to avoid missing a filing or limitation date.

If the client has not instructed or requested that they be provided with a written summary of the advice, then care should be taken to ensure an “off-risk” letter is sent. An “off-risk” letter is one which clearly sets out for the client that the practitioner is not in fact currently acting for them and that no steps will be taken to protect the client’s position in any way, until the practitioner is instructed in writing to do so. If, during the client interview, the lawyer identified there were legal issues outside of family law (and if the practitioner is not dealing with them) then the letter should also confirm that client has been told to see another lawyer in that area of law and that they may lose their rights if they delay. For example, if in the course of your discussion with a client, you discover the children had recently been in a car accident and may have suffered injuries, it is important that you inform the client to seek advice from a personal injuries lawyer and that if they elect not to, they may prejudice the children’s rights to make a claim later in life in the event of ongoing damage. Do not assume the client knows you are not acting for them in that matter as well. Be clear, in writing, about the scope of your instructions.

DRAFTING AFFIDAVITS

¶2-070 General

An affidavit can be defined as a written statement, either sworn or affirmed, which may be used as evidence in a court. Part 15.2 of the FLR sets out the rules which apply to affidavits in the FCA. Division 15.4 of Pt 15 of the FCCR sets out the rules which apply in relation to affidavits in the FCC. In a practical sense, the affidavit is how your client puts their evidence before the Court and attempts to persuade

them to the orders they are seeking.

¶2-080 Family Court of Australia

A client's affidavit assumes primary importance as an evidentiary tool in any proceedings.

The requirements for the form of an affidavit in the FCA are prescribed in r 15.08, and include that:

- the affidavit should be divided into consecutively numbered paragraphs, with each paragraph being, as far as possible, confined to a distinct part of the subject matter
- at the beginning of the first page, the affidavit should state:
  - the file number of the case in which the affidavit is sworn
  - the full name of the party on whose behalf the affidavit is filed, and
  - the full name of the person swearing or affirming the affidavit, referred to as the deponent
- the last page of the affidavit must also include a statement identifying:
  - the name of the witness before whom the affidavit was sworn, and
  - the date when, and the place where, the affidavit was sworn
- the affidavit should also display the name of the person who prepared the affidavit.

Practitioners should note the requirements of r 15.08(2) in respect of annexures to affidavits in the FCA, which provides that any document which is to be used in conjunction with an affidavit and tendered as evidence:

- must be identified in the affidavit (r 15.08(2)(a)), and

- must not be attached or annexed to the affidavit, or filed as an exhibit to the affidavit (r 15.08(2)(b)).

A tender bundle of annexures should be prepared and a hard copy of the document must be served on each person to be served at the same time as the affidavit is served on that person (see r 15.08(3)).

It is helpful if the annexure bundle is indexed and paginated when provided to the parties and the Court.

Further requirements about the contents of the affidavit are set out in r 15.09. Rule 15.09 provides that an affidavit must be:

- confined to facts about the issues in dispute
- confined to admissible evidence
- sworn by the deponent, in the presence of a witness
- signed at the bottom of each page by the deponent and the witness, and
- filed after it is sworn.

Rule 15.09(2) provides that any insertion in, erasure of, or alteration of an affidavit, must be initialled by the deponent and the witness. Any reference to a date (except the name of a month), number or amount of money must be written in figures (r 15.09(3)).

In the event that the person swearing the affidavit is either blind or illiterate, the practitioner must have regard to the provisions of r 15.10. An affidavit which is to be sworn or affirmed by a person who is blind or illiterate must contain a statement at the end of the affidavit confirming that:

- the affidavit was read to the deponent
- the deponent seemed to understand the affidavit, and
- for a deponent physically incapable of signing the affidavit, the deponent indicated that the contents were true.

If the deponent does not have an adequate command of English, the affidavit must contain a statement in accordance with the provisions of r 15.10(2), that a translation of the affidavit and oath be read or given in writing to the deponent in a language the deponent understands. The translator must certify that the affidavit has been translated.

Specific tips for the preparation of affidavits are detailed later in this chapter at ¶2-100.

Initiating Application

Rule 4.02 provides that a party filing an Initiating Application must not file an affidavit unless otherwise permitted or required to do so in accordance with Ch 4 of the FLR, or r 2.02.[13]

Interim or interlocutory proceedings

Chapter 5 of the FLR details the procedure for making an Application in a Case in the Family Court. Chapter 5 does not operate in isolation, and practitioners may also need to refer to the provisions contained in Ch 2, 4, 7 and 24.

Pursuant to r 5.10:

- the hearing time allocated for an interim or procedural application is limited to two hours, and
- cross examination will only be permitted in exceptional circumstances (r 5.10(2)).

Accordingly, any affidavit material filed on behalf of a party must contain all of the evidence upon which the party intends to rely. The importance of the affidavit to the success of your client's matter, cannot be overstated. Although a well- drafted affidavit will not, of itself, ensure your client secures the outcome they are seeking, it will avoid criticism from the Court as to the nature and form of the material. It is difficult to justify that criticism to the client if you have not complied with the rules as to form.

Rule 5.02 provides that a party who applies for an interim order in an Initiating Application (Family Law) or who files an Application in a Case must, at the same time, file an affidavit stating the facts to be

relied upon in support of the orders sought in the application, with the exception stated in r 5.02(2).

Rule 5.08 outlines the matters that the court may take into account when determining whether or not to make an interim order, namely:

- in a parenting case — the best interests of the child (s 60CC of the *Family Law Act 1975* (Cth) (FLA))
- whether there are reasonable grounds for making the order
- whether, for reasons of hardship, family violence, prejudice to the parties or the children, the order is necessary
- the main purpose of the FLR (r 1.04), and
- whether the parties would benefit from participating in one of the dispute resolution methods.

In accordance with r 5.09, and subject to r 9.07, affidavit evidence to be relied upon at an interim hearing, is limited to one affidavit by each party, and one affidavit of each witness, provided that the evidence contained in the affidavit is relevant to the issues in dispute and cannot be given by a party.

Application for interim parenting orders

As the court may consider whether the making of any order is in the best interests of the child (r 5.08(a)), any affidavit prepared on behalf of a party should address the primary considerations detailed in s 60CC(2) of the FLA and the additional considerations detailed at s 60CC(3). Those primary and additional considerations detailed in s 60CC provide a checklist of matters to which a practitioner can refer when drafting an affidavit on behalf of a party, in both interim and final proceedings. Using headings referring to each section being addressed can be of assistance to help frame the evidence for the court.

The court may also require that those considerations be addressed in any written outline filed prior to a final hearing. It is therefore of benefit to have turned your mind to those specific considerations when

drafting the material at the commencement of the matter.

Prior to the amendments introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, a parenting application filed by a party would require the court to consider whether the child or children subject to the application were living in a settled environment. The Full Court decision of *Cowling* v *Cowling*[14] provided a useful checklist as to the issues which a court may consider when determining whether a child or children are living in a settled environment:

- whether the current circumstances have arisen by virtue of some agreement between the parties or as a result of acquiescence
- whether the current arrangements have been unilaterally imposed by one party upon the other
- the duration of the current arrangements and whether there has been any undue delay in instituting proceedings or in the proceedings being listed for hearing
- the wishes, age and level of maturity of the child
- the current and proposed arrangements for the day-to-day care of the child
- the period during which the child has lived in the environment
- whether the child has any siblings and where they reside
- the nature of the relationship between the child, each parent, any other significant adult and his or her siblings, and
- the educational needs of the child.

These matters were not an exhaustive list of the evidence that should be presented on behalf of a client. However, particularly for newly-admitted practitioners, the court provided excellent guidelines which could be used as a checklist for interim parenting applications, to

ensure the practitioner had put all of the relevant evidence before the court.

The decision of the Full Court in *Goode and Goode*,[15] addressed *Cowling* in light of the amendments introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which commenced on 1 July 2006.

The court, constituted by Bryant CJ, Finn and Boland JJ, held that "there are passages in *Cowling* that do not sit comfortably with the Act as amended".[16] While it was accepted that the best interests of the child were the paramount consideration in deciding what interim parenting order to make, the court held there "are many elements in the Act as amended that would militate against the continued application of the principles in *Cowling*". In particular, the court held the decision in *Cowling*, "to the effect that the best interest of the child are met by stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act".[17]

The court further held that any decision to maintain a well-settled arrangement as being in the child's best interests could only be arrived at after consideration of the matters contained in s 60CC of the FLA, particularly s 60CC(3)(d) and (3)(m) and, if appropriate, s 60CC(4) and 60CC(4A). That said, s 60CC(4) and 60CC(4A) were repealed in 2011.[18]

Accordingly, any affidavit filed in support of an application for parenting orders under Pt VII of the FLA, should address:

- any evidence which may result in the rebuttal of the presumption of equal shared parental responsibility pursuant to s 61DA(2) of the FLA

- any other circumstances which would persuade a court that it was not appropriate to apply the presumption to the interim parenting order pursuant to s 61DA(3) or s 61DA(4)

- the primary considerations that the court must consider when determining what is in the child's best interests pursuant to s

60CC(2), and

- the additional considerations which may apply, as detailed at s 60CC(3), and in particular, s 60CC(3)(d),[19] 60CC(3)(m).[20]

Maintenance

The court's approach to determining an application for maintenance pursuant to s 72 (or s 90SF(1) in relation to de facto relationships) of the FLA is well settled. When preparing an application and accompanying affidavit, practitioners may be assisted by the decision of the Full Court of *Bevan and Bevan*.[21]

It was held in *Bevan*:

> "an award of spousal maintenance requires:
>
> (a) a threshold finding under s 72;
>
> (b) a consideration of s 74 and 75(2);
>
> (c) no fettering principle that pre-separation standard of living must automatically be awarded where the respondent's means permit it; and
>
> (d) discretion exercised in accordance with the provisions of s 74, with 'reasonableness in the circumstances' as the guiding principle".[22]

A threshold finding pursuant to s 72 or s 90SF(1) of the FLA is a positive finding that the respondent spouse is able to support the applicant spouse, and that the applicant spouse is unable to support himself or herself adequately by virtue of any one of the reasons set out in s 72(1) or s 90SF(1)(b), namely:

(a) by reason of having the care and control of a child of the marriage or de facto relationship who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate

gainful employment, or

(c) for any other adequate reason.

Affidavit material presented to the court in relation to an application for spousal maintenance should address the following, at a minimum:

(i) establishing that the applicant cannot support themselves (being a threshold finding under s 72 or s 90SF(1) of the FLA):

- details of the applicant's age, physical and mental capacity
- whether the applicant has the care of any children of the marriage or de facto relationship under the age of 18 years
- whether the applicant is employed
- details of the applicant's income, and whether any money is received from an income-tested pension
- any attempts by the applicant to secure employment
- details of the applicant's reasonable weekly expenses, and
- details of any deficiency in the amount received by the applicant and the amount reasonably spent by the applicant each week

(ii) evidence as to the reasonable maintenance needs of the applicant

(iii) establishing that the respondent has the capacity to provide and contribute to the applicant's reasonable needs (being the threshold finding under s 74 or s 90SE of the FLA):

- details of the respondent's age, physical and mental capacity
- whether the respondent is employed
- details of the respondent's income, earning capacity and

financial resources

- any recent changes to the financial circumstances of the respondent
- details of the respondent's reasonable weekly expenses, and
- details of any surplus in the amount received by the respondent and the amount reasonably spent by the respondent each week

(iv) consideration of any relevant matter pursuant to s 75(2) or s 90SF(3) of the FLA.

Urgent maintenance

Section 77 (or s 90SG in relation to de facto relationships) of the FLA provides for the court to make an award of urgent maintenance. Section 77 or s 90SG relevantly provides that if it appears to the court that a party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other as the court consider reasonable.

An order pursuant to s 77 or s 90SG is generally made for a defined period of time, pending a further determination of the substantive issue of the application for maintenance,[23] and is "in the nature of stopgap orders".[24]

The decisions of *Ashton and Ashton*[25] and *Chapman and Chapman*[26] may be of assistance when reviewing what evidence to include in any supporting affidavit to accompany a s 77 or s 90SG application.

When preparing an affidavit in relation to a s 77 or s 90SG application, at a minimum, a practitioner should address the following questions:[27]

- Is there evidence that there is an immediate or pressing need for maintenance or financial assistance?

- What is the immediate need for?
- What is the anticipated duration of the immediate need?
- Can the immediate need be met by a weekly, monthly or periodic payment?
- Can the applicant establish a threshold finding pursuant to s 72 or s 90SF(1)?
- Does the respondent have a prima facie ability to provide for the applicant spouse?

Objections to evidence

There is provision in both the FLR and the Federal Circuit Court Rules 2001 for the striking out of objectionable material.[28] The FLR provide that the court may strike out of an affidavit material:

- that is inadmissible, unnecessary, irrelevant, unreasonably long, scandalous, prolix, or argumentative, and
- which sets out an opinion of a person who is not qualified to give it.

> **Warning**
>
> In the event that material is struck out of an affidavit, there may be costs implications for the party who filed the affidavit.
>
> Practitioners would do well to take care when drafting affidavits to include only relevant evidence, which will reduce the time spent arguing objections to evidence, and will reduce the risk of a costs order against a client.

Evidence Act 1995

While some provisions of the *Evidence Act 1995* (Cth) (EA) are

excluded in some family law proceedings (s 69ZT, FLA), when drafting an affidavit practitioners should still consider the operation of a number of provisions in the EA:

- s 56(2) provides that evidence that is not relevant in the proceeding is not admissible

- s 55(1) provides that evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding

- s 69ZV of the FLA provides that evidence of children is not inadmissible merely because of the law against hearsay and the court can give such weight (if any) to that evidence as it sees fit

- s 78 provides that a person other than an expert can express an opinion only if the opinion "is based on what the person saw, heard or otherwise perceived about a matter or event; and . . . evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event", and

- s 131(1) provides that, subject to the exceptions listed in s 131(2), evidence of communications made in connection with an attempt to negotiate a settlement of a dispute cannot be adduced.

It is becoming increasingly common now, given our reliance on technology, for litigants to seek to rely on audio or video recordings as evidence in their proceedings. Practitioners should carefully consider the use of audio and video recordings as the rules in each state can be different.

Although the legislation differs in each State and Territory, the provisions in New South Wales (*Surveillance Devices Act 2007* (NSW)), Victoria (*Surveillance Devices Act 1999* (Vic)), South Australia (*Surveillance Devices Act 2016* (SA)), Western Australia (*Surveillance Devices Act 1998* (WA)) and the Northern Territory (*Surveillance Devices Act 2007* (NT)) are broadly similar.

In those jurisdictions, it is an offence to use either a listening device or an optical surveillance device to record a private conversation or activity without the consent of the parties to it.

The position in Queensland (*Invasion of Privacy Act 1971 (*Qld*)*, Tasmania (*Listening Devices Act 1991* (TAS)*)* and the Australian Capital Territory (*Listening Devices Act 1992* (ACT)*)* is similar, and applies only to listening devices.

A key point of distinction is that in Queensland, it is not unlawful for a party to record a private conversation where the person using the listening device was a party to the conversation.

By contrast, all other jurisdictions require at least that the party using the listening device be a party to the conversation and have the consent of those involved.

If one party seeks to rely on recorded evidence, and if the other party objects, the Court will consider:

- If the recording was prohibited by Australian law?
- Do any exceptions apply?
- If no exception is made out and the recording is unlawful, should the Court nonetheless exercise its discretion to admit it, having regard to the Evidence Act and the relevant family law principles?

Section 138 of the EA provides that if evidence was obtained improperly or in contravention of an Australian, that evidence is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

The court then engages in a balancing act to determine whether to admit the evidence:

> "Where evidence has been obtained unlawfully or improperly, this provision requires the court to engage in a balancing exercise, balancing or weighing those considerations supporting exclusion of the evidence against those supporting its admission in the

particular circumstances of the case" *R v McKeough* [2003] NSWCCA 385.

Section 138 of the EA sets out a non-exhaustive list of matters the court may consider when determining whether to allow the evidence to be admitted, including:

- the probative value of the evidence
- the importance of the evidence in the proceeding
- the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding
- the gravity of the impropriety or contravention
- whether the impropriety or contravention was deliberate or reckless
- whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights
- whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
- the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

The factors in s 138 are not exhaustive. The court will also look at s 135 of the EA and the general discretion to exclude evidence.

Practitioners should discuss the following risks of including evidence of video and audio recordings with clients:

- risk of police prosecution where the recording was unlawful
- risk that the evidence will not be admitted,
- risk that the evidence will not be given any weight

- risk that the recording could be found to be domestic violence or stalking, and

- risk that the evidence will backfire and reflect poorly on the party who made the secret recordings.

The matter *Leos & Leos* [2017] FamCA 1038 illustrates the significant risk of criminal penalty if a client obtains the recordings in an inappropriate manner. Both parents alleged the other had committed family violence towards them and the children. The father hired a private investigator to record the mother and children. He was arrested and plead guilty to recording private conversation offences under the *Surveillance Devices Act 2007* (NSW). He was sentenced to two 18-month bonds under *The Crimes Act* 1900 (NSW) and was fined $1,000. He consented to an Apprehended Violence Order.

The matter of *Leos* can be compared to the decision of Justice Hannam in *Huffman & Gorman [2014] FamCA 1077* which was considered to be at the less serious end of the spectrum. In that matter, the father had been recording interactions with the mother via a dictaphone on his belt without the mother's knowledge or consent. The father alleged three young children had been exposed to family violence. The objection to the recordings was dismissed and the recordings and transcripts were received into evidence at the judge's discretion.

If a client wishes to rely upon video or audio recordings, practitioners should take detailed instructions about the following matters:

- When and where were the recordings made?

- How were they made? At a simplistic level, this means assessing how concealed or elaborate the recording was. Could the evidence have been obtained in some other way?

- Was the other party to the private conversation aware of being recorded or gave consent to be so recorded, explicitly or implicitly?

- Do the original recordings still exist? Is any transcript made of the recordings accurate and complete? Have some conversations been deleted or altered?

- What was the context before and after the incidents recorded?

Footnotes

13 Rule 2.02 contains a table of documents that must be filed with each application.

14 *Cowling* v *Cowling* (1998) FLC ¶92-801; [1998] FamCA 19 at p 85,006.

15 *Goode and Goode* (2006) FLC ¶93-286; [2006] FamCA 1346.

16 Ibid, at p 80,901.

17 Ibid.

18 Ibid, at p 80,902.

19 As s 60CC(3)(d) states:

> "the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
>
> (i) either of his or her parents, or
>
> (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living".

20 ie any other fact or circumstance that the court thinks is relevant.

21 *Bevan and Bevan* (1995) FLC ¶92-600.

22 Ibid, at 81,981.

23 Senior Registrar Dittman, *Practical Strategies for Drafting Effective Affidavits in Interlocutory Applications*, Paper presented to Lexis Nexis Seminar, Brisbane 2005, at 11.

24 *Chapman and Chapman* (1979) FLC ¶90-671.

25 *Ashton and Ashton* (1982) FLC ¶91-285.

26 *Chapman and Chapman* (1979) FLC ¶90-671.

27 Senior Registrar Dittman, *Practical Strategies for Drafting Effective Affidavits in Interlocutory Applications*, Paper presented to Lexis Nexis Seminar, Brisbane 2005, at 12.

28 Family Law Rules 2004, r 15.13; Federal Circuit Court Rules 2001, r 15.29.

¶2-090 Federal Circuit Court of Australia

The rules in relation to the drafting of affidavits in the FCC are contained in Div 15.4 of the FCCR.

The FCCR provide that:

- the affidavit must be divided into consecutively numbered paragraphs (r 15.25)
- each paragraph, as far as it is possible, should be confined to a distinct part of the subject (r 15.25)

- the person making the affidavit must sign each page of the affidavit (r 15.26)

- the affidavit must contain a jurat which:
  - states the name of the person swearing the affidavit
  - states whether the affidavit is sworn or affirmed
  - states the day and place the person makes the affidavit
  - states the full name and capacity of the person before whom the affidavit is made
  - is to be signed by the person making the affidavit in the presence of the person before whom it is made, and
  - is to be signed by the person before whom it is made (r 15.26(2)).

- the term “jurat” is defined in the notation to r 15.26(2) as “a clause placed at the end of an affidavit stating the time, place and officer before whom the affidavit is made”, and

- any interlineation, erasure or other alteration made to the affidavit must be initialled by both the person making the affidavit and the person before whom the affidavit is signed (r 15.26(3)).

Rule 15.27 provides for the certification of an affidavit by person who is blind, illiterate or physically incapable of signing an affidavit. In the event that the person swearing the affidavit is blind, illiterate or physically incapable of signing the affidavit, the person before whom the affidavit is sworn must certify in or below the jurat, that:

- the affidavit was read to the person making it (r 15.27(1)(a))

- the person seemed to understand the affidavit (r 15.27(1)(b)), and

- in the case of a person who is physically incapable of signing, that the person indicated that the contents of the affidavit were true (r

15.27(1)(c)).

Unlike the requirements of the Family Court, in the FCC, FCCR r 15.28(1) provides that a document which is to be used in conjunction with an affidavit must be annexed to the affidavit. In the event that it is impractical to annexe the document due to either the nature of the document or its length, then the document may be an exhibit to the affidavit (r 15.28(2)).

Any annexure to an affidavit must be paginated, and contain a statement signed by the person before which the affidavit is made, which identifies the document as the particular annexure (r 15.28(3)). Annexures must be paginated, and the pagination should continue, consecutively, until the last page of the last annexure (r 15.28(4)).

If it is impractical to annexe a document to an affidavit, whether due to the nature of the document or its length, the document may become an exhibit to the affidavit (r 15.28(2)). Similarly, an exhibit to an affidavit must be marked with the title and number of the proceedings, be paginated, and bear a statement signed by the person before which the affidavit is made, identifying the document as the exhibit referred to in the affidavit (r 15.28(5)).

Practitioners should also be aware of the requirements of Practice Direction No. 2 of 2017 Interim Family Law Proceedings (from 1 January 2018).

That practice direction provides that, unless express leave is granted by the judge in whose docket the matter has been allocated, any affidavit filed in support of an interim application must not:

- exceed 10 pages in length for each affidavit, and
- contain more than 5 annexures.

Further, if the respondent seeks further interim orders in their filed response and those additional orders are opposed by the applicant, the applicant may then file a second affidavit in answer to the respondent’s material provided it does not:

- exceed 10 pages in length for each affidavit, and

- contain more than 5 annexures.

The further affidavit filed by the applicant should set out:

- any additional orders sought by the applicant, and
- any additional relevant facts relied on in opposition to the respondent's orders.

Failure to comply with the terms of the practice direction may result is loss of any priority listing, an adjournment and/or a costs order.

If a party wishes to rely upon an affidavit which does not comply with the practice direction, and if the judge who has been allocated the matter does not expressly give leave, then, at the discretion of the judge:

- non-complying affidavits will not be read, or
- the party with the material which does not comply with the practice direction will be required to select 10 pages out of their material that they wish to rely upon; and
- costs orders may be made.

A copy of the complete practice direction can be found at the FCC website: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/rules-and-legislation/practice-directions/2017/022017.

¶2-100 General matters and drafting tips

When drafting an affidavit on behalf of a client, the practitioner should always be cognisant of:

- the objective they are trying to achieve,
- the applicable rules of evidence,
- the legal principles which apply in the proceedings, and

- the rules which apply in each court.

The client's affidavit is often the most important document which can be filed on behalf of the client. It is the document which contains the evidence the client is relying on to persuade the court to make the orders sought in their application or response.

Sufficient care should be taken when drafting to ensure the affidavit relays the client's relevant evidence, admissibly, to the court. The need to prepare and file an affidavit urgently, or on short notice, is not an excuse to prepare affidavit material which contains irrelevant or little evidence, is poorly drafted, or difficult to follow.

A well-drafted affidavit should present the client's evidence in a concise and clear way. It is important for the affidavit to be easy to understand and contain only relevant information. This is where a practitioner must direct the client as to what is relevant information as opposed to information the client considers important to include.

Rule 15.13 of the FLR gives the court the power to strike out inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative material (r 15.13(1)). Irrelevant material will only distract the reader from the client's primary objective thereby making it less persuasive than it could have been.

In *Sheehan* v *Sheehan* (1983) FLC ¶91-352, the Full Court referred to the wife's lengthy affidavit as follows:

> "The substance of the affidavit commenced at para. 4, and commenced the matrimonial history of the parties by referring to the fact that they became acquainted as children at primary school when the wife was aged nine and the husband was aged ten. Put another way, whoever was responsible for the drafting of the affidavit thought it was, if not necessary, at least reasonable that, for the resolution of property and maintenance matters arising out of a 33-year marriage on 14 April 1945 which terminated on 27 July 1978 and which had resulted in four children being born and raised to adulthood, to start at a point 50 years prior to the present time".

If an affidavit lacks structure, the court will find the client's evidence

difficult to understand. The relevant facts in your client's affidavit should be easy for the court to find. Accordingly, it is recommended the affidavit be prepared chronologically so it is easy to follow. Alternatively, affidavits might be prepared by grouping issues together under headings. The court can then easily locate all of the relevant evidence applicable to each particular issue.

The practitioner must have an awareness of the legal principles relevant to the orders the client is seeking so the affidavit addresses the evidence the court will need to give your client the relief they are seeking.

Justice Allsop commented in *Byrnes* v *Jokona Pty Ltd* [2002] FCA 41, at [14], that practitioners are assisting in the preparation of an affidavit of a witness being the written evidence that reflects the honestly held recollection of an individual, assisted by sensibly ordered and presented documentary and other background information.

Practitioners should also avoid filing multiple affidavits which uses identical language; this can happen where more than one person is invested in the same subject matter. Where the language in the documents is the same, the inference is the witnesses have colluded. Palmer J commented in *Macquarie Developments Pty Ltd and Anor* v *Forrester and Anor* [2005] NSWSC 674:

> "Save in case of proving formal or non-contentious matters, affidavit evidence of a witness which is in the same words as affidavit evidence of another witness is highly suggestive either of collusion between the witnesses or that the person drafting the affidavits has not used the actual words of one or both of the deponents. Both possibilities seriously prejudice the value of the evidence and Counsel usually attacks the credit of such witnesses, with good reason".

Practitioners should also ensure the affidavit they prepare contains truthful evidence. Young J noted in *ERS Engines Pty Ltd* v *Wilson* (1994) 35 NSWLR 193 (at [197]):

> "It cannot be emphasised too greatly that one's obligation in making an affidavit is the same as when one is giving evidence in

the witness box. One is to tell the truth and the whole truth. It is completely unacceptable for a solicitor to prepare an affidavit in which a witness gives a half truth and it is completely unacceptable for a witness, especially an employee of an officer of the court, to only give the court a half truth. . . .”

Some general drafting suggestions include:

Do	Don’t
• present a summary of the relevant relationship history	• use generalisations
• give the court all of the relevant information to support your client’s application	• use broad statements
• address any legislative provisions, such as s 60CC to which the court is likely to refer when determining the client’s application	• use slang
• present the evidence in a chronological way	• include irrelevant or objectionable evidence
• present the evidence in a logical manner	• include irrelevant annexures
• be careful to address grammar and punctuation issues	• prepare the affidavit without reviewing the rules as to evidence
• use plain English	• try to incorporate your submissions in the affidavit — the affidavit should only address relevant facts.
• limit the client’s reliance upon hearsay evidence. If hearsay evidence is used, ensure you have included who told the	

witness the information, where and when they were told, and whether any other witnesses might have seen or heard any of the conversation/interaction	
• ensure that any evidence presented is presented in an admissible form (eg representations made by children)	
• use first person active language	
• use short, clear sentences	
• conversations should be set out in first person. It is also prudent to include a statement advising any words used which are attributed to or by a witness are, if not the words, then words to the same effect. (Justice Brereton RFD *Aspects of Advocacy: the Effective Presentation of Evidence*)	
• use short paragraphs	
• use headings where appropriate to make the affidavit easy to read	
• if appropriate, prepare an index to make the affidavit easy to navigate and ensure all annexure pages are numbered	
• when referring to an annexure, provide a full reference in the affidavit, including the appropriate page number and part of the document, so the court is clear about which evidence supports your client’s position	

• when responding to an allegation contained in another party's affidavit, don't simply refer to the paragraph of the previous affidavit. Outline for the court where the allegation can be found but also what it was	
• only include evidence which is relevant to your client's application	
• keep corroborating or "cheer leader" affidavits to a minimum, and if they are necessary, evidence should be relevant and succinct	
• tell the client's story in such a way that key evidence can be easily identified	
• give credit to the other party when it is appropriate. Generally, an affidavit which suggests one parent had no involvement in a child's life will be less persuasive than one which acknowledges a parent's involvement, but explains why the party swearing the affidavit made a greater or more significant contribution which will be relevant to the court's determination	
• present all relevant facts, including those which may be damaging to the client. It is unlikely the respondent will fail to include them. Any potentially damaging evidence should be included, and an attempt made to explain the circumstances. The weaknesses of your client's case should not be detailed at first instance in the other party's response documents	

• do not include without prejudice correspondence or evidence of without prejudice settlement discussions	
• when preparing an affidavit for an ex parte application, ensure all relevant evidence has been included so the position presented to the court is balanced	
• reality test your client's version of events	
• when annexing copies of electronic messages or communication, like SMS messages, internet messages or emails, consider including the most relevant passages directly in the body of the affidavit, and the full text message exchange as an annexure. Be mindful to ensure a complete copy of the relevant communication is presented so the court has an understanding of how each party communicates on issues.	

DIVORCE

Editorial information

Written by Louise Hennessy

¶3-000 Introduction

The main legislative provisions relating to divorce in Australia are in Pt VI of the *Family Law Act 1975* (Cth).[1]

Practitioners are referred to the *Best practice guidelines for lawyers doing family work*[2] prepared by the Family Law Council and Family Law Section of the Law Council of Australia, which provides a simple but useful reminder of matters which should be borne in mind and considered by legal practitioners before they commence divorce proceedings on behalf of a client.

In 2017, there were 49,032 divorces granted in Australia.[3] While many couples divorcing may choose to prepare and file their own applications at court, many still require the assistance and advice of legal practitioners. This chapter provides practical information on the

law applicable to divorce and nullity, the application process and the procedure to be followed.

Footnotes

1 Other provisions of relevance are s 44 and 93.

2 Which may be found at www.familylawsection.org.au/resource/BestPracticeGuidelinesv8

3 Australian Bureau of Statistics, *Marriages and Divorces* (ABS, 2017).

¶3-010 Marriage

Section 5 of the *Marriage Act 1961* (Cth) as amended with effect from 9 December 2017 provides a definition of marriage as "the union of two people to the exclusion of all others, voluntarily entered into for life".

When a client makes an appointment to see a legal practitioner, he/she has come to the conclusion that they can no longer continue with that union, or, at the very least, there are problems within that union that require a resolution. Rather than automatically assuming that a marriage cannot be saved, sensitive enquiries should be made to establish whether or not there is a reasonable prospect of a reconciliation.

Under s 12E of the *Family Law Act 1975* (Cth) (FLA), legal practitioners are in general obliged to provide prescribed information (s 12B, FLA) to their clients about non-court-based family services, court processes and services when they are consulted by or are representing a married person who is a party to proceedings for a divorce order or financial or Pt VII proceedings (children). A legal practitioner representing a party in proceedings under Pt VII must give the party documents containing the information prescribed under s

12D (about Pt VII proceedings). There are some exceptions to this rule, such as where the solicitor believes the client has already been given the information, or there is no real possibility of the parties reconciling.[4]

Considerations of cultural and religious affinities are important. Thought may also need to be given to obtaining a “talaq” (Islam), a “get” (Jewish) or religious annulment (Catholic).

Footnotes

4 *Family Law Act 1975* (Cth), s 12E(4) and (5).

¶3-020 Preconditions for making an application for divorce

Section 48(1) of the *Family Law Act 1975* (Cth) establishes that there is only one ground for divorce in Australia, which is that the marriage has broken down irretrievably. Fault is not a ground for divorce in Australia.

The ground for divorce is established if, and only if, the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the filing of the application for the divorce order (s 48(2)).

Where the court is satisfied that there is a reasonable likelihood of cohabitation being resumed, s 48(3) provides that a divorce order shall not be made.

¶3-030 Irretrievable breakdown

The irretrievable breakdown of the marriage is established by 12 months’ separation (s 48(2) *Family Law Act 1975* (Cth)). The Full Court in *Falk and Falk*[5] established that the breakdown in the relationship has to be substantial. In determining whether or not the

relationship has in fact irretrievably broken down, one looks at and compares the relationship which existed *before* the alleged breakdown with the relationship between the parties *after* the alleged breakdown.

Footnotes

5 *Falk and Falk* (1977) FLC ¶90-247.

¶3-040 12 months' separation

Divorce orders can be made if the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than 12 months (s 48(2) *Family Law Act 1975* (Cth)). For the purpose of calculating the 12-month period of separation, the day on which separation occurred is ignored.

In *Bozinovic and Bozinovic* (1990) FLC ¶92-121, where an application was filed on the first anniversary of the date of separation, it was held that the application was prematurely filed. The earliest it should have been filed was one day later. Reference was made to s 36 of the *Acts Interpretation Act 1901* (Cth).

Example

Jack and Jill separated on 1 January 2018 after five years of marriage. The earliest that either may file an application for divorce is 2 January 2019.

¶3-050 Reasonable likelihood of cohabitation being resumed

In order to satisfy s 48(3) of the *Family Law Act 1975* (Cth), "[m]ore than a likely resumption of some elements of the marital relationship must be shown — resumption of cohabitation must be shown to be likely — that is, a bilateral intention on the part of both spouses to resume living together".[6]

The Full Court in the case of *Bates and Sawyer*[7] did not agree with the "bilateral intention" in the judgment in *Todd* (supra), and seemed to suggest instead that a lower threshold may suffice in convincing the court that a resumption of cohabitation was likely. The standard of proof is the ordinary civil standard.

Footnotes

6 *Todd and Todd (No 2)* (1976) FLC ¶90-008 at p 75,080.

7 *Bates and Sawyer* (1977) FLC ¶90-319 at p 76,695.

¶3-060 Separation

The Full Court in *Pavey and Pavey*[8] said that "[s]eparation means more than physical separation — it involves the breakdown of the marital relationship (the *consortium vitae*). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed".

Physical separation is not a condition required to evidence the breakdown in the marital relationship. Parties can be considered as living separately and apart notwithstanding that they remain living in the same residence. Physical separation alone is not a condition that will satisfy the requirements of s 48(2) of the *Family Law Act 1975* (Cth), because in some marriages, the parties may be required to live apart but the marital relationship nonetheless remains intact. For example, one of the parties to the marriage may be in the armed forces, a prisoner or a patient in hospital and confined there for a substantial period of time due to illness. See *Whiteoak and Whiteoak*.

9

Footnotes

8 *Pavey and Pavey* (1976) FLC ¶90-051 at pp 75,211–75,213.

9 *Whiteoak and Whiteoak* (1980) FLC ¶90-837.

¶3-070 The three elements of separation

For separation to be established as a matter of fact, the marital relationship must have been broken. Marital relationships are unique, and what constitutes separation will be a question of fact and degree in each case. A substantial breakdown is all that is required.

Separation is not defined in the *Family Law Act 1975* (Cth), but reference to case law shows that three elements are required for the purposes of s 48(2):

- intention of one or both of the parties to sever or not to resume the marital relationship
- the parties act on that intention or act as though the relationship has come to an end, and
- where one party alone considers that the relationship is at an end that party must communicate that attitude to the other party.

Note

The case of *Todd and Todd (No 2)*[10] established the elements of intention and action. The requirement of communication was made clear in the case of *Falk and Falk*.[11] In respect of the time

from when the 12-month period will run, case law suggests that time will start to run from the date of the formation of the intention (see *Tye and Tye (No 1)*:[12] note that this case dealt with a *physical* separation of the parties).

Footnotes

10 *Todd and Todd (No 2)* (1976) FLC ¶90-008.

11 *Falk and Falk* (1977) FLC ¶90-247.

12 *Tye and Tye (No 1)* (1976) FLC ¶90-028.

¶3-080 Can the parties live separately but under the same roof?

Section 49(2) of the *Family Law Act 1975* (Cth) makes it clear that parties can live separately under the same roof:

> "The parties to a marriage may be held to have separated and to have lived separately and apart *notwithstanding that they have continued to reside in the same residence* or that either party has rendered some household services to the other". [emphasis added]

However, there may be some practical problems associated with parties living under the same roof; for example, in establishing that separation has in fact occurred or when it commenced. The court is also wary of parties submitting false claims of separation, and therefore some corroboration from them may be required. It would be prudent for the parties at the very least to sleep in separate rooms and to keep to a minimum the rendering of household services to each other.

A claim by parties that they continue to reside together for the sake of their children can create some difficulties. If parties continue to live together a clear distinction needs to exist between the parties living together for the sake of their children as parents, in contrast to living together as spouses.

Parties living under the same roof during all or part of the 12-month period of separation will each be required to file an affidavit with the court where the divorce application is made jointly. The affidavit will provide the court with information about the separation. On a sole application, only the applicant is required to file an affidavit.

Note

The affidavit should confirm that for the duration of the separation the applicant considered the marriage to have irretrievably broken down. In addition, reference should be made to the following matters (this list is not exhaustive).

Arrangements

- What changes have the parties made to their sleeping arrangements (including reference to the existence or not of a sexual relationship)?
- Where parties continue to perform domestic services for one another, how has this changed since separation (the court would normally expect to see a decline and each party becoming independent of the other)?
- Are there separate financial arrangements (eg sole bank accounts)?
- Is there less interaction in terms of social functions, arrangements and activities?
- How and when did the parties inform their children (if any), relations and friends of their separation?

Why the parties continue to reside together

- Why have the parties decided to continue to live under the same roof? This may be due to financial pressures, duties as parents to any children of the family, etc.
- What arrangements have the parties put in place for any children of the family who are under the age of 18?
- What government departments (eg the Child Support Agency and Centrelink) have been advised of the parties' separation? Provide evidence of any correspondence sent or received, and state whether there have been any changes in the payments received as a result of the separation.
- Is it envisaged that there will be a change to the housing arrangements? If so, what will those changes be and when will they take effect?

In addition, an affidavit may be required from an independent party who can corroborate the position. This witness may be a family, friend or neighbour who is aware of the particular circumstances of the separation within that household.

¶3-090 Domestic services

Can the parties be said to be living separately and apart where one party performs domestic services for the other?

This scenario has been considered in the cases of *Falk and Falk*[13] and *Hodges and Hodges*.[14] One spouse in each case prepared meals for the other spouse. They occasionally ate together. The same spouse did laundry for the other spouse and even received money for housekeeping. The parties no longer socialised together, nor did they share a bedroom. Each was found to have separated for the purposes of s 48(2) of the *Family Law Act 1975* (Cth). In each case it was a

question of fact and degree. The greater the degree of separation in all aspects of the lives of the parties the more likely they are to satisfy the court's requirements under s 48(2).

The kinds of services one party may find themselves performing for the other include laundry, cooking, cleaning, minor household repairs and maintenance work such as dealing with leaks, gardening or external household repairs.

Footnotes

13 *Falk and Falk* (1977) FLC ¶90-247.

14 *Hodges and Hodges* (1977) FLC ¶90-203.

¶3-100 Marriage to be of two years' duration or more

Where parties have been married for less than two years, they must first have considered a reconciliation with the assistance of a specified person[15] or, where the parties have not attended counselling, leave of the court must be obtained before an application for divorce is filed. The two-year period is calculated from the date of the marriage to the date of the divorce application.

Section 44(1B) of the *Family Law Act 1975* (Cth) requires the "specified person" to complete and sign a certificate, and that certificate must be attached to the application for divorce. The certificate will confirm to the court that the specified person has discussed with the parties the possibility of a reconciliation. The parties can obtain a blank certificate from the Family Court website to take with them to family counselling.

Where the parties have not attended counselling, the parties will require the leave of the court to apply for a divorce, and the applicant will need to explain to the court in an affidavit why they did not attend counselling (s 44(1C)). The reasons for this might be that the applicant

does not know where the respondent is or one of the parties refused to attend. The affidavit should deal with the reasons why the parties did not attend counselling and what attempts were made to see a counsellor (eg a counsellor was identified and an appointment made but not kept). Additionally it would be sensible to alert the court to any special circumstances of the case, for example, where there have been incidences of domestic violence.

The object of this requirement is to ensure that those involved in a short and, therefore, inexperienced marriage should be afforded the opportunity to consider reconciliation with a professional counsellor before taking matters further.

Footnotes

15 A specified person can be a family counsellor (s 44(1B)(a)(i)); or if the court is the Family Court, the Federal Circuit Court or the Family Court of a state — an individual or an organisation nominated for the parties by a family consultant (s 44(1B)(a)(ii)); or if the court is not the Family Court, the Federal Circuit Court or the Family Court of a state — an individual or an organisation nominated for the parties by an appropriately qualified officer of the court (s 44(1B)(a)(iii)).

¶3-110 Reconciliation

Under s 13B of the *Family Law Act 1975* (Cth) the court must consider from time to time the possibility of a reconciliation between the parties to the marriage. If the court considers that, from the evidence in the proceedings or the attitude of the parties, there is a reasonable possibility of a reconciliation between the parties, the court may adjourn the proceedings to allow the parties the opportunity to consider a reconciliation.[16] Where the court does adjourn the proceedings, it must advise the parties to attend family counselling, or

use the services of another appropriate person or organisation.[17] Under s 13B(4), where either of the parties requests that the proceedings resume, the court must do so as soon as practicable.

Footnotes

16 *Family Law Act 1975* (Cth), s 13B(2).

17 Ibid, at s 13B(3).

¶3-120 Resumption of cohabitation

Parties can resume cohabitation for one period of up to three months without prejudice to the application for divorce generally. The effect of a resumption of cohabitation depends upon whether or not the application for divorce has been filed at the court.

Section 50(1) of the *Family Law Act 1975* (Cth) provides:

> "For the purposes of proceedings for a divorce order, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before and after the period of cohabitation may be aggregated as if they were one continuous period, but the period of cohabitation shall not be deemed to be part of the period of living separately and apart".

¶3-130 What equates to a resumption of cohabitation?

What actions by the parties will be sufficient to show that they have resumed cohabitation? The parties need to show that they have resumed cohabiting in substantially the same terms (although it does not have to be in identical terms) as they were prior to their

separation. Both parties must intend to resume cohabiting and act upon that intention.

Watson J in *Todd and Todd (No 2)*[18] said:

> "[A]n agreement to resume cohabitation which is not carried out is insufficient. Just as intention (or acceptance) and action thereon are ingredients in the element of separation so intention (or acquiescence) and action thereon are necessary ingredients in the termination of separation".

A resumption of cohabitation will not be found if the parties merely return to living under one roof if other aspects of their relationship do not support a return to married life.

It is a question of fact and degree in each case whether there has been a resumption of cohabitation.

Casual acts of sexual intercourse have not been found to disrupt a period of separation or constitute a resumption of cohabitation (see *Todd and Todd (No 2)*[19] and *Saunders and Saunders*).[20]

For less than three months

Where parties resume cohabiting for a period up to (but not including) three months and thereafter they separate again, they may use the period of separation prior to their resumption of cohabitation in calculating 12 months' separation for the purposes of a divorce application.

In the case of *Clarke and Clarke*,[21] Fogarty and Nygh JJ described the intention of s 50 of the *Family Law Act 1975* (FLA) as encouraging ". . . parties to reconcile and without prejudicing their rights to relief should the reconciliation fail within three months".

For more than three months

Where parties resume cohabiting for three months or more, they will have to separate for a further 12 months before they are entitled to file an application for divorce.

The four conditions under s 50 of the FLA

Under s 50 there are four conditions which must be satisfied before an application for divorce can be filed:

1. The parties must have separated.

2. The parties must have resumed cohabitation on not more than one occasion.

3. A separation within three months of resumption of cohabitation must then occur.

4. A further period of separation must occur following the end of the period of resumed cohabitation.

Effect of a resumption of cohabitation after filing for divorce

While a resumption of cohabitation after filing of a divorce application may lead the court to believe that there is a likelihood of a reconciliation, it will not necessarily destroy the basis upon which the application was made in the first instance. See *Thompson and Thompson*[22] and *Toft and Toft*.[23] However, it would be possible for the court to conclude that a resumption of cohabitation after filing for divorce is supportive of a reasonable likelihood of reconciliation and, therefore, it should refuse an application under s 48(3) of the FLA. The relevant time at which the court must consider the reasonable likelihood of a resumption of cohabitation under s 48(3) is the date of the hearing as opposed to the date of filing the application. It is for the party asserting the reasonable likelihood of cohabitation to bring evidence to prove it.

Footnotes

18 *Todd and Todd (No 2)* (1976) FLC ¶90-008 at p 75,079.

19 Ibid.

20 *Saunders and Saunders* (1976) FLC ¶90-096.

21 *Clarke and Clarke* (1986) FLC ¶91-778 at p 75,663.

22 *Thompson and Thompson* (1977) FLC ¶90-206.

23 *Toft and Toft* (1980) FLC ¶90-860.

APPLICATION FOR DIVORCE

¶3-140 Who can apply?

An application for divorce can be filed:[24]

(1) if either party is:

- a citizen of Australia
- domiciled in Australia, and
- ordinarily resident in Australia and has been so resident for at least one year prior to filing the application.

(2) the parties have lived separately and apart for a period of at least 12 months and there is no reasonable likelihood of a reconciliation.[25]

Footnotes

24 *Family Law Act 1975* (Cth), s 39(3).

25 Ibid, s 48(2).

¶3-150 Joint or sole application?

The application can be filed as a joint application or one of the parties may file the application alone (s 44(1A), *Family Law Act 1975* (Cth)).

¶3-160 Where application could be made in another jurisdiction

If an applicant satisfies the criteria for issuing in more than one jurisdiction, careful consideration should be given to which is more appropriate for the case in question. Legal advice from a qualified legal practitioner in that other jurisdiction should be sought where appropriate. The benefit to the applicant of applying in another jurisdiction should be considered against the costs and feasibility of proceeding in that other jurisdiction.

¶3-170 Using the same legal practitioner

While there is no law against the same legal practitioner acting for both parties within the divorce proceedings, practical difficulties abound regarding potential conflicts of interest:

- where one party wishes to divorce and the other party does not
- where it is more beneficial to one party to remain married (eg for financial reasons or inheritances)
- where there are conflicting instructions on arrangements for any children of the family
- issues of child support
- maintenance for one party, and
- advising on commencing property proceedings.

It is therefore suggested that a legal practitioner should refuse to act for both parties even where they appear to be very amicable about all aspects of their relationship coming to an end. Where a legal practitioner decides to act for both parties and a dispute arises

between the parties, that legal practitioner should cease to act for both.

The usual rules as to circumstances in which a legal practitioner can be restrained from acting apply.

¶3-180 Procedure

The process

The application is filed in the Federal Circuit Court (see *Practice Direction* No 6 of 2003 which directed that all divorce applications should be filed in the Federal Magistrates Court, as it was then known) in all states and territories (save for Western Australia where it is filed in the Family Court of Western Australia).

All applications for divorce must be made electronically. To apply for a divorce as a litigant in person or as a lawyer for your client, this interactive online form needs to be used: www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i/apply-for-a-divorce/apply-for-divorce.

The fee for filing the application in the Federal Circuit Court at the time of print is $900 but reduced fees may be available. The fees can also be found at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/how-do-i/divorce/apply-for-a-divorce/apply-for-divorce.

For the Family Court of Western Australia the online divorce application is available on the Commonwealth Courts Portal at www.comcourts.gov.au.

Section 39 of the *Family Law Act 1975* (Cth) (FLA) gives the Federal Circuit Court jurisdiction in relation to all matrimonial cases other than those where the parties seek:

- a decree of nullity of marriage
- a declaration as to the validity of the marriage, or
- a declaration as to divorce or annulment of marriage.

Practicalities

Before commencing proceedings on behalf of a client, legal practitioners should consider the following useful advice from the *Best practice guidelines for legal practitioners doing family work*:

- The legal practitioner will need a copy of the marriage certificate before issuing the application (unless the applicant has already filed it in relation to other proceedings in the same registry).
- If the marriage certificate is not in English, an authorised translation will be required together with an affidavit from the person who carried out the translation.[26]
- Is the marriage recognised in Australia?
- Is Australia the most appropriate jurisdiction in which to commence divorce proceedings (eg are there assets in another country? If the divorce takes place in Australia for property settlement will the parties be prevented from bringing proceedings in that other country without an associated divorce application?).
- Is the client capable of giving instructions?
- Are appropriate arrangements being proposed for the welfare of any children of the marriage?

The following chart summarises the procedure under the FLA. The Family Law Rules 2004 are referred to as FLR and the Federal Circuit Court Rules 2001 as FCCR.

Irretrievable breakdown (s 48) and parties separate

Application for Divorce completed and filed in the Federal Circuit Court

Documents to be filed with Divorce Application are:
2 extra copies of Divorce Application
Marriage certificate (if not English, translation required)(r 25.01(2) FCCR)
Where no marriage certificate available. Affidavit stating why or undertaking to file
Court fee (if applicable)

Joint application
each retains a copy of the application

28 days

Application by 1 party

Service of documents
FCCR r 25.02/FLR r 7.04, r 7.07
(by personal service, by post at last known address or by electronic communication)
Documents to be served:

- Acknowledgement of service
- Envelope (with postage paid) for return of Form of Acknowledgement of service

28 days if Respondent within Australia and 42 days if outside Australia

Applicant to file Affidavit of Service with the court
Response filed (if any)

HEARING
FCCR Div 25.3 and Div 25.4

COURT WILL GRANT DIVORCE ORDER IF SATISFIED

ONE MONTH

ISSUE BY COURT OF DIVORCE CERTIFICATE (FLA s 55)
Marriage dissolved

Footnotes

Footnotes

26 Federal Circuit Court Rules 2001, r 25.01(4).

¶3-190 Service

Documents

Once the divorce application has been filed, and if the application is not a joint application, a sealed copy must be served on the respondent together with:

- a copy of the brochure *Marriage, Families and Separation*[27] (unless service is outside Australia) which can be obtained from the Federal Circuit Court or the Family Court
- the form of acknowledgment of service[28] which can be obtained from the Federal Circuit Court or the Family Court
- a copy of any other accompanying document filed with the court with the exception of the marriage certificate, and
- for service by post within Australia — a stamped self-addressed envelope.[29]

Service

Service[30] can be by way of personal service by a person other than the applicant and who is over the age of 18, or by post or electronic communication (facsimile or email). Service within Australia must take place 28 days before the hearing date or, if outside Australia, 42 days before the hearing date. It is advisable to arrange personal service where the applicant has concerns that the respondent will refuse to acknowledge postal service. Where the respondent has engaged the services of a legal practitioner, enquiries should be made of that legal practitioner to establish whether they have instructions to accept service on behalf of the respondent.

Personal service

The server cannot be the applicant but can be a friend, family member or process server. Where the person serving does not know the respondent a description together with a photograph should be provided to ensure that the correct person is served, thus saving time and costs. Once the server has established the respondent's identity, the server should ask the respondent to sign the acknowledgment of service. It is not unusual for respondents to refuse to take the documents on being served. In that situation the process server should inform the respondent of the nature of the documents being served and leave the documents with them.

To satisfy the court that service has taken place, the server will swear an affidavit of service (divorce) (which can be obtained from the Federal Circuit Court or the Family Court) in front of a legal practitioner or person authorised to witness an affidavit, and show them the acknowledgment of service if the respondent agreed to sign it. The applicant can also complete an affidavit of proof of signature (which can be obtained from the Federal Circuit Court or the Family Court) if they recognise their spouse's signature.[31] All documents should then be filed with the court.

Post or electronic communication

The applicant can post the documents to the respondent at their last known address or send the documents by electronic communication and, on receiving the acknowledgment of service, swear an affidavit by applicant for service by post (divorce) (which can be obtained from the Federal Circuit Court or the Family Court). The affidavit is to be sworn before a legal practitioner or person authorised to witness an affidavit, and the applicant will need to show them the acknowledgment of service if this has been signed. All documents should then be filed with the court.

Respondent cannot be found

Two options arise where the applicant cannot locate the respondent to arrange service of the documents:[32]

- substituted service, and

- dispensation of service.

Substituted service

The court can permit the documents to be served on a person other than the respondent. Before the court will make an order in those terms the court must be satisfied that the person identified will bring the documents to the attention of the respondent and they cannot be served personally.

Dispensation of service

The court may order that service does not have to take place at all if the applicant can show that all reasonable attempts have been made to locate the respondent.

Procedure for substituted or dispensation of service

The applicant will need to complete an application form to apply for substituted or dispensation of service together with an affidavit in support of the application[33] (see the Note box following for guidance on the contents of the affidavit). The court will hear an application for substituted or dispensation of service on the same date the divorce hearing is listed. The applicant must attend the hearing of that application. If the steps taken to locate the respondent do not satisfy the court, it may order the applicant to take such other steps as it deems appropriate. The factors taken into consideration by the court on an application can be found at r 7.18 of the Family Law Rules 2004 and r 6.15 of the Federal Circuit Court Rules 2001.

Note

What steps has the applicant taken to locate the respondent?

The applicant will need to prepare an affidavit advising the court of the following:

- When was the last time the applicant saw the respondent?

- When was the last time the applicant and respondent communicated in any way?
- What relatives or friends of the respondent has the applicant traced and contacted? What were the outcomes of those enquiries?
- Does the respondent work? If so, for whom and where? What attempts have been made to locate the respondent at or through their employer?
- Has the respondent, to the applicant's knowledge, moved abroad or is there any reason to think that the respondent is abroad?
- What property does the respondent have, including bank accounts, businesses and property?
- What are the details of any orders that the respondent is subject to, including those related to child support?
- Is there any reason why the respondent is not contactable?
- Is tracing the respondent causing financial hardship for the applicant?

Acknowledgment of service

This may be signed by the person on whom the document is served (the respondent) or by that person's lawyer.[34]

Hearing date

On filing an application for divorce, the registry manager will fix a date for the hearing of the application. The registry manager must fix a date with consideration given to the type of application to be heard and with the location of the respondent in mind.

On a joint application, the hearing should be fixed for at least 28 days after the application is filed. For any other application and where the respondent is in Australia, at least 42 days after the application is filed and where the respondent is outside Australia, at least 56 days after the application is filed.[35]

Footnotes

27 Family Law Rules 2004, r 2.03.

28 Ibid, r 7.07(3)(a); Federal Circuit Court Rules 2001, r 25.03(a).

29 Family Law Rules 2004, r 7.07(3)(b); Federal Circuit Court Rules 2001, 25.02(b).

30 Family Law Rules 2004, Ch 7; Federal Circuit Court Rules 2001, Pt 6.

31 Federal Circuit Court Rules 2001, r 25.07.

32 Ibid, at Div 6.4.

33 Ibid, at r 4.05.

34 Ibid, at r 25.04.

35 Family Law Rules 2004, r 3.01.

¶3-200 Divorce order

The court will grant an order for divorce if the application is successful. The *Family Law Act 1975* (Cth) (FLA) provides that the divorce order

takes effect automatically one month after the order is made (s 55) or on the making of a declaration under s 55A with respect to the arrangements for any children of the family (see ¶3-210).

If a court is satisfied that there are special circumstances for reducing the period of time before which a divorce order will take effect, it may do so under s 55(2)(b). The court may reduce the period of time to nil so that the divorce order will take effect immediately.[36]

Under s 57 of the FLA the court can rescind a divorce order where the parties reconcile following the making of the order but *before* the order takes effect. Section 58 also provides for a rescission of the order where there has been a miscarriage of justice due to fraud, perjury, suppression of evidence, or any other circumstance. There is no appeal from a divorce order that has taken effect (s 93). A divorce order cannot take effect where one of the parties has died (s 55(4)).

On 3 August 2005, the *Family Law Amendment Act 2005* amended the FLA to replace references to "dissolution of marriage" with "divorce" and "divorce order". The terms "decree of dissolution of marriage", "decree nisi" and "decree absolute" are replaced by "divorce order". Just as "decree absolute" took effect one month after "decree nisi", the divorce order takes effect one month after it is made (s 55). In that month proceedings can be brought to have the order rescinded.

Footnotes

36 See *Hodgens and Hodgens* (1984) FLC ¶91-502 and *Price & Underwood (Divorce Proceedings)* (2009) FLC ¶93-408.

¶3-210 Arrangements for children

Where there are children of the marriage who are under 18 years of age, s 55A of the *Family Law Act 1975* (Cth) (FLA) stipulates that the

parties must satisfy the court that appropriate arrangements have been made for their care, welfare and development or that there are circumstances by reason of which the divorce order should take effect even though the court is not satisfied that such arrangements are in place.

The proceedings can be adjourned (s 55A(2)) to enable a report to be obtained from a family consultant where the court doubts that appropriate arrangements have been made. The term “child of the marriage” is defined in s 55A(3) and covers any child treated by the parties as a child of the family immediately prior to the separation. However, a child *en ventre sa mere* (in the womb) is not a “child” for the purposes of s 55A.[37]

Care, welfare and development

There is no definition of “care, welfare and development” in the FLA but the phrase appears in s 60B, which states that the object of Pt VII of the Act is to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the “care, welfare and development” of their children. In *Opperman and Opperman*,[38] a majority of the Full Court indicated that welfare involves arrangements of a material and emotional nature. A useful all encompassing statement can be found in *W v W* (1926) per Lord Morrivale:

> “The matters of immediate consideration are the comfort, the health, and the moral, intellectual and spiritual welfare of the child”.

What constitutes “circumstances”?

Ultimately the court has discretion to decide, on a case-by-case basis, in what circumstances a divorce order should take effect irrespective of whether there are appropriate arrangements in place.

Some indication was given by the Full Court in the case of *Opperman and Opperman*[39] that two factors are involved under s 55A(1)(b)(ii). While the majority stressed that they did not want to define “circumstances”, they stated that:

> "[T]he court will have to balance on the one hand the termination of a marriage that has no social utility . . . as against the protection of the children of the broken family unit enjoined upon the court by s 43(c); but if indeed a question arises as to which aspect requires the more weight and attention, there is no doubt that the court should exercise its discretion so as to give more weight to the latter".

Case law shows that there are a number of circumstances that have satisfied the court:

- not knowing the whereabouts of the respondent who has not paid child maintenance nor been personally served (see *Clarke and Clarke*)[40]

- circumstances should be construed so as not to frustrate a broken marriage (see *Murphy and Murphy*).[41] In the case of *Murphy and Murphy*, the wife had moved interstate with the only child of the marriage. The husband had not consented to the move and ceased paying maintenance for the child. The husband continued to pay nothing by way of maintenance for his son as he was unemployed for many months and simply could not afford to pay. In his divorce application, he needed to provide evidence to the court as to the welfare of his son. His wife refused to provide such information unless the husband paid $500 into her solicitor's trust account. The husband undertook to commence paying maintenance commensurate with his salary as soon as he became employed. The court declared that there were circumstances by reason of which the decree nisi should be made absolute notwithstanding the court was not satisfied that proper arrangements had not been made for the child's welfare

- the provision should not be invoked to aid uncooperative or greedy spouses (see *Murphy and Murphy* supra), and

- where the arrangements proposed are not entirely satisfactory but they are the best arrangements in the circumstances (see *Murphy and Murphy* supra).

Parenting orders

Applications regarding parenting orders are dealt with as separate applications and do not fall to be considered as part of the application for divorce or indeed as part of the considerations under s 55A. Parenting orders are dealt with in Chapter 6.

Property orders and maintenance

A divorce order does not deal with other aspects of a marital breakdown, such as property, child support and maintenance. Applications for those are separate.

Warning

An application for maintenance or property division must be made within 12 months of a divorce order becoming final. Applications outside of 12 months require the leave of the court (s 44(3), FLA).

Leave to institute proceedings out of time may not be required due to the operation of s 44(2) which provides that a respondent may, in an answer to an application, include an application for any decree or declaration. In *Hedley & Hedley* (2009) FLC ¶93-413, the Full Court considered whether the wife required leave to institute proceedings, given that the property orders she sought were filed as part of a response to an application for parenting orders filed by the husband. Their Honours concluded that the wife did not require leave to institute property proceedings out of time as a result of s 44(2).

Footnotes

37 See *Diessel and Diessel* (1980) FLC ¶90-841.

38 *Opperman and Opperman* (1978) FLC ¶90-432.

39 Ibid.

40 *Clarke and Clarke* (1961) 2 FLR 7.

41 *Murphy and Murphy* (1977) FLC ¶90-291.

NULLITY

¶3-220 Introduction

Nullity applications are far less common than divorce applications. Therefore, what follows is a brief outline of the law and procedure.

Under the *Family Law Act 1975* (Cth), an application for a decree of nullity is based on the ground that the marriage is void (s 51). The circumstances where a marriage is void are to be found in s 23B of the *Marriage Act 1961* (Cth) (MA). For marriages solemnised between 20 June 1977 and 7 April 1986, s 23 of the MA applies and s 23B applies from 8 April 1986. Where an application for nullity relates to a marriage solemnised before 20 June 1977, the ground for making the application will be that the marriage was void according to the law at the time the marriage was entered into.

¶3-230 Void

The *Marriage Act 1961* (Cth) provides that a marriage may be declared invalid on one of the following grounds:

- at the time of the marriage either of the parties is lawfully married to another person (bigamy) (s 23B(1)(a))
- the parties are within a prohibited relationship (for example the parties are close relatives) (s 23B(1)(b)) (Prohibited relationships are defined in s 23B(2))
- procedural irregularity (s 23B(1)(c))

- lack of consent as a result of duress, fraud, mistaken identity or due to being mentally incapacitated (s 23B(1)(d)), and
- one of the parties was not of marriageable age (s 23B(1)(e)).

¶3-240 Jurisdiction

Only the Family Court of Australia and the Family Court of Western Australia have the power to declare a marriage invalid.

¶3-250 Bigamy

It matters not that there may have been a belief that the first spouse was dead before the second marriage took place or that a first spouse died after the second marriage took place. Bigamy is a criminal offence, the onus of proof being beyond reasonable doubt.

¶3-260 Prohibited relationships

Prohibited relationships are those between a person and an ancestor or descendant of the person or between a brother and sister (whether whole blood or of half blood). Relationships through adoption are prohibited as the adopted child is treated for the purposes of the *Marriage Act 1961* (Cth) as a natural child of the adoptive parents (s 23(3)). This applies whether the adoption is subsequently cancelled, annulled, discharged or otherwise ceases to be effective (s 23(5)).

¶3-270 Procedural irregularity

If a marriage solemnised overseas is recognised as a valid marriage in that country under local law, it will also be recognised as valid in Australia. If there is any doubt as to whether the marriage is valid in that country, expert evidence can be obtained as to the formal requirements for a valid marriage.

Section 88G(1) of the *Marriage Act 1961* (Cth) provides that a marriage certificate issued by a competent authority in a foreign

country is *prima facie* evidence of the occurrence of marriage and of the validity of the marriage.

A proxy marriage will be recognised in Australia if the form in which it was celebrated is recognised as a valid way to create a marriage in the country in which the marriage was celebrated.

¶3-280 Polygamous marriage

It is not possible to enter into a polygamous marriage (a marriage which permits more than one spouse) in Australia (s 6, *Family Law Act 1975* (Cth)). However, where the parties have entered into a polygamous marriage in a country where those marriages are recognised, the family law courts can still provide the assistance, help and relief that would be available to the parties were they in a monogamous marriage. They could therefore apply for either a divorce order or a decree of nullity.

Case study

Ghazel & Ghazel and Anor (2016) FLC ¶93-693

The husband was born in Iran and the wife was born in England. The parties married in Iran according to Iranian law which permitted a husband to take up to three additional wives. Thereafter, the parties went through a marriage ceremony at an English Registry Office. In 2007 the parties and their two children became Australian citizens. In 2008 a joint application for divorce was filed in Australia referring only to their marriage in England. In 2011 the husband married another woman in Iran. In 2013 the wife initiated proceedings in Iran and the Iranian court concluded that the parties marriage was still in existence as there was no legally registered divorce. In 2014 the wife filed an application in the Family Court of Australia seeking an order that the marriage between herself and the husband in 1981 in Iran be declared valid in accordance with the *Marriage Act 1961*. The trial judge dismissed the wife's application on the basis that a potentially

polygamous marriage will not be recognised as valid in Australia. The Attorney-General for the Commonwealth was invited by the Full Court to intervene, and did so. The Commonwealth's position was that a potentially polygamous foreign marriage which would have been recognised under Pt VA of the Marriage Act prior to the 2004 amendments would still be recognised and the parties marriage in Iran would remain valid under Australian law. The Full Court of the Family Court accepted the arguments of the Commonwealth and made the declaration as to validity sought by the wife.

¶3-290 Lack of consent

A marriage entered into overseas where the consent given was not real will not be recognised as a valid marriage in Australia (s 88D(2)(d), *Marriage Act 1961* (Cth)). This can be difficult to establish where a person of full age and capacity has participated in a marriage ceremony. The party claiming a lack of consent will need to show that the consent was not real due to a threat, use of force, a fraud, a case of mistaken identity or a mistake as to the nature of the ceremony being performed.

¶3-300 Incapacity

The relevant mental capacity is that of the parties at the time the marriage ceremony takes place and not that before or after the ceremony. The onus is on the person disputing the legality of the marriage to establish mental incapacity at the time of the ceremony.[42]

Footnotes

42 See *Sikander & Vashti* (2018) FLC 93-845

¶3-310 Marriageable age

Section 11 of the *Marriage Act 1961* (Cth) provides that a person must attain the age of 18 to be of marriageable age. This can be reduced by up to two years by a judge where there are exceptional circumstances, but only where the other party is of marriageable age.

Circumstances considered to be exceptional have included the following:

- where permission to marry is sought primarily to enable parties to marry before the impending birth of a child,[43] and
- where there is a pregnancy, and coupled with maturity, family support and the fact that the parties have been in a "steady" relationship for a period of time which, taken together, the court conceived to amount to exceptional circumstances.[44]

Footnotes

43 See *Re Z* (1970) 15 FLR 420.

44 See *Re H (an infant)* (1964–1965) NSWR 2004; *Re Z* (1970) 15 FLR 420.

APPLICATION

¶3-320 Who may apply?

Only a party to the marriage may institute proceedings, and the proceedings can be commenced by either party or jointly (s 44(1A), *Family Law Act 1975* (Cth) (FLA)). The application to be filed with the court is an initiating application which must be accompanied by an affidavit stating why the applicant wants the marriage annulled and details of the marriage ceremony performed. The hearing date will be

within 42 days of the application if the respondent is within Australia but within 56 days where the respondent is outside the jurisdiction.

Where a third party wishes to obtain an authoritative declaration that a marriage is void they may commence proceedings as to the validity of the marriage (s 113, FLA).

¶3-330 Service

In accordance with r 7.03 of the Family Law Rules 2004, the application is to be served on the respondent by way of special service. Special service means by hand (r 7.06), by post or electronic communication (r 7.07) or, where the respondent is legally represented, on the legal practitioner provided that the legal practitioner has confirmed in writing they are instructed to accept service (r 7.08).

Effect on children

Generally, the rule is that children born of a void marriage are illegitimate. However, s 91 of the *Marriage Act 1961* (Cth) provides that a child of a void marriage is legitimate if, at the time of the intercourse resulting in the child's birth, either party to the marriage reasonably believed that the marriage was valid.

Effect of decree

The effect of a decree of nullity is that the marriage is and always has been void.

Applications for divorce and nullity before the court

Where an application for divorce and an application for a decree of nullity are before the court, the court shall first determine the application for a decree of nullity and will not be able to consider the application for divorce unless the application for a decree of nullity has been dismissed.

Part B — Children

SHARED PARENTAL RESPONSIBILITY

Editorial information

Written by Anne-Marie Rice

¶4-000 Part VII Family Law Act — introduction

Decisions in cases involving disputes about where children should live and how much time they should spend with each parent (or other significant adults in their lives) are made pursuant to Pt VII of the *Family Law Act 1975* (Cth) (FLA). (The Australian Family Law system is currently the subject of a review by the Australian Law Reform

Commission. The Commission is to complete and table its report, which covers a broad spectrum of issues relating to family law, in late March 2019.) The Family Court, Federal Circuit Court and local magistrates/county courts have jurisdiction under the FLA. Magistrates/county courts are able to make interim and consent orders only and the Federal Circuit Court is limited to hearing matters which will take no more than two days at trial.

On 1 July 2006, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (amending Act) came into effect and brought significant changes to the way in which courts with jurisdiction under the FLA determine disputes relating to children. The amending Act substantially amended the Pt VII provisions and certain other provisions of the FLA and ancillary legislation (including the *Child Support (Assessment) Act 1989* (Cth), the *Australian Passports Act 2005* (Cth) and the *Marriage Act 1961* (Cth)), to reflect and encourage what the government intended to be a significant shift in attitudes to post-separation parenting.

The Attorney-General's Department press release of 31 March 2006 made it clear that the amendments to the FLA represented, at least so far as the then government was concerned, the most significant change to family law in over 30 years (or since the introduction of the FLA itself). The Explanatory Memorandum to the amending Act notes that it is designed to:

> "support and promote shared parenting and encourage people to reach agreement about parenting of children after separation. The amendments advance the Government's long standing policy of encouraging people to take responsibility for resolving disputes themselves, in a non-adversarial manner . . . [T]he initiatives in the Bill represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards co-operative parenting".

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* commenced on 7 June 2012 with an express aim of providing better protection for children and families at risk of violence and abuse. The Act also made several technical

amendments which correct drafting and minor policy oversights and provide other efficiencies for the courts and litigants.

In relation to the 2012 family violence amendments, the Explanatory Memorandum provides:

> "The Family Violence Bill retains the substance of the shared parenting laws introduced in the *Family Law Amendment (Shared Responsibility) Act 2006* (Cth) and continues to promote a child's right to a meaningful relationship with both parents where this is safe for the child".

¶4-010 The objects of and principles underlying Pt VII

The objects and principles of Pt VII of the *Family Law Act 1975* (Cth) (FLA) are found in s 60B which focuses on the importance of both parents playing an active role in the lives of their children after separation.

The objects of Pt VII of the FLA, as encapsulated by s 60B, are:

> "to ensure that the best interests of children are met by:
>
> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties and meet their responsibilities, concerning the care, welfare and development of their children".

The principles underlying these objects are also squarely focused on

children spending regular time with both of their parents and other people significant to their care. These principles, contained in s 60B(2), are that (except when it is or would be contrary to a child's best interests):

> "(a) children have the right to know and be cared for by both their parents . . .; and
>
> (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
>
> (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children; and
>
> (e) children have a right to enjoy their culture . . .".

The 2012 amendments to the FLA include provision (at s 60B(4)) that an additional object of the Act is to give effect to the United Nations Convention on the Rights of the Child (November 1989).

The principles clearly articulate the right for children to spend significant time with each parent and to otherwise be able to communicate with them in a full and meaningful fashion.

The rights of Aboriginal or Torres Strait Islander children to access, explore and appreciate their particular culture is also a clearly and distinctly articulated principle of the FLA (s 60B(3)).

As has been so in parenting cases since 1996, the best interests of the particular child or children remain the paramount consideration (the factors for determining what is in a child's/children's best interests are set out in s 60CC). In *Goode's*[1] case (see fact summary below), the first comprehensive decision since the introduction of the new Pt VII regime, the Full Court stated:

> "the child's best interests are ascertained by a consideration of the objects and principles in s 60B and the primary and additional considerations in s 60CC".

Since *Goode's* case, there have been a number of significant cases in this area which canvass the application of the shared parenting legislation. The provisions should not be "over-read". It should be remembered that the legislation requires that in determining the best interests of a child, primary consideration should be given to the benefit of a child having a meaningful relationship with both parents not *the* most meaningful relationship.[2]

In *Maldera & Orbel* [2014] FamCAFC 135, the Full Court upheld an appeal by the maternal grandmother against orders made by the trial judge for her grandson to live with his father. Although the child had initially lived with his parents from birth, when he was around four years of age he began living with the maternal grandmother and spent time with each of his parents. In 2007, the grandmother sought to formalise those arrangements and instituted proceedings in the Family Court. In 2009, orders were made for the grandmother to have sole parental responsibility and for the child to live with her. Those orders were not opposed by either of the parents. In 2013, with the child still living with the maternal grandmother, and having spent time with the father, the father filed an application for the child to live with him on the basis that there had been a number of significant changes in his living arrangements, including that he was now in a stable relationship with his new wife, with whom he had three children. The trial judge made the orders sought by the father for the child to live with him, and in doing so placed significant emphasis on the objects of Pt VII of the FLA as set out in s 60B, stating at [122]–[123] *"If I make the Orders the father seeks I will be better meeting the objects and principles in s 60B. I also cannot refuse to make the Orders the father is seeking simply because there is some risk that the change might not work"*.

The grandmother appealed the decision on the grounds that the trial judge had erred in applying the terms of s 60B as justification for the orders made for the child to live with the father in the circumstances of the matter. On appeal the Full Court held, among other issues, that:

> *"It is abundantly clear that the comparative significance for a particular child of the fact of parenthood (which may in an individual case be decisive) is to be considered and weighed along with the other matters identified in s 60CC (and if relevant s 65DAA). But not on the basis that the factors referred to in s 60B can be used in favour of a parent to deliver an outcome inconsistent with the proper application of s 60CC".* [at 81]

The Full Court further said at [74] that:

> *"Thus, we do not agree that in deciding a parenting case it was necessary to discuss the significance and weight of relevant s 60B factors or that where the outcome of s 60CC deliberations did not enable the court to determine a parenting order, s 60B may be decisive"*.

Their Honours went on at [81] to say *". . . s 60B cannot be used to establish a hierarchy as to outcome in which parents sit at the apex".* In other words, the reference to "parents" in s 60B does not trump the paramountcy principle.

In addition to these stated objects and principles set out in s 60B, the FLA has a clear focus on alternate dispute resolution and the onus on lawyers (and other advisers) to encourage parties to resolve matters by means other than application to the court, including through family dispute resolution and parenting plans. These issues are discussed in greater detail in Chapters 5 and 6.

Example

***Goode and Goode* (2006) FLC ¶93-286**

The first major Full Court decision to consider interim proceedings in the context of the amendments under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* was *Goode's* case. The facts of the case are as follows:

- The parties were married in July 1996 and, after a separation in 1999, they separated on a final basis in late May 2006 when the father left the matrimonial home.
- There were two children of the marriage, T aged 8 at the time of trial, and J aged 2 at the time.
- Initially following separation the children remained living with the mother and spending time with the father each alternate weekend. The mother submitted to

the trial judge that these arrangements occurred by agreement but the father's case was that the mother was restricting the time the children could spend with him to these times.

- The mother applied for final orders that the children live with her and spend time with their father and that both parents have joint responsibility for decisions affecting the children's long-term care, welfare and development (the application having been filed before 1 July 2006).

- In response, the father sought orders, on both an interim and final basis, for an equal shared care arrangement, and also sought orders for joint long-term decision making responsibility. In response to the father's interim application, the mother sought orders that the children live with her and spend time with the father on alternate weekends, for half the school holidays and, in relation to the older child, for two additional days each week. There was little real dispute about the parties' respective abilities to appropriately care for the children.

- The mother alleged that the father had, during the relationship, engaged in behaviour that constituted family violence.

- The trial judge made orders for the children to live with the mother and spend time with the father each alternate weekend, on Monday and Tuesday evenings in relation to the older child, and during the school holidays. His Honour did not make any orders for equal shared parental responsibility and found that it was not appropriate for the presumption in s 61DA to apply. Having regard to the principles enunciated in *Cowling v Cowling*,[3] his Honour concluded that there was nothing in the evidence to suggest that the arrangements which had been in place for several months prior to the hearing did not meet the needs of the children. The trial judge did not specifically consider the matters set out in s 60CC.

- The father appealed.

- On appeal the Full Court summarised and gave guidance as to the application of the relevant sections of Pt VII of the FLA confirming that the best interests of the children remain the paramount consideration in parenting matters, that the presumption in s 61DA is enlivened even where no orders for equal shared parental responsibility are sought, and that the status quo and many of the principles enunciated in *Cowling's* case are no longer applicable.

- The Full Court held that the trial judge was correct in determining that the presumption in s 61DA ought not apply but erred in failing to properly consider the relevant s 60CC factors in reaching a decision to maintain the status quo in terms of the arrangements for the children.

Footnotes

1 *Goode and Goode* (2006) FLC ¶93-286 at p 80,892.

2 *M and L (Aboriginal Culture)* (2007) FLC ¶93-320.

3 *Cowling* v *Cowling* (1998) FLC ¶92-801.

¶4-020 The concept of "parental responsibility"

Despite the radical change in the approach which the courts have adopted in determining parenting disputes after the 2006 amendments, "parental responsibility", one of the central tenets of Pt VII of the *Family Law Act 1975* (Cth) (FLA) (see ¶4-000), is not a new concept. "Parental responsibility" has been defined in the FLA since 1996 when the *Family Law Reform Act 1995* (Cth) took effect and, among other things, removed from the legislation the concept of "guardianship" which had previously encompassed matters relating to long-term interests of children and responsibilities of parents.

Section 61B of the FLA contains the following definition:

> "*parental responsibility*, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."

Since the introduction of this concept, the courts have focused on the rights of children and the responsibilities of parents.

The precise legal meaning of "duties, powers, responsibilities and authority" of parents remains a rather nebulous concept. Identifying any specific legislative provisions about these issues is difficult. Many Family Court judges have, since the introduction of s 61B, referred to the definition in their reasons for judgments but there are no reported cases in which this definition is meaningfully expanded upon. As Carmody J noted in *W v G [No 1]*: "apart from the primary duty to maintain and the authority to make decisions relating to the care, welfare and development of the child, the precise scope of parental responsibility is undefined".[4]

Shortly after the definition was introduced into the FLA in 1996, the

Commonwealth Attorney-General's Department commissioned a survey of community attitudes towards parental responsibility which found that, generally, Australians regarded the following as being the "core values" of parental responsibility:

- to provide love and emotional support
- to teach children right from wrong, and
- to look after children's education.[5]

In addition, the need to provide financial support for children and to protect them from exposure to violence was also considered as being of high importance.

There is nothing in the reported case law to suggest that these general community perceptions about the meaning of "parental responsibility" are inconsistent with the approach taken by judges.

It would appear then that parental responsibility is essentially a responsibility to make all such decisions as are necessary to ensure that a child's needs are met, and includes decisions about matters including (but by no means limited to):

- where the child lives
- medical treatment
- education
- religious upbringing
- the child's name
- social conduct and interaction
- protection of the child from harm
- passports, and
- marriage of children under 18.

Generally speaking, parents have (and indeed share) parental responsibility for their children. It is only when disputes about children come within the sphere of the FLA that the need to "allocate" parental responsibility arises. Indeed, s 61C(1) prescribes that each of the parents of a child under 18 has parental responsibility for that child (subject to any order of the court). That responsibility continues regardless of any change in the parents' relationship — such as separation or remarriage (s 61C(2)).

As the Full Court of the Family Court noted in B (Infants) and B (Intervener) *v* Minister for Immigration and Multicultural and Indigenous Affairs: "parents have a responsibility to make all such decisions as are necessary to ensure the child's care needs are met . . . [and] it is important to bear in mind the normal rights and duties of parents when considering the circumstances of [each] case".[6]

If an order is made in relation to a child, the parental responsibility of each of the child's parents is diminished only by the extent expressly provided for in the order (s 61D). In other words, if the order does not specifically allocate parental responsibility, or some aspect of it, to one parent then both parents retain their existing responsibilities.

> "Where no contrary order has been made, parents may exercise this responsibility independently or jointly. This would be so whether the parties were married, living together, never married, never lived together or separated so long as there was no contrary order in force".[7]

The Full Court of the Family Court has held that orders limiting or curtailing the parental responsibility of a parent should be made only in circumstances which warrant it and, in practice, orders for one parent to have sole parental responsibility for a child are very rare. In *VR* v *RR* (2002) FLC ¶93-099, the Full Court commented:

> ". . . in our view it is clear from the legislative scheme that any intervention by the Court in the due performance of an aspect of parental responsibility, that seeks to interfere with or diminish the responsibility of either parent to care for the child in the manner that parent deems appropriate, should be made only where the Court is of the view that the welfare of the child will be clearly

advanced by that order being made".[8]

The issue of parental responsibility was also discussed in some detail in *Cook and Stehbens*.[9]

It is possible for an order for parental responsibility to be made in favour of a person other than a parent of the child. In *Director-General of the Department of Human Services (NSW) & Tran and Anor* (2010) FLC ¶93-443, the Full Court held there was no reason why an order for sole parental responsibility could not be made in favour of the Department.

Footnotes

4 *W* v *G [No 1]* (2005) FLC ¶93-247 at p 80,049.

5 "Parental Responsibilities" — Family Law Evaluation Project 1996. Australian Government — Attorney-General's Department in conjunction with Australian Institute of Family Studies. Report prepared by Kathleen Funder, PhD, and Bruce Smyth.

6 *B (Infants) and B (Intervener)* v *Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FLC ¶93-141 at p 78,338.

7 *Goode and Goode* (2006) FLC ¶93-286 at p 80,894.

8 *VR* v *RR* (2002) FLC ¶93-099 at p 88,940.

9 *Cook and Stehbens* (1999) FLC ¶92-839.

¶4-030 Equal shared parental responsibility

The concept of parental responsibility is not new and, although it is

now expressly referred to in the *Family Law Act 1975* (Cth) (FLA), neither is the concept of "shared parental responsibility". Judges dealing with the issue of parental responsibility have historically made decisions based on the parties sharing that responsibility. Indeed, in *AMS v AIF*; *AIF v AMS*[10] the High Court noted:

> "Joint custody and guardianship became increasingly common even before recent [ie 1996] legislation made shared parental responsibility for a child the norm. Under the legislation, before it was changed, the determination of whether joint or sole guardianship should be ordered was within the discretion of the court. Departure from the norm of shared parental responsibility is also within the court's discretion".[11]

Since 2006 the FLA has contained, in s 61DA, the rebuttable presumption that it is in the best interests of children for parents to have "equal shared parental responsibility" for them.

The presumption applies in all parenting cases unless there are reasonable grounds to believe (as distinct from the making of allegations) that a parent of the child (or a person who lives with a parent of the child) has engaged in abuse of the child (or another child in the family) or family violence (s 61DA(2), see *Champness & Hanson* (2009) FLC ¶93-407). The presumption can also be rebutted where the court is satisfied that it is inconsistent with the child's best interests (s 61DA(4)). The Full Court confirmed in *Dundas & Blake* (2013) FLC ¶93-552 that unless the evidence satisfies the court that it is not in the best interests of the child for the presumption to apply, there must be explicit and cogent reasons why the presumption should be rebutted.

In 2012, the definition of family violence was significantly amended and the consequences of these amendments and the treatment of *family violence* by the courts are discussed in more detail at Chapters 7 and 8.

The presumption can also be rebutted where the court is satisfied that it is inconsistent with the child's best interests (s 61DA(4)) but it otherwise applies in all cases where parenting orders are to be made. It is worth noting that, it is not necessary for either party to have

actually sought an order for equal shared parental responsibility, for the court to make an order to that effect: see *Goode's* case (supra). This is so whether orders are sought on an interim or final basis as the making of a parenting order triggers the presumption.

Interestingly, although a wide category of persons, including grandparents, can apply for parenting orders (s 64B(2)), the presumption is expressly stated to apply only to the *parents* of a child. Although reference is made throughout Pt VII of the FLA to a "person" with parental responsibility (see, for example, s 61D(1) which refers to a "person" who has parental responsibility for a child and s 65DAC(1) which refers to "persons" who, under a parenting order, share responsibility for a child), and while it is possible for a person who is not a parent of the child to apply for a parenting order, the presumption that responsibility be *shared equally* applies only to a parent.

The presumption applies in interim parenting matters unless the court is of the view it is not appropriate for the presumption to apply (s 61DA(3)). However, in making a final order, the court must disregard the allocation of parental responsibility made in any interim orders (s 61DB).

Accordingly, it would appear that there are three primary circumstances in which the presumption of equal shared parental responsibility will not apply:

- There are reasonable grounds to believe that a parent (or other person who lives with the parent) has engaged in child abuse or family violence. The expansion of the definition of family violence as a result of the 2012 legislative amendments is likely to widen the number of cases in which the presumption is, at least on an interim basis, likely to be found not to apply.

- In interim hearings where the court considers it inappropriate for the presumption to be applied.

- When the application of the presumption is not otherwise in the child's best interests.

Save for circumstances involving child abuse or family violence, the FLA offers no guidance as to when it may not be appropriate to apply the presumption as contemplated by s 61DA(3) in the context of interim hearings. This fact was noted by the trial judge in *Goode's* case. In giving consideration to the Explanatory Memorandum to the amending legislation and to the comments of the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Full Court noted that s 61DA(3) does not provide a broad general discretion but operates "only in circumstances where limited evidence may make the application of the presumption, or its rebuttal, difficult".[12]

In *Goode's* case the trial judge was troubled by the difficulty of making a determination that the presumption should be triggered where there was a dispute about whether the acts of one party constitute family violence. Ultimately, the Full Court agreed with the trial judge's decision that it was inappropriate for the presumption to apply in circumstances where the trial judge was unable to make a finding, on reasonable grounds, that family violence had occurred. The trial judge found that he was not able to rely upon the allegations as far as family violence was concerned as he was required by s 61DA(2) to be satisfied on reasonable grounds that violence had occurred.[13]

In that same case, the Full Court had the opportunity to consider whether there is any distinction between parental responsibility (which parents have unless a specific order is made) and the responsibility which a parent has as a result of the making of an order for shared parental responsibility. After considering the effect of s 61C, 61D, 61DA and 65DAC, the Full Court held that there is a clear distinction between these two types of parental responsibility. In the case of the former, that is where no formal order has been made, parents may exercise their responsibilities independently or jointly but that:

> "once the Court has made an order allocating parental responsibility between two or more people, including an order for equal shared parental responsibility, the major decisions for the long-term care must be made jointly, unless the Court otherwise provides".[14]

In the case of *Vanderhum and Doriemus* (2007) FLC ¶93-324, the Full Court of the Family Court of Australia considered an appeal by a father against orders made for the two children of the marriage to live with the mother and spend time with the father. The trial occurred in late 2005 and early 2006 and, on appeal, the father submitted the trial judge erred in failing to take into account the pending change to the FLA foreshadowed by commencement of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

The Full Court dismissed the appeal saying it was parliament's intention that the provisions of the amendment Act were to apply prospectively and not retrospectively in the exercise of original jurisdiction under Pt VII of the Act. As there was no error in the trial judge's application of the law at the time of the hearing, the Full Court did not find any basis on which to interfere with that decision.

The amendments to Pt VI introduced in 2012 by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* which commenced on 7 June 2012 have not changed the presumption of equal shared parental responsibility nor the legislative pathway that mandates consideration of equal shared care. However, s 60CC(2A) now expressly states that the court is to give greater weight to the need to protect a child from physical or psychological harm than to the right of a child to have a meaningful relationship with the other parent. Also removed as a result of the 2012 amendments were the "friendly parent" provisions previously contained in s 60CC(3)(c). There is now, as a result and as a product also of the relocation of the old s 60CC(4) factors to s 60CC(3)(c) and (ca), a greater emphasis on the conduct of a parent in terms of their own responsibilities rather than the extent to which they have assisted the other.

Footnotes

10 *AMS* v *AIF*; *AIF* v *AMS* (1999) FLC ¶92-852.

11 Ibid, at p 86,043.

12 *Goode and Goode* (2006) FLC ¶93-286 at p 80,893.

13 Ibid, at p 80,894.

14 Ibid.

¶4-040 Significance of order for equal shared parental responsibility

An order allocating equal shared parental responsibility for a child, whether made on an interim or final basis, has significant consequences. A court is not, however, bound to make a final order for equal shared parental responsibility on the same terms as an interim order.

The rebuttable presumption that it is in a child's best interests for their parents to have equal shared parental responsibility for that child essentially requires parents to embrace the significance of the other in their child's life. However, the accompanying note to s 61DA(1) of the *Family Law Act 1975* (Cth) (FLA) makes it clear that the presumption relates to parental responsibility only: "it does not provide for a presumption about the amount of time the child spends with each of the parents".

However, where the presumption of equal shared parental responsibility applies, s 65DAA(1) of the FLA makes it clear that the court must consider whether the child spending equal time with their parents is both in that child's best interests and reasonably practicable. If an equal time order is in the child's best interests and reasonably practicable, the court is not automatically bound to make such an order but must consider doing so. This approach was confirmed by the Full Court in the first Full Court decision (*Goode's* case) after the introduction of the Pt VII regime.[15] In *Goode's* case, their Honours confirmed that:

> "if the presumption that it is in the best interests of the child for the

> parents to have equal shared parental responsibility is applied, then the path described in s 65DAA needs to be followed starting with whether an order for a child spending equal time with both parents would be appropriate".[16]

Section 65DAA(1) expressly states that equal time must be both in the child's best interests and reasonably practicable. Nevertheless, the note to s 65DAA(1) also indicates that the effect of s 60CA is that in making a decision for the child to spend equal time with each of the parents, the court must regard the best interests of the child as the paramount consideration.

Therefore, it is arguable that even where it is reasonably practicable to accommodate a child spending equal time with both parents, an order in those terms may be resisted on the basis that it is not, in the overall scheme of the matter, in the child's best interests. This might be the case, for example, where the child is very young and primarily attached to one parent and where the court accepts the argument that the child would benefit from the stability provided by having one "home".

Much has been written by psychologists and social workers about the impact on children of spending equal time with each of their parents. For example, Professor Richard Chisholm and Dr Jennifer McIntosh prepared an article which considered the question of how best to deal with affording children the best care arrangements within a framework of difficult and conflicted family circumstances. The article was an integral component of the lead up to the 2012 changes.[17] The paper:

- made research findings about the circumstances in which shared care arrangements are sometimes being made, whether by agreement or by court order
- reviewed the literature on the psychology of shared care for young children, and
- analysed the *Family Law Act 1975*.

The article provides an insightful look into the effects of the shared

parenting provisions and how best to move forward.[18] The advantages of equal shared care are, perhaps, obvious and include giving children the benefit of the love and care of both their parents and the ability to maintain close and loving relations with each of them. In addition, a shared care arrangement enables the parents to pursue their own careers and interests in a way which may positively affect their parenting skills and abilities.

On the other hand, an equal shared care regime can have its disadvantages, including potential instability for the child in terms of housing/accommodation and in the context of different parenting techniques and attitudes. In highly conflicted cases, an equal shared care regime risks being a partial continuation of the relationship which may cause confusion or exposure to ongoing conflict for the child.

Prior to July 2006 (see ¶4-000), and the introduction of the mandatory consideration of equal shared care, the court had regard to many factors in determining whether an equal shared care regime was in the best interests of the child including, for example:

- compatible and consistent parenting values and styles
- positive/non-conflictual relations between the parties
- commitment to the concept of shared parenting and mutual trust about each other's parenting abilities
- ability to communicate about the children
- acceptance that each parent has something to offer the child
- a child-focused approach and ability to understand the age-specific needs of the child
- supportive extended families and new partners
- physical proximity and work flexibility, and
- degree of financial independence (to ensure child's needs are fully met in each home).

Historically and understandably, except where they were made by consent, equal shared care orders were relatively uncommon, not least because the need for judicial determination tended to be indicative of a lack of communication and cooperation between parties. Just because the court must now consider equal shared care does not mean that more parents will suddenly display or adopt the favourable characteristics set out above.

In the event the court forms the view that equal time with each parent is not both in the child's best interests and reasonably practicable, s 65DAA(2) requires the court to consider whether an order that the child spending *substantial and significant time* with the other parent is in their best interests and reasonably practicable. Again, any decision must be made having regard to the best interests of the child being the paramount consideration.

Orders for equal or substantial/significant time are, of course, not the only options open to the court. As the Full Court made clear in *Goode's* case, if neither of those scenarios:

> "delivers an outcome that promotes the child's best interests, then the issue is at large and to be determined in accordance with the child's best interests".[19]

Similarly, the application of the presumption of equal shared parental responsibility and the subsequent application of s 65DAA is not the only trigger for an order that a child spend equal or significant time with their parents. As the judges of the Full Court made clear in *Goode's* case:

> "even if the presumption . . . is not applied . . . the Court is nonetheless required to consider, in determining what is in the best interests of the child, the arrangements that will promote the child's best interests".[20]

In making reference to the High Court decision in *U v U*[21] and the Full Court decision of *Bolitho v Cohen*,[22] their Honours went on to note that this could include consideration of a proposal that is not advanced by either party (provided that the parties are accorded procedural fairness in relation to the court's proposal).

Some of the terminology used in s 65DAA is new to the family law vernacular and, where necessary, their meanings are set out within the sections.

“Substantial and significant time”

“Substantial and significant time” is noted in s 65DAA(3) as being:

- time including days that fall on weekends and holidays and days which do not fall on these days
- time which allows the parent to be involved in the child’s daily routine and days of significance to the child (such as birthdays), and
- time which allows the child to be involved in days of significance to the parent.

Section 65DAA(4) prescribes that the court may also have regard to any other matter it thinks appropriate in determining whether or not the time a child spends with the parent is substantial and significant.

“Reasonable practicality”

In order to determine whether equal or substantial and significant time meets the “reasonable practicality” test, s 65DAA(5) prescribes that the court must have regard to:

> “(a) how far apart the parents live from each other; and
>
> (b) the parents’ current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
>
> (c) the parents’ current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
>
> (d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant".

Most of these considerations (in particular those articulated at (c) and (d)) are precisely the kinds of issues which the court has, historically, considered in determining what arrangements are in a child's best interests. Although the FLA now requires consideration of the child's best interests and the reasonable practicality of shared care, there is a significant overlap between these two concepts. The types of issues which the court will have regard to in assessing the two concepts remain largely unchanged.

The judgment in *Gladstone & Gladstone* (2014) FLC ¶93-608 provides a helpful analysis of the interpretation and application of s 65DAA(5) of the *Family Law Act 1975*. See in particular his Honour Justice Thackray's judgment at [52]–[65].

In *MRR* v *GR* (2010) FLC ¶93-424, the High Court of Australia allowed a mother's appeal after concluding that the Full Court should have held it was not open to the Federal Magistrate to find that it was reasonably practicable for the child to spend equal time or substantial and significant time with each of the child's parents. The Federal Magistrate's orders provided that the parties have equal shared parental responsibility for the child and that she spend equal time with each of them. The orders were made on the basis that, contrary to the mother's expressed wish, both parents would live in Mt Isa. Following separation, the mother and child lived in Sydney until interim orders were made for their return to Mt Isa. The mother sought to live in Sydney with the child. Their Honours noted that it was necessary for the Federal Magistrate to proceed to consider whether substantial and significant time spent by the child with each parent was in the child's best interests, given equal time was not possible and whether that was reasonably practicable.

In *Hamish & Brighton* (2014) FLC ¶93-624, the mother appealed from parenting orders and, in particular, the orders providing for time which may be spent by the father with the children and the injunction restraining the mother from relocating with the children interstate. The parties lived in Western Australia for a majority of the marriage. The mother had sought to relocate to South Australia due to a number of

factors, including the proximity of family members and cheaper housing. The mother's submissions included that the trial judge failed to address s 65DAA. In allowing the appeal, the Full Court noted that the trial judge did not mention s 65DAA(2) in his reasons or undertake the exercise required by the section. Their Honours stated: "Given what the High Court has said in *MRR* v *GR*, we doubt that the necessary findings providing the power to make the orders which his Honour made were present" [at 42].

In *Cox & Pedrana* (2013) FLC ¶93-537, an appeal by the mother was allowed against a parenting order which provided that the father have sole parental responsibility for their child as the trial judge did not address the presumption contained in s 61DA of the Act and referred to the Full Court decision of *Rosa & Rosa* [2009] FamCAFC 81 but did not refer to the decision of the High Court of *MRR* v *GR* (2010) FLC ¶93-424 which overturned the decision.

In *Wainder & Wainder* (2011) FLC ¶93-473, the Full Court held that a trial judge erred in failing to determine whether an order for equal time would be reasonably practicable once the child started school.

In *Adamson* & *Adamson* (2014) FLC ¶93-622, the mother appealed against parenting orders and, in particular, a coercive order requiring her to relocate with the parties' child to an area near the respondent's residence. The principal issues on appeal included the application of s 65DAA in relation to "reasonable practicability" and the exercise of discretion to make a coercive order. In allowing the appeal, the Full Court stated:

> "If it had been necessary to consider such a coercive order in the context of 'reasonable practicability' it was necessary that the trial judge not assume, as appears to have been the case, that the father's choices and freedoms did not fall for consideration. Here it seems that the trial judge proceeded on the footing that the mother had to subordinate her ambitions and wishes to the wishes of the father to pursue his life in Town C and his work in Sydney. No consideration was given, given the respective parenting roles in contemplation, to the father moving. We consider that his Honour thus erred in principle". [at 80]

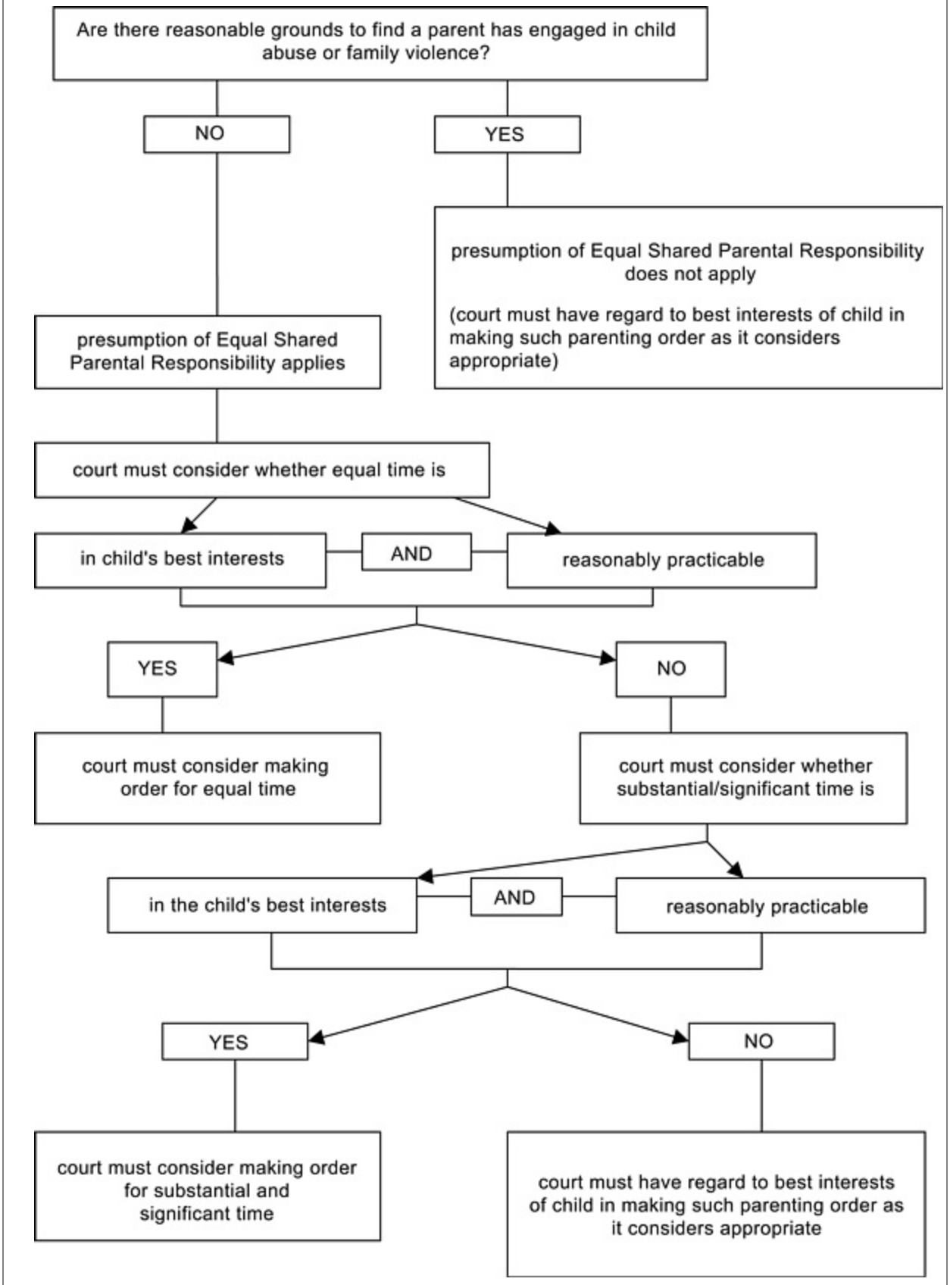
“Consider”

Just what is required by the term “consider” in s 65DAA is unclear. However, in the case of *Aboriginal & Torres Strait Islander Affairs, Minister for & Norvill v Chapman sub nom Tickner v Chapman* (the *Hindmarsh Island Bridge* case),[23] the Federal Court held that “considering the issue” requires more than the relevant judicial officer simply stating that they had turned their mind to the question. In that case, the Full Court of the Federal Court was of the view that it was necessary for the decision maker to be fully informed of the facts and circumstances of the case and the arguments and opinions put forward and to undertake an “active, intellectual process directed at that representation or submission”.[24]

In *Goode’s* case,[25] the Full Court analysed the Federal Court’s decision and discussion on the meaning of “consider” but ultimately concluded that the court’s observations in that case were not entirely helpful in the context of s 65DAA. Their Honours were of the view that:

> “the juxtaposition of ss 65DAA(1)(a), 65DAA(1)(b) and 65DAA(1)(c) suggests a consideration tending to a result, or the need to consider positively the making of an order, if the conditions in s 65DAA(1)(a), being the best interests of the child, and s 65DAA(1)(b), reasonable practicality are met. The same considerations apply to s 65DAA(2)”.[26]

Summary


Are there reasonable grounds to find a parent has engaged in child abuse or family violence?
NO
YES
presumption of Equal Shared Parental Responsibility does not apply
(court must have regard to best interests of child in making such parenting order as it considers appropriate)
presumption of Equal Shared Parental Responsibility applies
court must consider whether equal time is
in child's best interests
AND
reasonably practicable
YES
NO
court must consider making order for equal time
court must consider whether substantial/significant time is
in the child's best interests
AND
reasonably practicable
YES
NO
court must consider making order for substantial and significant time
court must have regard to best interests of child in making such parenting order as it considers appropriate

A further consequence of an order for equal shared parental responsibility is that, where the exercise of that responsibility involves the making of a decision about a major long-term issue (see ¶4-050) affecting the child, then the order is taken to require the decision to be made jointly (s 65DAC(2)). In addition, the order is taken to require the persons to consult each other about the decision to be made and to make a genuine attempt to come to a joint decision (s 65DAC(3)). However, it is not necessary for any other person, for example a school enrolments officer, to be satisfied that the decision was made jointly before acting on it (s 65DAC(4)).

In light of the very clear terms of s 65DAC, it is to be expected that the court will take a very firm position with regard to any parent who makes unilateral decisions affecting a child's long-term welfare.

For guidance in relation to the drafting of orders for parental responsibility, see *Pavli and Beffa* [2013] FamCA 144.

Footnotes

15 Ibid, at p 80,895.

16 Ibid.

17 R Chisholm and J McIntosh, "Cautionary notes on the shared care of children in conflicted parental separations", *Journal of Family Studies*, 2008. The article is a revised and expanded version by the same authors of "Shared care and children's best interests in conflicted separation: A cautionary tale from current research", *Australian Family Lawyer*, vol 20(1), 2008, pp 3–16.

18 See also *Parent–Child Contact and Post Separation Parenting Arrangements*, Report No 9 (Australian Institute of Family Studies, Melbourne, 2004), www.aifs.gov.au/institute/pubs/resreport9/main.html.

19 *Goode and Goode* (2006) FLC ¶93-286 at p 80,891.

20 Ibid, at p 80,895.

21 *U* v *U* (2002) FLC ¶93-112.

22 *Bolitho* v *Cohen* (2005) FLC ¶93-224.

23 *Aboriginal & Torres Strait Islander Affairs, Minister for & Norvill* v *Chapman, sub nom Tickner* v *Chapman* (the Hindmarsh Island Bridge case) (1995) 57 FCR 451.

24 Ibid, per Black CJ at p 462.

25 *Goode and Goode* (2006) FLC ¶93-286.

26 Ibid, at p 80,898.

¶4-050 Major long-term issues

Parents (or others who have responsibility for a child) are not required to consult in relation to issues that do not relate to major long-term matters (s 65DAE, *Family Law Act 1975* (Cth) (FLA)). In other words, a person with whom a child is spending time need not consult the other parent about decisions such as what the child wears or what activities the child will engage in while they are with that parent.

“Major long-term issues” are defined in s 4(1) of the FLA and include, but are not limited to, matters relating to the child’s:

- education
- religious and cultural upbringing

- health
- name, and
- living arrangements so far as changes to those arrangements may impact on the time the child spends with a parent.

The definition also expressly confirms that unless it results in a move away from one parent, the decision of a parent to commence a new relationship is not, of itself, a major long-term issue relating to the child. One assumes this is not the case where the relationship itself or the circumstances arising from it represent an unacceptable psychological or physical risk to the child.

¶4-060 The approach in interim hearings

In *Goode's* case, the Full Court had the opportunity to consider the application of the principles enunciated in *Cowling* v *Cowling*,[27] the decision upon which the trial judge relied in reaching his decision. At first instance, the trial judge indicated that there was nothing on the evidence which could lead to the conclusion that the arrangements in place for the children, which had been established for approximately three months prior to the hearing, were anything other than appropriate and in their interests.

On appeal, the Full Court gave careful consideration to the impact of the amendment to Pt VII of the *Family Law Act 1975* to the determination of interim applications. Having particular regard to [18] of the Full Court's decision in *Cowling*, their Honours confirmed that the procedure for making parenting orders will continue to be an abridged process where no findings of fact are made at an interim hearing. However, significantly, while the best interests of the child remain the paramount consideration, the Full Court made it clear that the promotion and preservation of stability for the child, which was a key part of the *Cowling* decision, is no longer an appropriate consideration in interim cases.

In what was a significant departure from the established approach

prior to the 2006 amendments, the Full Court clearly stated:

> "The reasoning in Cowling . . . for [a] decision to the effect that the best interests of the child are met by stability when the child is considered to be living in well-settled circumstances, must now be reconsidered in light of the changes to the Act, particularly changes to the objects (s 60B), the inclusion of the presumption of equal shared parental responsibility (s 61DA), and the necessity if the presumption is not rebutted to consider the outcomes of equal time and substantial and significant time *. . . where there is a status quo or well settled environment, instead of simply preserving it, unless there are protective or other significant best interest concerns for the child, the Court must follow the structure of the Act and consider accepting, where applicable, equal or significant involvement by both parents in the care arrangements for the child*". [emphasis added][28]

The court noted that this latter statement does not mean that the current arrangements will not ultimately be preserved but rather that, in reaching such a conclusion, a court must first give proper consideration to the matters contained in s 60CC and to s 60B(1)(a) — namely that children have the benefit of both parents having a meaningful involvement in their lives to the maximum extent consistent with their best interests. Their Honours concluded that the trial judge was in error in not considering the father's application in light of the relevant s 60CC factors.

In rejecting the submissions made on behalf of the mother that the court can only consider equal or substantial/significant time if the presumption of equal shared parental responsibility applies, their Honours confirmed that the legislative pathway articulated in Pt VII must be followed in all parenting cases, including interim hearings, and clearly articulated that such a course would involve:

> "(a) identifying the competing proposals of the parties;
>
> (b) identifying the issues in dispute in the interim hearing;
>
> (c) identifying any agreed or uncontested relevant facts;

(d) considering the matters in s 60CC that are relevant and, if possible, making findings about them (in interim proceedings there may be little uncontested evidence to enable more than a limited consideration of these matters to take place [and the Court noted that lengthy affidavits are unlikely to be helpful in resolving this challenge];

(e) deciding whether the presumption in s 61DA that equal shared parental responsibility is in the best interests of the child applies or does not apply because there are reasonable grounds to believe there has been abuse of the child or family violence or, in an interim matter, the Court does not consider it appropriate to apply the presumption;

(f) if the presumption does apply, deciding whether it is rebutted because application of it would not be in the child's best interests;

(g) if the presumption applies and is not rebutted, considering making an order that the child spend equal time with the parents unless it is contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;

(h) if equal time is found not to be in the child's best interests, considering making an order that the child spend substantial and significant time as defined in s 65DAA(3) with the parents, unless contrary to the child's best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;

(i) if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;

(j) if the presumption is not applied or is rebutted, then making

such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and

(k) even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child".[29]

In *Treloar & Nepean* (2009) FLC ¶93-416, the Full Court found that, given the unusual circumstances of the case and the recommendations of the expert, an order on an interim basis for equal shared parental responsibility should not have been made.

Footnotes

27 *Cowling* v *Cowling* (1998) FLC ¶92-801.

28 *Goode and Goode* (2006) FLC ¶93-286 at p 80,901.

29 Ibid, at p 80,903.

DISPUTE RESOLUTION AND FAMILY RELATIONSHIP CENTRES

Editorial information

Written by Anne-Marie Rice

¶5-000 Introduction

Primary (also known as alternate) dispute resolution, counselling and mediation have long been part of the language for family lawyers, but the formal definitions in the *Family Law Act 1975* (Cth) (FLA) relating to these issues were repealed in 2006 and replaced by the concepts of "family counselling" (s 10B), "family counsellor" (s 10C), "family consultant" (s 11B), "family dispute resolution" (s 10F) and "family dispute resolution practitioner" (s 10G).

Arbitration has also become more widely used since amendments to the FLA by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* although, currently, the Act provides for arbitration in financial matters only. Mediation continues to be a popular form of alternate dispute resolution and, in many parts of the country, parents are electing to resolve issues in dispute by engaging in a process that has become known as "collaborative practice". The

FLA makes no formal reference to either mediation or collaborative practice although the resolution of disputes by both of these means has an obvious, and positive effect on families and a significant impact on the courts' workloads.

¶5-010 Family counselling and counsellors

"Family counselling" and the role of "family counsellors" have changed dramatically under the changes to the *Family Law Act 1975* (FLA), both in relation to pre-filing counselling and in the context of contested proceedings.

For separated couples, family counselling should, logically and where communications are open and relatively amicable, be the first process adopted in the attempt to reach agreement about parenting arrangements.

Family counselling is defined in s 10B as a process in which a "family counsellor" helps:

> "(a) one or more persons deal with personal and interpersonal issues in relation to marriage; or
>
> (b) one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following:
>
> (i) personal and interpersonal issues;
>
> (ii) issues relating to the care of children".

The term "family counsellor" (defined in s 10C) applies to the following strictly limited persons:

- a person accredited as a family counsellor under the Accreditation Rules (see s 10A and Pt 5 Div 1 of the Family Law Regulations)
- a person authorised to act on behalf of an organisation designated by the minister (who must publish, at least annually, a list of organisations designated for this purpose) (s 10C(1)(b))

- a person authorised to act under s 38BD or s 38R(1A) as a family counsellor (ie Family Court counsellors)

- a person engaged to act as a family counsellor under the *Federal Circuit Court Act 1999*, or

- a person authorised by a Family Court of a state to act as a family counsellor.

Counselling with an approved family counsellor is generally privileged and, with the exception of corroborated disclosures of child abuse or risk of abuse (s 10E(2)), a family counsellor must not disclose any communications made to him or her (s 10D(1)) and nothing said in family counselling can be admitted in any court or in any proceedings (s 10E(1)).

This confidentiality also applies to any professional to whom the family counsellor refers the parties (such as a private counsellor), and there is an onus on the family counsellor to inform the other professional of the effect of s 10E (s 10E(4)). A literal interpretation of this provision means that where parties are referred to a private counsellor (who may not independently fall within the category of persons set out in s 10C), what is said in the context of those counselling sessions is also privileged.

Despite those protections on discussions had in counselling, s 10D(2) provides that family counsellors *must* disclose communications where the disclosure is necessary in order to comply with the laws of a state or territory (eg the mandatory reporting of child abuse (s 10D(2))). Nationwide, child protection legislation contains mandatory reporting provisions for family dispute resolution practitioners (see below). Further, family counsellors *may* disclose matters if consent to do so is given by the person who made the communication, or their parent where that person is under 18 years (s 10D(3)), and where the disclosure is reasonably necessary to:

- protect a child from harm

- prevent or lessen a serious threat to the life or health or property of

a person

- report an offence or possible offence involving violence or intentional damage to property

- assist the independent children's lawyer to properly represent the child, or

- conduct research relevant to families (s 10D(4) and (5)).

Use of the word "may" provides family counsellors with discretion as to whether they disclose such matters and to whom they are disclosed. As a result, the family counsellor cannot be compelled by the court to produce their notes from, or give evidence about, such counselling, even in circumstances where the parties agree to the disclosure. This creates a clear delineation between circumstances in which disclosure must occur and circumstances in which disclosure may occur. The discretion applies particularly to threats of harm made against another adult, a family pet or property of the relationship. The family counsellor is not required to inform the person against whom the threat was made, nor the police, although they may choose to do so.

There is a very significant distinction between disclosure and admissibility. The potential conflict between s 10D and 10E is dealt with by s 10D(6) which provides that:

> "Evidence that would be inadmissible because of s 10E is not admissible merely because this section requires or authorises its disclosure".

The note to s 10D(6) further clarifies the position by stating: "this means that the counsellor's evidence is inadmissible in court, even if [s 10D] allows the counsellor to disclose it in other circumstances".

However, s 10E(2) notes that the inadmissibility of evidence of anything said, or any admission made, by or in the company of a family counsellor conducting family counselling does not apply to an admission made by an adult that indicates a child under 18 years has been abused or is at risk of abuse, or a disclosure by a child under 18 years that indicates that the child has been abused or is at risk of

abuse, unless in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

The current approach taken by the court in considering whether there is sufficient evidence of the admission or disclosure available to the court from some other source is to examine that evidence in a *Voir Dire* at the commencement of trial.

A family counsellor is an adviser as defined in s 60D(2) of the FLA. The definition includes legal practitioners, family counsellors, family dispute resolution practitioners and family consultants in the definition of adviser. Section 60D(1) compels advisers to inform a person seeking assistance in relation to the care of a child to regard the best interests of the child as the paramount consideration and to encourage the person to act on the basis that those best interests are met by protecting the child from physical or psychological harm, in priority to the promotion of a meaningful relationship with both parents. The shift in focus to prioritise protection from harm is a key component of the amendments to the *Family Law Act 1975* in 2012 and strengthens advisers' obligations to prioritise the safety of children.

The issue about compliance with subpoena by family counsellors was discussed in *Uniting Care–Unifam Counselling and Mediation and Harkiss and Anor* (2011) FLC ¶93-476. In that case, the Full Court confirmed that there is no compulsion to produce documents issued under a subpoena that is inconsistent with s 10E(2)(a) and (b).

¶5-020 Family dispute resolution

Since the introduction of the Family Law Rules 2004, parties to parenting matters, in the Family Court (but not strictly the Federal Circuit Court), have been required to comply with the pre-action procedures set out in Sch 1 to those rules. Parties must also comply with the dispute resolution requirements of s 60I and have attended upon and obtained the requisite certificate from a family dispute resolution practitioner prior to commencing proceedings in all but urgent and/or high-risk cases. All applicants for parenting orders must file a s 60I certificate and otherwise satisfy the requirements set out in s 60I(7)–(12).

The objects of the procedures are stated to be to:

- encourage early and full disclosure of relevant matters
- provide parties with a process to avoid legal action and to minimise costs
- help with the efficient management of cases, and
- encourage parties for whom litigation becomes necessary to seek reasonably achievable orders.

The procedures clearly indicate that all prospective parties to a case are required to focus upon the best interests of the child (procedure 1(6)), while they participate in dispute resolution (expressly stated to include “things such as negotiation, conciliation, arbitration and counselling”), exchange a “notice of intention to claim”, explore options for settlement, and comply, so far as is possible, with their duties of disclosure (procedure 1(1)).

While the pre-action procedures are not binding and there are exceptions to this requirement, as set out in r 1.05(2), if a case involves allegations of family violence or risk of child abuse, the procedures themselves state that unless there is good reason for not having done so, parties are expected to have followed them before starting a case and that there may be serious costs consequences as a result of non-compliance (procedures 1(2) and 1(3)).

The introduction of these procedures in early 2004 focused practitioners, and parties, on the importance of exhausting all options of dispute resolution before commencing proceedings.

In addition, and since 2006, parties in all courts must also comply with the dispute resolution requirements of s 60I and have attended upon and obtained the requisite certificate from a family dispute resolution practitioner before bringing an application, except in limited circumstances including urgency (s 60I(9)(d)) and family violence (s 60I(9)(b), and 60J). The amendments to the *Family Law Act 1975* in 2012 and particularly the expansion of the definition of *family violence* in s 4AB(1) may well expand the categories of exempted cases under

s 60I.

¶5-030 Family dispute resolution and practitioners

Consistent with the government's desire that the court system be used as a place of last resort for the resolution of parenting disputes, s 60I(1) of the *Family Law Act 1975* (Cth) (FLA) expressly compels parties to "make a genuine effort to resolve that dispute by family dispute resolution before the Pt VII order is applied for".

All parties are required to have attended upon and obtained the requisite certificate from a family dispute resolution practitioner before bringing any application for parenting orders. Since 1 July 2008, all applicants for parenting orders, regardless of whether previous orders have been made or the matter has otherwise been before the court in the past, must file a s 60I certificate and otherwise satisfy the requirements set out in s 60I(7)–(12). Family dispute resolution is a process by which an independent professional helps people affected or likely to be affected by separation or divorce to resolve some or all of their disputes (s 10F). A legal practitioner is not automatically a family dispute resolution practitioner.

The term "family dispute resolution practitioner" is defined in s 10G of the FLA and in terms similar to the definition of "family counsellor" in s 10C (see ¶5-010). A "family dispute resolution practitioner" must meet the national accreditation standards and, in practice, includes many lawyers (solicitors and barristers), psychologists and social workers.

Family dispute resolution practitioners are advisers within the definition in s 60D and have the same obligation to prioritise the safety of children as each of the advisers identified at ¶5-010 above.

Professionals falling within the strict definition are the only persons entitled to give a certificate pursuant to s 60I(7). The Family Relationship Centres, established by the federal government in mid-2006 and at the same time as the new Pt VII provisions were introduced (see ¶4-000), are a cost-effective source from which many parties may access a family dispute resolution practitioner, although there is now a significant number of private family dispute resolution

practitioners available. The location and role of those centres are discussed in greater detail at ¶5-070.

While many parties may opt for the cost-effective family dispute resolution services provided by the Family Relationship Centre (FRC), there are often long delays between when a parent registers and when the family dispute resolution actually takes place. Once a party registers with the FRC, the other party will then be invited to attend, following which both parties must go through an individual intake session, a separate group session, and finally the family dispute resolution with the other party. This process can sometimes take many months depending on availability at any given centre. As a result, the services offered by private family dispute resolution practitioners, such as psychologists, social workers, solicitors or barristers, are often much more efficient when compared with the opportunity cost of long delays in the public system. That opportunity cost will be exacerbated for any parent who is attempting to establish or re-establish a relationship with a child. Private practitioners usually conduct their intake sessions and family dispute resolution on the same day, although some may offer an earlier intake session by phone to maximise the time available for the family dispute resolution itself on a following day.

There are four kinds of certificates that a registered family dispute resolution practitioner can provide pursuant to s 60I(8). The certificate must state one of the following:

- that the person did not attend family dispute resolution because of the other party's failure to attend (s 60I(8)(a))

- that the person did not attend family dispute resolution because the practitioner considers it would not have been appropriate (s 60I(8)(aa))

- that the person attended family dispute resolution and all attendees made a genuine effort to resolve the issues in dispute (s 60I(8)(b)), or

- that the person attended family dispute resolution but that person,

or the other party, did not make a genuine effort to resolve the issue (s 60I(8)(c)).

If the matter proceeds to court, in making the orders that it ultimately considers appropriate, the court may take into account the type of certificate provided.

The only exceptions to the requirement to attend family dispute resolution before filing an application are set out in s 60I(9). The requirement to file a certificate from a family dispute resolution practitioner does not apply if any one of the following applies:

- the application is made by consent of all parties or in response to an application made by another party
- the court is satisfied, on reasonable grounds, that there has been abuse/family violence or there is a risk of abuse/family violence of the child by a party
- the application relates to a “particular issue” (presumably this means a single issue) and a parenting order has been made in relation to that issue in the preceding 12 months and the application relates to contravention and there are reasonable grounds to believe that the respondent has shown a serious disregard for their obligations under the order
- the application is urgent
- one or more of the parties is unable to participate effectively in family dispute resolution (including for reasons associated with remoteness), or
- any other circumstance set out in the regulations.

If an application for a parenting order is filed without a certificate because the relevant criteria in s 60I(9) are satisfied, the court *must* nonetheless consider making an order that a person attend family dispute resolution (s 60I(10)).

The expansion in 2012 of the FLA definitions of *family violence* (s

4AB(1)) and *abuse* relative to a child (s 4(1)) has not in practice led to what was anticipated to be a potential increase in the number of applicants proceeding to court without having first attempted family dispute resolution.

There is nothing to prevent parties obtaining legal advice from, and undertaking negotiations through, legal practitioners without having first attended a family dispute resolution practitioner. The requirement to participate in the family dispute resolution process and obtain a s 60I certificate only becomes necessary once court proceedings are inevitable. By the time family dispute resolution becomes necessary, and if the parties and their legal practitioners have already had extensive negotiations, parties will often be fully entrenched in their positions. The prospect of matters resolving as a result of the intervention of a family dispute resolution practitioner may be limited in those circumstances.

Sections 10H and 10J refer to the confidentiality of disclosures made in family dispute resolution by practitioners. In essence, similar to the restrictions on disclosures made in the course of family counselling, nothing that is said in the context of family dispute resolution is admissible in court or in any proceedings (unless it relates to disclosures of child abuse, subject to the limitations imposed by s 10J(2) which are approached by the court in the same way as s 10E(2) discussed in greater detail at ¶5-010). However, in certain circumstances and with the consent of the parties, the family dispute resolution practitioner may disclose matters raised in the course of the dispute resolution process. The disclosure by the family dispute resolution practitioner does not, of itself, make the evidence admissible.

In a decision that raises concerns about shortcomings of the process, Riethmuller FM (as he then was) held in the case of *Rastall* v *Ball* [2010] 44 FLR 1290 that the intake session conducted by a family dispute resolution practitioner is a separate phase to the family dispute resolution proper, and that none of the intake process is confidential. The issue of confidentiality in family dispute resolution intakes was again considered in *French and Winter* [2012] FMCA Fam 256 where one parent attended family dispute resolution but the other

parent did not. Federal Magistrate Demack confirmed that, in her view, "*communications received during the 'process' commence at the first engagement or interaction. The fact that the process is aborted, halted, or misconceived does not provide an exemption to the prohibition of disclosure of communications made in the process*".

Family dispute resolution practitioner's do, however, pursuant to s 10H(6) and 10J(3), have a discretion to disclose any information necessary for the practitioner to issue a certificate pursuant to s 60I(8).

Practitioners' checklist: parenting applications

Pre-action procedures

(Family Law Rules, Sch 1, Pt 2 and requirements under s 60I of the Family Law Act 1975)

Rule 1.05 stipulates that parties must comply with the pre-action procedures set out in Sch 1. Practitioners should be familiar with the schedule.

Parties wishing to apply for an order under Pt VII must first attend a family dispute resolution with a registered family dispute resolution practitioner in an attempt to try and resolve the matter unless any of the s 60I(9) exemptions apply.

A certificate pursuant to s 60I(8) must be obtained from a registered family dispute resolution practitioner. The certificate from the family dispute resolution practitioner can be in one of four forms set out above.

All applicants for parenting orders, regardless of whether previous orders have been made or the matter has otherwise been before the court in the past, must file a s 60I certificate and otherwise satisfy the requirements set out in s 60I(7)–(12).

The only exceptions to the requirement to attend family dispute resolution before filing an application are set out in s 60I(9). The requirement to file a certificate from a family dispute resolution practitioner does not apply if one of the exceptions set out above applies.

¶5-040 Family consultants

The concept of “family consultants” was introduced into the *Family Law Act 1975* (FLA) as a separate and distinct concept from family counsellors and family dispute resolution practitioners. The term is defined in s 11B of the FLA and essentially refers to psychologists and social workers employed or subcontracted by the Family Court and who were previously known as Family Court counsellors and mediators. Again, family consultants are advisers within the definition of s 60D and have, as their primary obligation, the protection of children from harm.

The primary function of a family consultant is to provide services in relation to proceedings under the FLA and include (s 11A):

- assisting and advising people involved in the proceedings
- assisting and advising the court and giving evidence
- helping the parties to resolve disputes
- reporting to the court under s 55A and 62G of the FLA, and
- advising the court about appropriate programs and services to which the court can refer the parties.

In performing their functions, the family consultant has the same protection and immunity as a judge of the Family Court (s 11D).

Family consultants have significant involvement in all court proceedings and nothing that is said to, by or in the company of a family consultant is confidential or privileged.

Family consultants are present in the court room at trial and during any discussions or negotiations that occur outside the court room. The family consultant may, at the request of the trial judge, give evidence of their observations of the parties regardless of whether or not they have had any prior involvement in the matter.

The court may seek advice from the family consultant about whether

the parties ought to attend counselling, family dispute resolution or other courses or programs prior to making an order that the person do so (s 11E). The court may also order parties to attend appointments with the family consultant (s 11F) and, if a person fails to do so, the family consultant must report the failure to the court, which may then make such further orders as are appropriate in the circumstances.

¶5-050 Obligations on legal practitioners

Legal practitioners are, perhaps obviously, *advisers*, within the definition of s 60D(2) of the *Family Law Act 1975* (FLA). Section 60D(1) expressly provides that if advice or assistance is given to a person in relation to matters concerning a child, the adviser must:

> "(a) inform the person that the person should regard the best interests of the child as the paramount consideration; and
>
> (b) encourage the person to act on the basis that the child's best interests are best met:
>
> (i) by the child having a meaningful relationship with both of the child's parents; and
>
> (ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (iii) in applying the considerations set out in subparagraphs (i) and (ii) — by giving greater weight to the consideration set out in subparagraph (ii)".

The wider obligations on legal practitioners set out in Pt IIIA of the FLA codify and expand upon what might otherwise be described as "best practice" guidelines for family law specialists. The Attorney-General's Department has made it clear that:

> "lawyers should direct clients towards non-litigious approaches to dispute resolution and advise clients of their obligation to make a genuine effort to resolve their dispute outside the court system

rather than seeing a court application as a normal process".[1]

Section 12A sets out the objects of Pt IIIA of the FLA, which are very clearly focused on ensuring all possible avenues of dispute resolution are exhausted before court proceedings commence. The objects are expressly stated as follows:

> "(a) to ensure that married couples considering separation or divorce are informed about the services available to help with a possible reconciliation, in situations where a reconciliation between the couple seems a reasonable possibility; and
>
> (b) to ensure that people affected, or likely to be affected, by separation or divorce are informed about the services available to help them adjust to:
>
> (i) separation or divorce; and
>
> (ii) orders made under this Act; and
>
> (c) to ensure that people affected, or likely to be affected, by separation or divorce are informed about ways of resolving disputes other than by applying for orders under this Act".

In advising clients who have sought legal advice about parenting matters, practitioners must give, at the very least, information about the (s 12B):

- legal and possible social effects of the proposed proceedings (including the consequences for the children involved)
- services provided by family counsellors and family dispute resolution practitioners
- steps involved in the proposed proceedings
- role of family consultants, and
- arbitration facilities available to arbitrate disputes.

Indeed, unless the client has already received the relevant information, s 12E specifically obliges legal practitioners to provide clients with documents (produced by the court) containing information about the following:

- the range of non-court based family services available to assist in resolving their parenting dispute, as well as the court's processes and services. In practical terms, this will involve legal practitioners referring their clients to a Family Relationship Centre (where accessible) and to family relationship practitioners

- reconciliation and marriage counselling where clients are married (unless the practitioner thinks there is no reasonable possibility of reconciliation), and

- the objects, principles and other applicable law under Pt VII.

Section 12E also requires practitioners to provide their clients with the court-generated documents containing the information referred to above. The combined Family Court and Federal Circuit Court website (www.familylawcourts.gov.au) lists a number of relevant brochures, such as:

- Before you file — pre-action procedure for parenting orders

- Family consultants

- Compulsory family dispute resolution — court procedures and requirements

- Going to court — tips for your court hearing

- Legal words used in court

- Marriage, families and separation

- Parenting orders

Consistent with this approach, the court, family counsellors, family dispute resolution practitioners and arbitrators are obliged to give

prescribed information (s 12F and 12G).

In addition to the obligations imposed on practitioners by Pt IIIA, s 63DA of the FLA sets out further, comprehensive obligations to be followed by all "advisers" (defined in s 63DA(5) to include lawyers, family counsellors, family dispute resolution practitioners and family consultants). Section 63DA clearly emphasises shared parenting, and addresses both the associated procedural and substantive issues involved in putting such arrangements into effect.

Section 63DA(1) provides that if an adviser gives assistance in relation to matters of parental responsibility they must inform that person:

- that they could consider entering into a parenting plan (discussed in greater detail in Chapter 6), and
- about where they can get further assistance to develop a parenting plan and the content of it.

These objects should by no means be viewed as an attempt to exclude lawyers from being involved in negotiations surrounding the breakdown of relationships and the formalising of arrangements in relation to parenting. They are, however, clear in requiring that both parties and practitioners focus on alternate means of dispute resolution and use the court process only as a last resort.

Footnotes

1 Attorney-General's Department Discussion Paper, "Family Relationship Centres, the Family Relationship Advice Line and the Legal Profession", www.familyrelationships.gov.au.

¶5-060 Court's powers and obligations in relation to counselling and dispute resolution

Part IIIB of the *Family Law Act 1975* (Cth) (FLA) also imposes specific

obligations on the court to help accommodate any possible reconciliation between parties and to refer parties to family counselling, family dispute resolution and other family services or to arbitration (which is now also heavily emphasised in the FLA).

The objects of Pt IIIB are set out in s 13A and clearly reflect the government's desire to limit the number of matters brought before the courts and to encourage parties to fully explore reconciliation and to utilise alternative dispute resolution.

¶5-070 Family Relationship Centres and Family Advice Line

As part of the major overhaul of the family law system, the government introduced Family Relationship Centres (FRCs) and a national Family Relationship Advice Line (a telephone advice line providing legal and other advice: 1800 050 321). The FRCs are essentially government-sanctioned dispute resolution forums where parties will be encouraged to resolve their disputes and enter into parenting plans. The government clearly wants FRCs to be the first port of call when parents require information about relationship and separation issues.

At the date of publication, there are 65 FRCs nationwide.

The purpose of the FRCs is to give separating parents a forum (in individual, group and joint sessions) in which they can sit down, focus on the needs of the children and agree on parenting arrangements without going to court. The FRCs will assist separating families to make workable arrangements for their children without having to go to court.

The FRCs, whose staff are trained in identifying issues of family violence and child abuse, will also provide information and advice about how to resolve disputes, dispute resolution services, and how to contact Legal Aid, community legal centres or private legal practitioners.

The FRCs also often provide additional post-separation parenting services to assist families to improve their communication and

parenting skills following the breakdown of their relationship. Increasingly the courts refer parties to post-separation parenting programs to assist with improving the post-separation dynamic.

The FRCs will not, however, provide legal advice, although it has been identified that such advice may be required at different stages of the negotiation process, including:

- prior to the parties' attending at the FRC — in those circumstances parties will be provided with information and materials about the family law system and the legal effect of parenting plans and consent orders

- during the dispute resolution process — in this case parties will be directed to the national Family Relationship Advice Line, or to their own legal practitioners, for immediate legal advice, and

- after an agreement is reached in relation to the preparation and execution of consent orders.

The FRCs will refer many participants to community legal centres which play a large role in advising parties involved in the dispute resolution process. A list of those community legal centres can be found at www.naclc.org.au. At the time of publication, there are 181 community legal centres located Australia wide.

Where the centre staff decide that the dispute resolution process on offer is not suitable, parties may need to be referred to legal practitioners for advice about what further steps they may take.

Each of the FRCs is independently operated. The intake process and mediation/dispute resolution model will vary from centre to centre. This means that coordinating dispute resolution between centres (eg in cases where the parties live some distance apart) may be difficult.

In all cases, the first three hours of dispute resolution will be provided free of charge and will provide an opportunity for parties to devise parenting plans (in the course of which they must be advised to consider arrangements for the children to spend equal or significant and substantial time with each of their parents).

The emphasis on parenting plans in Pt VII of the *Family Law Act 1975* (Cth) has no doubt resulted in an increasing number of such agreements being reached, and signed by the parties, at the conclusion of the dispute resolution process. However, it is important for parties to fully appreciate the impact of executing parenting plans and their enforceability (which are discussed in Chapter 6), preferably before they are executed.

In addition to services offered by FRCs, there are a large number of state government and not-for-profit organisations that also offer counselling services, FDR, supervised contact services, parenting orders programs, post-separation cooperative parenting services and services supporting children after separation. A full list of the family law service providers available in each state and territory can be found at www.familyrelationships.gov.au.

¶5-080 Family Relationship Advice Line

To further complement the changes to the family law system, a free national advice line was established to provide information about:

- services to help maintain relationships
- the family law system and family separation
- how to develop workable post-separation parenting arrangements
- the impact of conflict on children
- Family Relationship Centres (FRCs) and other dispute resolution services, including telephone services, and
- other services which will help with family relationship and separation issues.

The telephone number for the advice line is 1800 050 321. The advice line is available from 8 am to 8 pm, local time, Monday to Friday and from 10 am to 4 pm, local time, on Saturday (closed on Sundays and national public holidays). The telephone advice line also represents a

significant resource for parties who are unable to attend an FRC. Parents, grandparents, children, step-parents and friends are encouraged to access it.

All calls to the advice line are made on an anonymous basis, but callers will be invited to supply a few personal details to identify them should they call again. It is not mandatory to provide those details.

> **Tip**
>
> The Commonwealth Attorney-General's family relationships website (www.familyrelationships.gov.au) is an excellent source of information about the Family Relationship Centres and the options available to separating parents generally. The site contains information useful to both practitioners and parties, fact sheets and direct links to relevant organisations throughout the country.

¶5-090 Arbitration

In arbitration, a trained arbitrator listens to the evidence or reads the submissions and delivers an award in relation to financial matters. Parenting and child support issues cannot be the subject of arbitration. Advantages of arbitration include:

- the parties control the process (eg select the arbitrator, the method of arbitration and the timing of the arbitration)
- a hearing can be earlier than in the Family Court
- more private than a court case, and
- can be used to resolve a difficult aspect of the dispute such as the valuation of a business, enabling the parties to negotiate an overall settlement.

Referrals to arbitration can be made with the consent of all parties by a court exercising jurisdiction under Pt VIII (s 13E(1) of the *Family Law Act 1975* (Cth) (FLA)) or parties can agree to an arbitration without the commencement of court proceedings. Arbitration awards can be registered in the court which made the referral to arbitration or, if there is no referral, by a court exercising jurisdiction under s 13H of the FLA. Registered awards can be reviewed but only on questions of law (s 13J). Matters relating to approved s 87 maintenance agreements cannot be arbitrated (reg 67C, Family Law Regulations 1984).

Names of qualified arbitrators are on the website of the Australian Institute of Family Law Arbitrators and Mediators: www.aiflam.org.au.

¶5-100 Collaborative practice

Collaborative practice is a method of dispute resolution in which all negotiations and exchange of information occur in face-to-face meetings attended by both parties and their lawyers and, in many cases, neutral financial and counselling/communication experts. In the collaborative process, the parties are actively involved in working jointly to identify the issues and working towards a mutually acceptable solution.

The emphasis is on interests-based negotiations and finding a solution with which both parties can live by using a process which will help to preserve, as much as possible, a productive post-separation relationship. The parties and their lawyers execute a contract confirming the lawyers (and any neutral experts involved) will withdraw from the representation of the parties if the matter cannot be resolved without litigation and this, of itself, changes the dynamics of the negotiations. The parties also agree not to take unilateral and provocative actions, such as dealing with assets or ceasing child support payments, and agree to provide full and timely disclosure. Lawyers do not engage in positional correspondence, but discuss issues at the face-to-face meeting with each participant having the chance to consider their views in advance.

Collaborative lawyers have been trained in all states and territories of Australia. It is also a process regularly adopted overseas in countries

such as the United States and the United Kingdom.

Tip

The contact details for various collaborative lawyers organisations within Australia are as follows:

- Australian Association of Collaborative Professionals, www.collaborativeaustralia.com.au.
- Collaborative Professionals (NSW) Inc, www.collabprofessionalsnsw.org.au.
- Collaborative Practice Canberra, www.collaborativepracticecanberra.com.au.
- Collaborative Professionals WA, www.collaborativeprofessionalswa.com.au.
- Queensland Association of Collaborative Professionals, www.qacp.org.au.
- Collaborative Professionals Victoria, https://www.liv.asn.au/Home.

The Law Council of Australia has produced Best Practice Guidelines for practitioners adopting this form of dispute resolution in Australia.

Many collaborative practitioners also join the International Academy of Collaborative Professionals (IACP). The IACP is the most representative body of collaborative professionals worldwide. It provides support, education, information, training and resources to members and its Standards Committee has developed standards (ethical, training, etc) for collaborative practice. The IACP website address is www.collaborativepractice.com.

PARENTING ORDERS, PLANS AND GUIDELINES

Editorial information

Written by Anne-Marie Rice and edited by Anne-Marie Rice and Erin Shaw

¶6-000 Parenting orders — the practicalities

Orders dealing with children are known, generally, as “parenting orders”. The expressions “residence”, “contact” and “specific issues”, which were introduced into Pt VII of the *Family Law Act 1975* (Cth) (FLA) in 1996 following the commencement of the *Family Law Reform Act 1995* (and which replaced the expressions “custody”, “access” and “guardianship”), were removed entirely with the July 2006 changes brought about by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

Orders previously couched in terms of “residence” now refer to the person “with whom the child lives”, and orders previously referring to “contact” now refer to the person with whom the child “spends time” or “communicates”.

The meaning of “parenting order” is set out in s 64B(2) of the FLA as follows:

> “A parenting order may deal with one or more of the following:
>
> (a) the person or persons with whom a child is to live [there is no automatic requirement for a child to live with the other parent in the event of the death of a parent who has had such an order made in their favour — s 65K];
>
> (b) the time a child is to spend with another person or other persons;
>
> (c) the allocation of parental responsibility for a child;
>
> (d). . . the form of consultations [persons who share parental responsibility for a child] are to have with one another about

decisions to be made in the exercise of that responsibility;

(e) the communication a child is to have with another person or other persons;

(f) maintenance of a child [unless the child support scheme applies];

(g) the steps to be taken before an application is made to a court for the variation of the order . . .;

(h) the process to be used for resolving disputes about the terms or operation of the order;

(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child".

A very wide category of persons may apply for a parenting order, and s 64B(2) specifically notes that persons referred to in that subsection may include either a parent of the child or any other person, including a grandparent of the child.

In each case, parenting orders are to be made in favour of the person with whom the child lives or spends time or communicates (s 64B(6)). Section 64C also specifically provides that parenting orders may be made in favour of a parent of the child or some other person. Section 65C sets out, in very clear terms, that the following persons may apply for a parenting order:

- either or both of the child's parents
- the child
- a grandparent of the child, or
- any other person concerned with the care, welfare or development of the child.

Accordingly, it follows that orders can be made for a child to live, spend time, and communicate with any of these persons, or for these

persons to have or share parental responsibility for a child.

The concept of “specific issues” previously referred to in the FLA (and reflected in detailed orders covering things such as parents’ communication with doctors and schools, attendance by children at extracurricular activities, forms of discipline and dietary requirements) has also been abolished. Those matters are now dealt with under the general auspices of parenting orders and s 64B(2)(i), which states that one of the matters which may be dealt with by a parenting order is “any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child”.

In order to ensure that parenting orders are given full effect, the FLA contains detailed sanctions for non-compliance, referred to in greater detail at Chapter 10, and an express prohibition on third party interference with orders. Sections 65M, 65N(2) and 65NA(2) respectively provide that a person must not prevent or hinder any person from delivering a child to the person they live with, or from spending time with or communicating with a child, or otherwise interfere with that person and the child benefiting from the time to be spent with each other under the order. Section 65P provides that a person must not hinder a carer (who is a person to whom the order allocates parental responsibility) from discharging their obligations under the order (s 65P(2)).

Parenting orders remain in force until the subject child turns 18, marries, enters a de facto relationship or is adopted (s 65H and 65J).

¶6-010 Parenting orders and the “paramountcy principle”

“In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration” (s 60CA of the *Family Law Act 1975* (Cth) (FLA)). This reference to the best interests of the child has become known as the “paramountcy principle”.[1]

The court determines what is in a child’s best interests by reference to the primary and additional considerations, which are detailed in s

60CC (see ¶7-000). It is interesting to note that the terms used are not "primary" and "secondary" indicating there is no hierarchy among the considerations. In interpreting these provisions the Full Court of the Family Court has noted there is no priority to any provision in Pt VII (*Aldridge and Keaton* (2009) FLC ¶93-421) nor does the FLA require consideration of the s 60CC factors in any particular order (*Slater and Light* [2011] FamCAFC 1).

The primary considerations are:

- the benefit of the child having a meaningful relationship with both parents (s 60CC(2)(a)), and

- the need to protect the child from physical or psychological harm from exposure to abuse, neglect or family violence (s 60CC(2)(b)).

However, June 2012 amendments to the FLA incorporated a new s 60CC(2A) which goes some way to identifying which of the s 60CC factors are the most important. That subsection states:

> "In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b)".

The inclusion of this new provision is entirely consistent with the focus on avoiding exposure to family violence or abuse as set out in s 60CG and means that a court should prioritise the protection of the child over a "meaningful relationship" with the other parent. There is not, in the 2012 amendments, any indication of whether the protection of a child from family violence or abuse is to take priority over the additional considerations, but noted commentators have suggested it is unlikely that any additional consideration could outweigh a primary consideration which has clearly stated priority over the other.

The additional considerations are set out in s 60CC(3) and outlined in ¶7-000.

One significant change to the additional considerations is the removal of any obligation to consider the performance of each of the parents (or other relevant parties) in what had been described as the "good or

responsible parent test". Section 60CC(3)(c) and (ca) now require the court to take into account only the extent to which each parent has:

> "(c) taken, or failed to take, the opportunity:
>
> (i) to participate in making decisions about major long-term issues in relation to the child; and
>
> (ii) to spend time with the child; and
>
> (iii) to communicate with the child;
>
> (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child".

The requirement to consider the extent to which each parent has facilitated the other's being involved in the child's life in a practical and decision-making sense (as previously contained in former s 60CC(4)) has been removed.

Section 60CC(3)(c) and (ca) place an onus on the court to give consideration to the events which have occurred and the circumstances which have arisen since separation. This means that the attitude and approach taken by parents to their responsibilities as parents both during the relationship and following separation, will be relevant in the court's decision about where a child should live and how much time they should spend with each parent.

A parent who has had limited practical involvement with their child and who has sought little involvement in the life of their child following separation will need to give good evidence about how that situation came about in order to overcome the hurdles created by s 60CC(3)(c) and (ca) if the facts also involve non-payment of child support.

It may be argued that these stringent considerations give the court some room to move when considering, as it must, whether or not it is in the best interests of a child to spend equal or substantial and significant time with each parent.

Where orders are made by consent, the matters set out in s 60CC(2) and (3) are not mandatory considerations; however, the court may, of

course, still have regard to them (s 60CC(5)).

Another significant amendment to the “best interests factors”, as the s 60CC(2) and (3) considerations are commonly known, is the expansion of s 60CC(3)(k) which requires the court to give much greater consideration to the circumstances (and evidence) surrounding the making of a family violence order, including taking into account any findings made by the court in, or proceedings for, that order.

These considerations and the other principles the court must consider in parenting disputes are discussed in greater detail at Chapter 8.

The combined courts *Family Violence Best Practice Principles*, revised in 2016, provide practical guidance on the matters the court expects will be given the most attention in preparing material for an interim or final hearing.

Example

Types of orders — practical example

1. That the parents, X and Y, have equal shared parental responsibility for the children, A, born xx/xx/xxxx, and B, born yy/yy/yyyy (“the children”).

2. That children are to live with Y and spend substantial and significant time with X during the times detailed below.

3. That Y shall make the children available to spend time with X at all times as may be agreed between the parties and failing agreement as follows:

    (a) from after school on Thursday until the commencement of school on Tuesday each alternate week with X to collect the children from and return them to school at the commencement and conclusion of each visit

    (b) each other week, from after school on Wednesday until the commencement of school on Thursday with X to collect the children from and return them to school at the commencement and conclusion of each visit

    (c) for the first half of all school holiday periods in even numbered years and the second half of all school holiday periods in odd numbered years with the arrangements set out at O 3(a) and (b) to be suspended during holiday periods, [depending on the degree of conflict and likelihood of confusion, the first, last and middle day of the holiday period can be set out in the orders or included as a notation]

    (d) from 2 pm on 25 December until 5 pm on 26 December in odd numbered

years with the children to spend reciprocal time with Y in even numbered years

(e) from 5 pm on 24 December until 2 pm on 25 December in even numbered years with the children to spend reciprocal time with Y in odd numbered years

(f) for not less than two hours on each of the children's birthdays and X's birthday at such specific times as the parties may agree [in cases of high conflict, precise times may need to be set out, the orders taking into account birthdays falling on school days or at times when the children are with one or other parent], and

(g) from 5 pm on the day before Father's Day in the event the children are not otherwise spending time with X on that day and with the children to return to Y's care at 5 pm on the day before Mother's Day in the event the children are with X on that day.

4. That the children are to otherwise communicate with X at all times as may be agreed between the parties and failing agreement as follows:

(a) by telephone between 6 pm and 7 pm each Tuesday and Thursday with X to telephone the children on Y's home telephone and Y to ensure the children are available to take the X's call

(b) by email at all reasonable times, and

(c) by other written correspondence at all times as the X and children may initiate.

5. That each of the parties ensure that the children attend such extra-curricular activities as may be scheduled during the time the children are in their care providing that neither party enrol the children, or either of them, in any activity which would impose upon the time the child spends with the other parent, without that parent's prior consent.

Again, in cases of high conflict, it may be necessary to include a non-denigration clause, a clause compelling neither party to change a child's schools without agreement and clauses requiring the parent with whom the children live to authorise schools, doctors and the like to provide the other parent with such information as may be requested by them.

While it is possible for an order to simply read that child X spends time with one parent, strictly speaking, orders in those terms do not create an obligation on a parent to facilitate those arrangements and, although not commonly encountered, raises issues with respect to enforceability.

Footnotes

1 See also s 65AA of the *Family Law Act 1975* (Cth) which

contains (arguably unnecessarily), a cross-reference back to s 60CA and the paramountcy principle.

¶6-020 Other orders available to the court

In addition to the more common types of parenting orders referred to above, the court also has the power to make orders relating to the following:

1. The allocation of parental responsibility in favour of, or orders for a child to live with, a non-parent

Where the court proposes to make an order, with the consent of the parties, for a child to live with someone other than a relative of the child, or for parental responsibility to vest in someone other than a relative of the child, the parties must have attended a conference with a family consultant to discuss the matter, or the court *must* be satisfied that the circumstances make it appropriate to make the proposed order (s 65G, *Family Law Act 1975* (Cth) (FLA)).

In such cases, it will be necessary to file, with an Application for Consent Orders, or otherwise provide to the court, affidavit evidence satisfying this requirement.

2. Attendance upon a family consultant or post-separation parenting program

Sections 65L and 65LA set out the court powers in relation to these types of orders and are largely self-explanatory. These provisions of the FLA enable the court to order parties to attend post-separation parenting programs or to meet with an individual family consultant in order to assist the parties in coming to terms with the orders and to help ensure the long-term success of the arrangements put in place as a result of the court's orders.

3. The arrest of persons who interfere with the operation of an order

See Chapter 10.

4. Removal of a child from Australia

Where a parenting order has been made or where proceedings are pending, a party must not remove the child from Australia without the consent of the other parent or an order of the court (s 65Y and 65Z). Where a child is removed from Australia under those circumstances, as well as invoking the Family Law (Child Abduction Convention) Regulations 1986, the court may impose a penalty of three years' imprisonment.

In order to ensure the child does not leave Australia, the court may make orders restraining the owners of aircraft and vessels leaving the country for a destination outside Australia (s 65ZA and 65ZB).

See Chapter 9 for more details in relation to child abduction and Australian Federal Police enforcement orders.

5. Child maintenance

See Chapter 21.

6. Childbearing expenses

Upon application by the mother or her legal personal representative (s 67F), the court has the power to make orders requiring the father of a child to contribute towards the mother's childbearing expenses, but only where the parents are not married. In making such an order, the court must have regard to the income and financial resources of both parents (s 67C), and may make such orders it considers proper, including on an urgent basis, and including orders for the father to pay for (s 67B):

- the maintenance of the mother during the *childbirth maintenance period* (defined in s 4(1) of the FLA as the three-month period commencing two months before the child is born or, where the mother is in employment, commencing on the day on which the mother stops working — where she does so upon medical advice and more than two months before the child is born)

- the mother's reasonable medical expenses associated with the

pregnancy and birth

- the reasonable expenses of the mother's funeral in the event she dies during the birth, and

- the reasonable funeral expenses for a stillborn child.

Proceedings for orders for the father to make payments of this kind must be commenced within 12 months of the birth of the child, or with the leave of the court (s 67G), and they may be commenced at any time during the mother's pregnancy.

While the financial circumstances of a mother receiving maternity leave benefits, any baby bonus or paid parental leave may go some way to mitigating the need for a childbearing expense order, consideration of the mother and father's income cannot take into consideration any income tested pension, allowance or benefit received by either party.

7. Location, Commonwealth information and recovery orders

When a child has been removed from the care of a person and the whereabouts of that child is unknown, a person with a parenting order in their favour, or a person who is otherwise concerned with the care, welfare and development of a child, may apply to the court for a location order (pursuant to s 67J) or a recovery order (pursuant to s 67Q).

A *location order* and *Commonwealth information order* require a person or Commonwealth department to give information about the child's location to the registry manager of the court. Usually this information will relate to the whereabouts of the person who has removed the child rather than the child itself, but the effect (of locating the child) is the same. A Commonwealth information order has the effect of causing government records, including those held by the Australian Taxation Office and Centrelink, to be searched on a three-monthly basis.

A *recovery order*, which remains in force for 12 months, requires a person or persons — usually the Australian Federal Police — to

provide such assistance as is necessary to return a child to a parent of the child or a person with a relevant parenting order in their favour. Compliance with these types of orders is compulsory.

The child's best interests remain the paramount consideration for courts called upon to make orders of this kind, and the court is generally empowered to make such orders as it thinks fit.

See Pt VII Div 8 Subdiv C of the FLA for further details about these highly technical types of orders and the obligations which they impose.

8. Allegations of child abuse

Where a party to proceedings makes allegations that a child has been abused, or is at risk of abuse, s 67Z(2) requires that party to file a Notice of Child Abuse or Family Violence (Form 4) in accordance with r 2.04D of the Family Law Rules 2004 (Cth) (FLR).

As of 12 January 2015, parties filing an Initiating Application or a Response to Initiating Application in the Federal Circuit Court seeking parenting orders must also file a Notice of Risk, regardless of whether allegations of abuse or risk of abuse have been made in the affidavit accompanying the application or response. The Notice of Risk replaces the Form 4 Notice of Child Abuse or Family Violence in Federal Circuit Court proceedings, although the Form 4 is still required to be filed by parties making allegations that a child has been abused, or is at risk of abuse in Family Court proceedings.

The Notice of Risk is the prescribed notice (pursuant to r 22A.02 of the FCC Rules 2001) when allegations for the purposes of s 67Z(2) or s 67ZBA(2) are raised on or after 12 January 2015. If a party answers "yes" to Question 2 of the form (that is, "*Has a child to whom the proceedings relate been abused or is a child to whom the proceedings relate at risk of being abused?*") the prescribed child welfare authority must be provided with a copy of the Notice of Risk by the Registry Manager who may also provide such other court documents and information as is required to enable investigation of the contents of the Notice of Risk. The Notice of Risk fulfils the court's obligation under s 69ZQ(1)(aa).

There is also a requirement to file such a notice if an interested person

opposes an order on the basis there has been family violence or there is a risk of family violence (see s 67ZBA). Where such a notice is filed, the registry manager must notify the prescribed child welfare authority of the notification.

Where a member of the court staff or personnel, performing their duties under the FLA, has reasonable grounds for suspecting that abuse has occurred or may occur, that person must notify the relevant child welfare authority (s 67ZA). This obligation applies regardless of whether or not the suspicion arose as a result of confidential counselling or family dispute resolution.

Case study

The treatment of contested allegations of child abuse and the evidence necessary to support such allegations in interim hearings was considered by the Full Court in *Lane & Nichols* (2016) FLC ¶93-750. In that case, the mother made allegations that the child of the relationship, aged three years, had been sexually assaulted by the father. The father denied those allegations. A counsellor, to whom the mother had taken the child, swore an affidavit supporting the mother's allegations and indicating that it would not be in the child's best interests to spend any time with the father, pending a final hearing. The family consultant preparing a report for the interim hearing noted the risk of psychological harm to the child if even supervised time was ordered, pending a final hearing. Judge Turner made orders for supervised time pending a final hearing and one of the grounds raised by the mother on appeal was that insufficient weight had been given to the evidence of the counsellor and the family consultant and that the primary judge failed to give adequate reasons for ordering supervised time in light of the evidence. The Full Court:

- raised concerns about whether the qualifications of the counsellor and the family consultant were sufficient to enable them to express admissible expert opinion on whether the

subject allegations of sexual abuse were likely to be true or whether there was a risk of psychological harm if orders for visits were made

- concluded that the primary judge could place no legitimate weight on the views of the purported expert witnesses even if such evidence was admissible, and

- found that, even if the trial judge had erred in misapprehending that evidence or in failing to adopt it, such error was insufficient to found a conclusion that a substantial miscarriage of justice had occurred.

9. Supervised time

The court has the power to make orders that a child's time with a parent is to take place on a supervised basis, where concerns as to risk of physical or psychological harm exist. Such orders are most frequently made on an interim basis, pending a full examination of the relevant allegations, with the child's time with the parent taking place at a contact centre or in the presence of an appropriate family member/third party. Many practitioners and Independent Children's Lawyers prefer the use of a contact centre where evidence as to how visits have proceeded is more readily available. Although sometimes warranted, the courts have long recognised that permanent supervision of visits between a child and parent is undesirable.

Case study

In *Betros and Betros* [2017] FamCAFC 90, where orders had been made giving the father leave to reopen proceedings if certain conditions in relation to his therapeutic interventions had been met, the Full Court confirmed (at [13]):

> "Conditions should usually be given to whether orders can be created to avoid the permanence of supervision or, if that is not practicable in the circumstances of the case, whether the orders for permanent supervision are instead best made unconditionally, leaving the supervised party to decide if and when he or she might bring fresh proceedings to vary the orders upon proof of changed circumstances, in the manner envisaged by *Rice and Asplund* (1970) FLC ¶90-725".

For *Rice and Asplund* principles, see ¶6-065.

10. Injunctions

The court retains the power to grant such injunctions as it thinks necessary or appropriate to protect the welfare of a child (s 68B). Such injunctions may relate to the personal protection of a child or parent (or person in whose favour a parenting order has been made) or restraining a person from entering or remaining in the place of employment, residence or education of a child or parent (or person in whose favour a parenting order has been made). Injunctions may also be granted restraining a parent from changing a child's name or from enrolling them at any school or other organisation under a different name.

In *Department of Human Services & Brouker and Anor* (2010) FLC ¶93-446, the Family Court made orders restraining a 14-year-old girl from leaving Australia to enter into an arranged marriage to a man she had never met. The judge accepted the submission on behalf of the Department that permitting the girl to be taken overseas for the purpose of marriage would be contrary to her welfare. In his Honour's view, a 14-year-old girl would not have the understanding of the significance of marriage which would be attributable to an adult.

The associated powers of arrest which vest in the court in relation to these types of injunctions are contained in s 68C.

11. Special medical procedures

The types of orders the court can make under Pt VII can be far reaching and cover issues far more complex than just how often a child is to see each of their parents.

One of the more unusual types of parenting orders that the court can make relate to what are commonly known as “special medical procedures”. These involve the court making decisions about whether or not it is in the best interests of a child to undergo a particular medical procedure, such as sterilisation of intellectually disabled children.

This complicated issue was considered by both the Family Court and the High Court in 1992 in a case which became known as *Marion’s* case. The matter came before the High Court after an appeal from the Full Court of the Family Court’s decision in *In re Marion*.[2] In that case, the Full Court considered, by way of case stated and following an application made by Marion’s parents, whether the applicants could lawfully authorise the sterilisation of their severely intellectually disabled teenage daughter and, if they could not, whether the Family Court had jurisdiction to authorise such a procedure. The majority of the Full Court found that the authority for making such a decision lay with Marion’s parents. Nicholson CJ, in a minority judgment, disagreed. His Honour was of the view that the court’s welfare jurisdiction extends beyond its *parens patriae* jurisdiction and that, for the court’s consent to a sterilisation operation to be required, it must be established that there are certain rights possessed by the child that cannot be abrogated by the consent of that child’s guardian. He described these rights as the right to bodily inviolability and the right to choose to procreate. His Honour was firmly of the view that the proposed procedure was a breach of Marion’s right to *bodily inviolability* and could not be performed unless lawful consent was obtained. He was further of the view that:

> “the fact that sterilisation involves the irreversible removal of a basic human right, namely the opportunity to reproduce, compels the conclusion that it is not something that can be consented to by a surrogate in the form of a guardian”.[3]

The Secretary of the Northern Territory Department of Health and

Community Services appealed the decision to the High Court and was supported in that appeal by the intervener, the Commonwealth Attorney-General.

The High Court in *Secretary, Department of Health and Community Services v JWB and SMB*,[4] ultimately held that the power to authorise sterilisation for a non-therapeutic purpose lies not with the child's guardians but with the Family Court. Their Honours reached this conclusion because of the significant risks of making a wrong decision (which the court described as including the complicated nature of consent, the role of the medical profession and the fact that the parents' decision will involve not only the interests of the child in question but the "*independent and possibly conflicting (although legitimate) interests of the parents and other family members*")[5] and because of the particularly grave (and perhaps obvious) consequences that would result from such a decision.

In the majority judgment of Mason CJ, Dawson, Toohey and Gaudron JJ, the court stated:

> "[there are] factors involved in a decision to authorise sterilisation of another person which indicate that, in order to ensure the best protection of the interest of a child, such a decision should not come within the ordinary scope of a parental power to consent to medical treatment. Court authorisation is necessary and is, in essence, a procedural safeguard.[6]
>
> . . .
>
> Children with intellectual disabilities are particularly vulnerable, both because of their minority and their disability, and we agree with Nicholson CJ that there is less likelihood of (intentional or unintentional) abuse of the rights of children if an application to court is mandatory, than if the decision in all cases could be made by the guardian alone".[7]

The question whether the actual operation proposed was in Marion's best interests was then reconsidered by the Family Court in *In re Marion (No 2)*.[8] In that case, Nicholson CJ (sitting alone) found that the performance of a hysterectomy was in the best interests of

Marion's long-term welfare and set out what, in his opinion, were the relevant factors which determined that question. They were:

- Marion's particular condition which required the procedure or treatment
- the nature of the procedure or treatment proposed
- the reasons it was proposed that the procedure or treatment be carried out
- the alternative courses of treatment available in relation to the condition
- the desirability of and effect of authorising the procedure or treatment proposed rather than the available alternatives
- the physical effects on Marion and the psychological and social implications for Marion of authorising or not authorising the proposed procedure or treatment
- the nature and degree of any risk to Marion of authorising or not authorising the proposed procedure or treatment, and
- the views, if any, as to the proposed procedure or treatment and to any alternative procedure or treatment expressed by:
  - Marion's guardians
  - a person entitled to custody of Marion
  - a person responsible for the daily care and control of Marion, and
  - Marion.

In *Re Alex: Hormonal treatment for gender identity dysphoria*,[9] Nicholson CJ made orders for the administration of hormonal treatment to a 13-year-old child in order to begin a sex change process. He said the proposed treatment was a type of special

medical procedure to which neither Alex, nor a parent or guardian, could give consent.

Nicholson CJ authorised the treatment, having considered the eight factors in special medical procedure applications identified *In Re Marion (No 2)* (1994) FLC ¶92-448. His Honour found, *inter alia*, that:

- the expert medical opinion agreed that the hormonal treatment was the best option
- it conformed with Alex's wishes
- Alex's school had taken steps to anticipate and minimise any social problems that he might encounter
- his carers had made provisions for the expense of ongoing medical treatments, and
- all the parties to the proceedings were in favour of the treatment.

On the other side of the equation, his Honour found that if Alex did not receive treatment he was at risk of reverting to unhappiness, behavioural difficulties and self-harm.

Other medical procedures which the court has had reason to determine include:

- an application by the mother of a 14-year-old child for the court to authorise sex reassignment from female to male[10]
- an application by the parents of a 10-year-old child for:

  (i) an order authorising the performance on the child of a bone marrow harvest or a peripheral blood collection, and

  (ii) a declaration that the parents were authorised to consent to the performance of the harvest or the collection.[11]

Prior to the landmark decision of *Re: Kelvin* (2017) FLC ¶93-809 (discussed below), in *Re: Jamie* (2013) FLC ¶93-547, the Full Court considered whether treatment of childhood gender identity disorder is

a medical procedure which requires court authorisation pursuant to the court's welfare jurisdiction under s 67ZC of the FLA. Allowing the appeal by Jamie's parents, the Full Court concluded that:

1. Stage one treatment is not a "special medical procedure" that requires court authorisation.

2. If the child is not Gillick-competent, Sstage two treatment is a "special medical procedure" that requires the authorisation of the court. The Full Court applied the requirement from Marion's Ccase that court authorisation for irreversible medical treatment is required in circumstances where there is a significant risk of the wrong decision being made as to the child's capacity to consent to the treatment (i.e. Gillick-competence) and the consequences of such a wrong decision are particularly grave.

3. If a child is not Gillick-competent, the court must determine whether or not to authorise stage two treatment.

4. If a child is Gillick-competent, the child can consent to stage two treatment and no court authorisation is required.

5. The question of whether or not a child is Gillick-competent, is a matter to be determined by the court, even if the treating practitioners opine that the child is Gillick-competent.

6. If provision of treatment, stage one or stage two, is in dispute, the court will make a determination under s 67ZC of the FLA. If the child's parents and treating practitioners agree as to the commencement of stage one treatment, *Marion's* case does not apply and court authorisation is not required.

The landmark decision of *Re: Kelvin* [2017] FamCAFC 258, determined that:

1. determination of whether the child is Gillick-competent to consent to stage two treatment can be made by the child's treating medical practitioners, and in cases where the child's treating medical practitioners are of the opinion that the child is Gillick-

competent, a declaration of Gillick-competence by the cCourt is not required,; and

2. court authorisation for stage two treatment is *not* required where the child consents to the treatment, the treating professionals agree that the child is Gillick-competent, and the parents do not object to the treatment.

Re: Jaden [2017] FamCA 269 involved an application for a declaration that the child, Jaden, was Gillick-competent to consent to stage two treatment for Ggender Ddysphoria. The application sought, in the alternative, an order that the stage two treatment was of a type which required the authorisation of the court, and that Jaden's legal statutory guardian was authorised to consent to the treatment on behalf of Jaden. Notwithstanding that Jaden's treating doctors were of the opinion that Jaden was *not* Gillick-competent, the court found that Jaden *was* Gillick-competent and the declaration was made.

Applications in these types of unique matters must be made in accordance with Div 4.2.3 of the FLR. The application must be an Initiating Application (Family Law) and accompanied by a supporting affidavit including evidence from a medical practitioner (r 4.09(2)) and be sufficient to satisfy the court that the application is in the child's best interests (r 4.09(1)). The application must, in accordance with r 4.10, also be served on the relevant Child Welfare Authority.

Footnotes

2 *In re Marion* (1991) FLC ¶92-193.

3 Ibid, at p 78,301.

4 *Secretary, Department of Health and Community Services* v *JWB and SMB* (1992) FLC ¶92-293 at p 79,181.

5 Ibid.

6 Ibid, at p 79,180.

7 Ibid, at p 79,181.

8 *In re Marion (No 2)* (1994) FLC ¶92-448.

9 *Re Alex: Hormonal treatment for gender identity dysphoria* (2004) FLC ¶93-175.

10 *In Re A (a child)* (1993) FLC ¶92-402.

11 *Re GWW and CMW* (1997) FLC ¶92-748.

PARENTING PLANS

¶6-030 Significance of parenting plans

Parenting plans, which are written documents setting out agreements reached between parties in relation to matters affecting their children, have been utilised by separated parents since they were introduced into the *Family Law Act 1975* (Cth) (FLA) by the *Family Law Reform Act 1995*.

Until 2003, those plans could be registered with the court and thereafter enforced. However, in 2003, the *Family Law Amendment Act 2003* removed the procedure for the registration of parenting plans from the FLA. Consequently, and as a result of their unenforceability, the significance of parenting plans diminished and any agreements reached between the parties were generally incorporated into consent orders.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to the FLA, although not reintroducing the process by which parenting plans can be registered, elevated the significance

of parenting plans and obliges lawyers to encourage their clients to formalise arrangements for their children by these means.

Indeed, s 63B of the FLA expressly states that parents are encouraged to reach informal agreement between themselves about matters concerning their children and to take personal responsibility for their parenting arrangements and resolving conflict between them. The provisions of the section expressly encourage parents to see the legal system as a last resort and to regard the best interests of the child as the paramount consideration. This squarely places responsibility for resolving parenting disputes on parents rather than the court.

¶6-040 What are parenting plans?

A parenting plan is any written, signed and dated agreement made, free from any threat, duress or coercion, between the parents of a child. A parenting plan may deal with any of the following matters (s 63C(2), *Family Law Act 1975* (Cth) (FLA)):

- the person or persons with whom a child is to live
- the time a child is to spend with another person or other persons
- the allocation of parental responsibility for a child (s 63C(2A) specifically notes that this allocation of responsibility may be made in favour of a parent or any other person, including a grandparent)
- if two or more persons are to share parental responsibility for a child — the form of consultation those persons are to have with one another about decisions to be made about the exercise of that responsibility (s 63C(2B) specifically notes that the plan may deal with responsibility for making decisions about major long-term issues)
- the communication a child is to have with another person or persons

- maintenance of the child (unless, where the *Child Support Assessment Act 1989* applies, the provisions in the plan are a child support agreement)

- the process to be used for resolving disputes about the terms of or operation of the plan

- the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan, and

- any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

While it would appear from the wording of s 63C(2) that this list is exhaustive in terms of the kind of matters that may be included in a plan, there is nothing on the face of the FLA to suggest that including other matters in a plan in any way invalidates it. Indeed s 63CAA specifically provides for parenting plans to include child support arrangements and notes that an agreement may be both a parenting plan and a child support agreement (s 63CAA(3)), although the requirements now associated with binding and limited child support agreements may make that unlikely.

Although no specific reference is made in the FLA, in cases where the Child Support Scheme is no longer applicable (eg for children over 18) parenting plans can also contain provisions dealing with the payment of what is known as adult child maintenance. The requirement of the court to have regard to such provisions may be of benefit particularly in cases where a child of the parties, who is aged over 18, has, for example, specific medical needs which the parties have agreed to share in a particular way.

Although s 63C(2) and (2A) make it clear that parenting plans can make reference to persons other than the parents of a child, plans can only be executed by the parents of a child. Thus, it seems that in cases involving grandparents or other relatives/carers, arrangements for the children to spend time or communicate with those people, or for them to have or share parental responsibility for the child, cannot

be formalised by way of a parenting plan without the consent and agreement of both parents. If it is not possible to obtain the consent of each parent, consent orders will continue to be the only means by which arrangements can be formalised.

It is possible for parenting plans and parenting orders to coexist. For example, the orders may deal with the significant issues of where a child is to live and how much time they are to spend with each parent, while the parenting plan may deal with the more intricate issues such as what discipline methods are to be adopted, how future discussions are to be facilitated and who will assist parties with the resolution of any disputes. Practitioners and parents ought be aware, however, that pursuant to s 64D(1) FLA, if there are parenting orders in place and the parents subsequently enter into a parenting plan, and if the parenting plan purports to vary any of the orders, those orders will be unenforceable. This occurs unless pursuant to s 64D(2) the original orders include a provision that specifically provides that the orders cannot be altered by a subsequent parenting plan. This is an order able to be made in exceptional circumstances such as where there is a need to protect the child from physical or psychological harm, and/or abuse, neglect of family violence, or where there is substantial evidence that one of the parents is likely to seek to use coercion or duress to gain the agreement of the other parent, to a parenting plan.

¶6-050 Parenting plans and legal practitioners

Section 63DA(1) of the *Family Law Act 1975* (Cth) (FLA) also elevates the significance of parenting plans for solicitors and compels advisers (which include lawyers, family counsellors, family dispute resolution practitioners and family consultants) to inform their clients that they could *consider* entering into a parenting plan and where they can obtain assistance to do so.

There is nothing preventing the adviser from providing this assistance. However, if they do so, further obligations are imposed, namely that the adviser must inform the client that, among other things, they could consider the option of arrangements being made that provided for the child to spend equal time or substantial and significant time with each

of the parents (subject to the caveats of being in the child's best interests and reasonably practical).

Section 63DA(2) sets out these obligations and provides that, where advice is given about a parenting plan, the adviser must also:

- inform the parent that, if the child spending equal time with them is:

  (i) reasonably practicable, and

  (ii) in the child's best interests

  they could consider the option of an arrangement of that kind[12]

- inform the parent that, if the child spending equal time is not reasonably practicable or is not in the best interests of the child but the child spending substantial or significant time with each of them is:

  (i) reasonably practicable, and

  (ii) in the best interests of the child

  they could consider the option of an arrangement of that kind

- inform the parent that decisions made in developing parenting plans should be made in the best interests of the child

- inform the parent of the matters that may be dealt with in a parenting plan in accordance with s 63DA(2)

- inform the parent that, if there is a parenting order in force, the order may include a provision that it is subject to a subsequent parenting plan

- where parents are to share parental responsibility, inform them about including in the plan, provisions dealing with the way they will avoid future conflicts and misunderstandings, the process for future dispute resolution and the process by which the plan may

be changed in the future

- explain to them, in language they are likely to understand, the availability of programs to help with any difficulties experienced in relation to parenting plans, and

- inform the parent that the court must have regard to the terms of the most recent parenting plan when making a parenting order, if it is in the best interests of the child to do so.

In giving advice in relation to s 63DA(2)(a) and (b), advisers need only inform parties that they should *consider* the child spending equal or substantial or significant time with each of them. They are not obliged to advise whether this option is appropriate in the particular circumstances. This requirement may be in inherent conflict with the new obligation in s 60D which requires advisers to prioritise the safety of a child over the meaningful relationship with each parent.

Nevertheless, it is difficult to contemplate circumstances in which the diligent practitioner would not also provide, or be requested to provide, advice about the appropriateness of the arrangements contemplated by the parties. Indeed one of the objects of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to Pt VII of the FLA was to ensure that any applications ultimately made to the court are reasonably sustainable in all the circumstances of the case.

For the purposes of s 63DA(2)(b), “substantial and significant time” involves the child spending time with that parent on weekends and holidays, as well as days that do not fall on weekends and holidays, and at times which allow the child to spend time with the parent on occasions that are of significance to the child and the parent (eg birthdays). These are not the only matters to consider in determining whether the time the child spends with a parent is substantial and significant, but they are useful primary guides.

Note

While s 63DA obliges practitioners to advise clients that they should consider entering into parenting plans, where certainty and enforceability are important to the parties, practitioners may also provide advice in relation to the benefits of using of a parenting order instead.

Footnotes

12 These considerations are in the reverse order than how they appear in s 65DAA; however, whether this is significant remains to be seen.

¶6-060 Parenting orders versus parenting plans

Except in exceptional circumstances, and irrespective of the circumstances leading to its execution, parenting orders will be subject to later parenting plans (unless of course that parenting plan has been made under threat, duress or coercion). In other words, a parenting plan trumps a parenting order unless the order expressly provides for it to have precedence.

Section 64D(1) of the *Family Law Act 1975* (Cth) provides that, subject to s 64D(2), a parenting order is taken to include a provision that it is subject to a later written parenting plan agreed to by the persons to whom the order applies. This means that a parenting order made after a full hearing, with the benefits of expert evidence and possibly the independent representation of the children, may be made redundant by a subsequent parenting plan executed by the parties without any legal or other expert assistance at all.

Warning

There is no cooling-off period for parenting plans, and parents

would be wise to ensure that they are fully aware of the consequences of executing a parenting plan whether before, or after, parenting orders are made by the court.

This capacity for parties to “revisit” orders made following contested proceedings may well cause practitioners, and particularly the Independent Children’s Lawyers, some considerable consternation.

Section 64D(2) does give the court the power to include in the order a provision that the parenting order may only be varied by subsequent order of the court and not by a parenting plan. The circumstances in which parenting plans will not take precedence are limited to “exceptional circumstances”, which are expressed in s 64D(3) to include (but not be limited to):

- the need to protect a child from physical or psychological harm from exposure to abuse, neglect and violence, and
- where there is substantial evidence that one of the parents may use coercion or duress to gain the agreement of the other to a subsequent parenting plan.

It appears from the wording of s 64D(2), and particularly the reference to “exceptional circumstances”, that orders containing this protection can be made only following a contested hearing and not with the consent of the parties.

It is also worth noting again that, when making a parenting order, the court must have regard to the terms of the most recent parenting plan entered into by the child’s parents if doing so would be in the child’s best interests (s 65DAB). Advisers are required to inform their clients about this when giving advice in relation to parenting plans and parenting matters generally (s 63DA(2)(h)).

¶6-065 Revisiting orders

The court will entertain fresh proceedings relating to children who are

the subject of existing orders only in certain circumstances. The principle is known as “The Rule in Rice and Asplund” (*Rice and Asplund* (1979) FLC ¶90-725) and is based on an understanding that it will only be in a child’s best interests to expose them to further proceedings if there has been a significant change in circumstances since the making of the order.

In a statement of principle that has remained unchanged since 1979, the Full Court (at p 78-905) made it clear:

> “. . . the court should have regard to any earlier order and to the reasons for . . . that order . . . It should not lightly entertain an application to reverse an earlier custody order. To do so would be to invite endless litigation for change is an ever present factor in human affairs. Therefore, the court would need to be satisfied by the applicant that . . . there is some changed circumstance which will justify such a serious step, some new factor arising or, at any rate, some factor which was not disclosed at the previous hearing which would have been material. . . . These principles apply whether the order is made by consent or after a contested hearing”.

The Rule in Rice and Asplund has been discussed and endorsed in the recent cases of *Poisat and Poisat* [2014] FamCAFC 129 and *Gorman and Huffman and Anor* [2016] FamCAFC 174. See also *Biggs v Hurst* [2014] FamCA 217.

¶6-070 Enforcement of parenting plans

While s 70NAC of the *Family Law Act 1975* (Cth) requires the court to take the existence of parenting plans into account in contravention proceedings, parenting plans are not, of themselves, enforceable. This may ultimately prove problematic in some cases, and parents should be aware that parenting plans cannot be the subject of any applications for contravention as the drafting of Div 13A clearly refers to allegations of contravention of orders, not plans.

¶6-080 What about existing parenting plans?

Parenting plans registered prior to the 2003 legislative changes brought about by the *Family Law Amendment Act 2003* remain in force until they are revoked by agreement in writing between the parties (see s 63DB, *Family Law Act 1975* (Cth) (FLA)).

Formal procedures are prescribed in the FLA and the Family Law Rules 2004 (Cth) (FLR), which must be followed in order to formally revoke a registered parenting plan (see s 63E of the FLA and r 23.03 of the FLR).

The only circumstances in which a court can set aside, discharge, vary, suspend or revive a registered parenting plan are set out in s 63H of the FLA, and require the court to be satisfied that:

- the consent of a party to enter into a plan was obtained by fraud, duress or undue influence
- the parties want the plan set aside, or
- it is in the best interests of a child to set aside the plan.

In all proceedings under this section, the best interests of the child are the paramount consideration.

Registered parenting plans containing provisions relating to child welfare have the same effect as orders of the court unless the plan purports to determine that the child concerned is to live with a person who is not the parent of the child (s 63F(3) and (5)). The court may vary or refuse to enforce the terms of child welfare provisions of registered parenting plans if the best interests of the child so require (s 63F(2) and (6)).

Registered parenting plans containing provisions relating to child maintenance have the same effect as orders of the court but have no effect when an administrative assessment by the Child Support Agency otherwise applies in relation to the subject child (s 63G). Plans containing such provisions will continue to operate upon the death of either party unless they expressly provide otherwise. These types of parenting plans are distinct from child support agreements.

¶6-090 Independent Children's Lawyer

An Independent Children's Lawyer (ICL) — formerly known as the children's representative — is defined in s 4(1) of the *Family Law Act 1975* (Cth) (FLA) as "a lawyer who represents the child's interests in proceedings". The appointment of an ICL, pursuant to s 68L(2) of the FLA, can be made upon application by a party or on the court's own initiative and in cases where the court considers it in the best interests of the child to do so.

In making the decision about whether or not a child or children require independent representation, the court will give consideration to what are known as the *Re K* factors. In the 1994 decision of *Re K*,[13] the Full Court of the Family Court articulated a number of (non-exhaustive) criteria that the court should consider in determining whether or not an order for the separate representation should be made. Those factors are:

- allegations of child abuse whether physical, sexual or psychological
- intractable conflict between parties
- where the child has been alienated from one or both parents
- issues of cultural or religious difference
- where the sexual preferences of one or both parents, or other significant person, impinge on the child's welfare
- issues of significant medical, psychiatric or psychological illness or personality disorder relating to the child or relevant adults
- where it is not appropriate for the child to live with either parent
- where the child's views would result in changing the long-standing arrangements for the child or result in the child not spending any time with one parent

- proposed removal of the child from Australia or to a place which would exclude the child from spending time with the other parent
- the proposed separation of siblings
- where neither party is represented, and
- where the court is asked to exercise jurisdiction in relation to special medical procedures and the child's interests are not adequately represented.

The ICL is neither the child's legal representative nor obliged to act on the child's instructions. They are essentially an "honest broker" in the proceedings and are required to obtain, and form an independent view of, the evidence and otherwise act in the best interests of the child. Although previously the subject of much judicial discussion, the role and duties of the ICL are now set out clearly in s 68LA of the FLA.

Section 68LA(5) provides that the ICL must:

> "(a) act impartially in dealings with the parties to the proceedings; and
>
> (b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and
>
> (c) if a report or other document that relates to the child is to be used in the proceedings:
>
> (i) analyse the report or other document to identify those matters . . . most significant . . . for determining what is in the best interests of the child; and
>
> (ii) ensure that those matters are properly drawn to the court's attention; and
>
> (d) endeavour to minimise the trauma to the child associated with the proceedings; and

(e) facilitate an agreed resolution of matters . . . to the extent to which doing so is in the best interests of the child".

There is now an express obligation on the ICL as "an interested person" (pursuant to s 67Z(4)), to file and serve a Notice of Abuse or Risk of Abuse in relevant circumstances.

The ICL is not under an obligation to disclose to the court, and in fact cannot be required to disclose to the court, any information communicated to them by the child unless the ICL considers the disclosure to be in the best interests of the child. In those cases, the disclosure can be made even if it is against the direct wishes of the child.

The role of the ICL is a proactive one. The ICL must act in the best interests of the child regardless of whether or not the parties have reached agreement between themselves. In the decision of *T v N*,[14] Moore J was critical of the children's representative (as the ICL was then known) for simply consenting to parenting orders agreed to by the parties when there was no objective evidence to suggest that those orders were in the best interests of the children concerned.

The ICL is funded by the relevant Legal Aid body of the state or territory and may be a solicitor employed directly by the Legal Aid Office or a practitioner in private practice who has completed the mandatory training and otherwise been appointed to the panel of practitioners approved to undertake such work. The practices of ICLs vary depending on if funding is available for various interventions, including the commissioning of family or psychiatric reports.

Footnotes

13 *Re K* (1994) FLC ¶92-461.

14 *T* v *N* (2003) FLC ¶93-172.

¶6-100 Views of the children

Although the *Family Law Act 1975* (Cth) (FLA) expressly states at s 60CE, that a child cannot be required to express their views, in determining whether to make a particular parenting order, the court *must* consider any views that are expressed by the child and apply such weight as is appropriate in the circumstances having regard to the child's age and degree of maturity (s 60CC(3)(a) and 60CD(1)).

The court may inform itself of the views of a child by (s 60CD(2)):

- having regard to the contents of a s 62G report
- making an order for the child to be independently represented,[15] or
- such other means as the court thinks appropriate, which may include consideration of a family report privately commissioned by the parties.

Where a report is prepared by a family consultant pursuant to s 62G, that consultant must ascertain, and include in the report, the views of the child (s 62G(3A)) unless this would be inappropriate in light of the child's age or maturity or any other special circumstance (s 62G(3B)).

Privately prepared family reports generally address this issue as a matter of course in the attempt to determine what parenting arrangements are in the child's best interests. When commissioning a family report, it is important for practitioners to ensure that the report writer specifically ascertains the child's views and indicates what weight should appropriately be attached to them.

Footnotes

15 Section 68LA(5)(b) now compels the independent children's lawyer to ensure the child's views are put before the court.

¶6-110 Family violence

The provisions of the *Family Law Legislation Amendment (Family Law and Other Measures) Act 2011* commenced on 7 June 2012 and their primary intention was to prioritise, above all else, the protection of children from family violence and abuse.

The most significant amendments from those provisions were the expanded definition of family violence (also known as domestic violence) and the prioritising of protection from harm in s 60CC(2A) (see ¶6-010 above).

Formerly contained in s 4(1) the definition is now set out at s 4AB(1) of the *Family Law Act 1975* (Cth) (FLA) and provides:

> "4AB(1) For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.
>
> 4AB(2) Examples of behaviour that may constitute family violence include (but are not limited to):
>
> (a) an assault; or
>
> (b) a sexual assault or other sexually abusive behaviour; or
>
> (c) stalking; or
>
> (d) repeated derogatory taunts; or
>
> (e) intentionally damaging or destroying property; or
>
> (f) intentionally causing death or injury to an animal; or
>
> (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
>
> (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or

predominantly dependent on the person for financial support; or

(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty".

It is important to note that the definition of family violence is contained exclusively in s 4AB(1). Section 4AB(2) simply provides illustrations of the sort of conduct that may fall within the definition. To satisfy the criteria of family violence the conduct must not just be of the kind set out in s 4AB(2), it is essential that the violent, threatening (or similar) behaviour has the effect of either coercing or controlling a family member or causing the family member to be fearful. The test is likely to be a factual one, involving a discernible link between action and response, but the depth of the evidence required remains to prove family violence is yet to be tested.

It is significant that there is no requirement of "reasonableness" in the new definition. The previous definition of family violence in the FLA contained reference to conduct that caused a person "reasonably to fear for, or reasonably to be apprehensive about" their safety.

The amendments also include a new definition, in s 4AB(3), of exposure to violence and set out, in s 4AB(4), the various situations that may constitute a child being exposed to family violence, including the child:

"(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family".

It is not entirely clear why such a definition was introduced. It did not represent any change to the law. In any case, in order to fall within the definition of exposure to family violence there must, first, have been family violence — which means the nexus between behaviour and response must be satisfied — and the child must have seen it, or heard it, or been exposed to its effects. It is entirely possible for a child to be distressed seeing or hearing behaviour, such as an argument or assault, which has not caused fear or coercion in the parent "victim".

There was also meaningful change to the definition of abuse which is set out in s 4(1) as:

"*abuse*, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the *first person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child".

Paragraphs (c) and (d) were not in the previous definition.

Section 4AB(1) also contains an extensive definition of family violence in the context of other family members including step-parents and

relatives.

Obligations on parties

There is an onus on parties to proceedings to inform the court of the existence of a family violence order relating to the child or a member of the child's family (s 60CF(1)). This onus extends to persons who are not parties to the proceedings but who are otherwise aware of the existence of a relevant family violence order.

Where allegations of abuse and/or violence that would affect the presumption applicable in parenting cases exist, parties must file a Form 4 Notice of Child Abuse or Family Violence with a supporting affidavit or affidavits (r 2.04D of the Family Law Rules 2004) if proceedings are in the Family Court. Pursuant to r 22A.02 Federal Circuit Court Rules 2001, a Notice of Risk must be filed with any application or response in respect of parenting matters (ie whether allegations exist or not).

One of the most contentious provisions introduced into the FLA as a result of the 2006 amendments was s 117AB. By virtue of s 117AB(2), the court must order any party who has knowingly made a false allegation or statement to pay some or all of the costs of the other party or parties. The *Family Law Legislation Amendment (Family Law and Other Measures) Act 2011* repealed s 117AB as to costs where false statements made. The amendments took effect 7 June 2012. The Act also inserts new obligations on parties to provide the court with information regarding risks to the child, or another child who is a member of the child's family.

Obligations on the court

The court is, by virtue of s 67ZBB of the FLA, required to take prompt action when allegations of child abuse and/or family violence are made. The allegation need not be confined to an allegation in a document and s 67ZBB compels the court to take prompt action in cases where allegations of child abuse or family violence are made, including considering whether interim or procedural orders, to protect parties or speed up the proceedings, ought to be made. Such steps as are determined to be necessary must be taken as soon as practicable

and not more than eight weeks after filing (s 67ZBB(3)(a) and (b)).

In addition to the substantial details required in Form 4 itself, r 2.04B(2) of the Family Law Rules 2004 (Cth) (FLR) requires an affidavit setting out the evidence on which the Form 4 Notice is based, to be filed at or before the time Form 4 is filed. Affidavits already drawn in support of an interim application, which is accompanied by Form 4, are sufficient.

The Family Court has a process enabling a registrar to consider the application in chambers as soon as practicable. The court has requested that a covering letter also be provided setting out the history of the matter, including attempts to comply with the pre-action procedures or details why that may not have been appropriate, and how the court might best deal with the allegations. Where an urgent interim hearing is requested the covering letter should also address the reasons for this request.

Further, in determining what orders are in the best interests of a child when making parenting orders, the court must, having regard to s 60CC(3)(j) and (k) of the FLA, consider:

> "(j) any family violence involving the child or a member of the child's family;
>
> (k) if a family violence order applies, or has applied, to the child or a member of the child's family — any relevant inferences that can be drawn from the order, taking into account the following:
>
> (i) the nature of the order;
>
> (ii) the circumstances in which the order was made;
>
> (iii) any evidence admitted in proceedings for the order;
>
> (iv) any findings made by the court in, or in proceedings for, the order;
>
> (v) any other relevant matter".

This means that the court must consider the circumstances under which the protection order was made with greater scrutiny than was the case before the 2012 amendments which revised the content of s 60CC(3)(k).

Parties are required to participate in family dispute resolution prior to the commencement of any Pt VII proceedings (s 60I(3)). When making a parenting application to the court (regardless of whether orders have been made previously), a s 60I certificate is required.

If the exceptions to this requirement as set out in s 60I(9) apply, that is:

(a) the application is made by consent or in response to another Pt VII application

(b) there are reasonable grounds to believe that there has been or is risk of child abuse or family violence, and/or there is a risk that delay in determining the matter will result in a risk of child abuse or family violence (see s 60J(2))

(c) the application is made in relation to a discrete issue about which orders have been made in the previous 12 months and the application relates to a contravention and the court is satisfied that the respondent's behaviour constitutes a serious disregard for the orders

(d) the application is urgent

(e) one or more of the parties cannot meaningfully participate in family dispute resolution (eg because of incapacity, physical remoteness), or

(f) for any other reason specified in the regulations

then a certificate is not required before proceedings are commenced. However, where this occurs, s 60I(10) compels the court to consider making an order for the parties to attend family dispute resolution.

Further, and in what might be regarded as an attempt to mitigate the

impact of proceedings in highly inflamed circumstances, if s 60I(9)(b) applies (ie there has been or is a risk of child abuse or family violence) and family dispute resolution is not required before the application is filed, then the court is prohibited from hearing the application. This is true unless the applicant has indicated, in writing, that they have received information from a family counsellor or family dispute resolution practitioner about the services and options available to them in the circumstances (including non-court based alternatives) (s 60J(1)). This prohibition does not apply if any such delay would result in a risk of abuse or family violence (s 60J(2)).

Accordingly, in cases where allegations of violence or abuse, or risk of violence or abuse are made, the applicant *must* include in their affidavit evidence about the information regarding the services and options they received prior to the application being filed. If the applicant confirms that they have not received this information, the court is required to refer the party to a family dispute resolution practitioner or family counsellor to obtain that information (s 60J(4)).

In addition, when determining what order to make, the court must, to the extent the best interests of the child allows, ensure that the parenting order is consistent with the family violence order and does not expose a person (not just the child) to an unacceptable risk of family violence (s 60CG(1)). To achieve this, the court may place in the orders such safeguards as it considers necessary (s 60CG(2)).

¶6-115 Treatment of family violence at interim hearings

Allegations of family violence are regularly raised in initiating material, and must be identified in the Notice of Risk required to be filed with any affidavit or response in which such allegations are made. The treatment of family violence allegations and the presumption of equal shared parental responsibility in the context of interim hearings, where the court is unable to make findings of fact, was considered by the Full Court in *Salah and Salah* (2016) FLC ¶93-713.

Case study

In *Salah and Salah*, the mother made allegations of serious family violence perpetrated by the father in the presence of their three children (the youngest of whom had significant health and development concerns). The father denied the allegations. The trial judge noted the competing allegations and concluded that the evidence was "not capable of sustaining a finding" and that the presumption for equal shared parental responsibility still applied.

The Full Court noted the challenges for trial judges in the treatment of disputed allegations at interim hearings, and, confirming the approach adopted in *Goode and Goode* (2006) FLC ¶93-286, *Treloar and Nepean* (2009) FLC ¶93-417, *SS and AH* [2010] FamCAFC 13 and *Eaby and Speelman* (2015) FLC ¶93-654, made it clear that when confronted with significant allegations of violence, the trial judge is "required to do more than merely note the contention or conjecture". Rather, the judge must apply s 61DA(3) (or s 61DA(4)) and give reasons for not applying the presumption (or indicate why it is not in the best interests of the children for the presumption not to apply).

Section 69ZL *Family Law Act 1975* (Cth) (FLA) (introduced via the *Family Law Amendments (Family Violence and Other Measures) Act 2018)* provides that where interim parenting orders are made, the court may give its reasons in short form.

¶6-120 Relationship between parenting orders and family violence orders

Division 11 of Pt VII of the *Family Law Act 1975* (Cth) (FLA) deals with the relationship between parenting orders and family violence orders.

Section 68N sets out the purposes of Div 11 as being to resolve inconsistencies between orders under Pt VII and family violence

orders, to ensure that orders do not expose people to family violence and to achieve the objects and principles in s 60B.

Where the court makes an order or grants an injunction that is inconsistent with an existing family violence order, it *must*, to the extent necessary, identify the inconsistency, give a detailed explanation of how the contact provided for by the order is to take place, and explain the order, its purpose and the parties' obligations to all relevant persons in language they are likely to understand (s 68P(2)).

There is a further obligation on the court to give, within 14 days, a copy of the order or injunction to (s 68P(3)):

- all persons bound by it (including the parties)
- a person otherwise affected by the family violence order
- the registrar/principal officer of the court that made or varied the family violence order
- the Commissioner of the Police force of a state or territory, and
- the state or territory child welfare department.

However, s 68(2A), (2B) and 2(C) of the FLA (introduced via the *Family Law Amendments (Family Violence and Other Measures) Act 2018*) now provides judges with the discretion to dispense with the requirement (under the FLA) to explain an order/injunction to a child, where that order/injunction provides (expressly or impliedly) for the child to spend time with a person, where the child is protected from that person by a family violence order, if the court considers that it is in the child's best interests not to have that explanation provided to them. In determining whether or not it is in the child's best interests, the court must have regard to all or any of the matters contained in s 60CC(2) and may have regard to all of any of the matters set out in s 60CC(3).

Section 68Q confirms that, to the extent of any inconsistency with orders made under Pt VII of the FLA, the family violence order is

invalid. An order for a declaration of the invalidity of the family violence order may be made to a court with jurisdiction under Pt VII by the parties to either the family law proceedings or the family violence proceedings.

Subject to the limitations imposed by s 68S, in proceedings to make or vary a family violence order on a final basis, a state or territory court with jurisdiction under Pt VII of the FLA (which includes all state and territory magistrates or local courts), may revive, vary, discharge or suspend the Pt VII order or injunction if it also makes or varies a family violence order and has before it evidence that was not before the court which made the Pt VII order (s 68R(1) and (3)).

Previously, where the court determining the family violence application makes only an interim order, any variation to the Pt VII order would cease to have effect at the time the interim family violence order ceases to have effect or after 21 days (whichever is earlier). However, the changes introduced by the *Family Law Amendments (Family Violence and Other Measures) Act 2018* removed the 21-day time limit, so that now, the court's revival, variation or suspension under s 68R will cease to have effect at the earliest on the following events:

1. the time at which the interim family violence order ceases being in force (s 6T(1)(a)) (Note: this is not a new provision)

2. the time specified in the interim order as being the time at which the revival, variation or suspension will cease to have effect (s 68T(1)(b)), or

3. the time that the order is affected by an order made by a court, under s 68R or otherwise, after the revival, variation or suspension (s 68T(1)(c)).

In summary, the effect of these changes is that the revival, variation or suspension of an order will always cease at the time the interim family violence order expires, although the court retains the ability to decide the time frames and to deal with matters on a case-by-case basis, as the circumstances require.

PRINCIPLES THE COURT MUST CONSIDER WHEN CONDUCTING CHILD-RELATED PROCEEDINGS

Editorial information

Written by Karen Williams and edited by Anne-Marie Rice and Erin Shaw

INTRODUCTION

¶7-000 Historical background

It may be difficult to appreciate today the revolutionary nature of the *Family Law Act 1975* (Cth) (FLA) when it was introduced in 1975. Prior to that, divorce was based on principles that had evolved over centuries of English case law and which were grounded in ecclesiastical law of the Middle Ages.[1]

The principle governing marriage for centuries was the principle of consortium, whereby "the law placed the wife under the guardianship of the husband, and entitled him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world by enforcing cohabitation and a common residence".[2]

Children were not considered as legal entities at all. The ancient law of England documented by Sir William Blackstone stated:

> "The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or his children: for whom the master or parent is also liable in some cases to answer".[3]

The interests of the child were subordinate to paternal interests and the welfare of children was rarely considered. The phenomenon of child abuse was not recognised until the 1970s.[4]

The original FLA introduced radical changes in principles and procedures regarding children. The *Family Law Amendment Act 1995* introduced the "best interests" principle to replace the welfare principle, as outlined in *B* v *B*.[5] In disputes that involved children, the

“best interests” of the child were paramount.

Further developments and clarification were introduced with the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, especially with respect to proceedings in child-related matters. The Family Law Amendment (Shared Parental Responsibility) Act amendments resulted from:

- recognition of the adverse impact that protracted litigation and conflict has on children
- the need for the views of children to have greater impact upon proceedings, and
- the need for the “best interests” principle to be clarified by a hierarchy of values or factors to guide decision makers.

See ¶7-030–¶7-080, which outline the principles that the court relies upon in order to conduct its proceedings to ensure that the “best interests” principle is maintained, in that:

- the views of the child are heard and that their needs are considered
- the impact of family violence is lessened
- cooperation between the parents is encouraged, and
- the proceedings are conducted efficiently and in an informal and child-friendly manner.

Before discussing this principle it is pertinent to consider some of the difficulties in applying the “best interests” test. These difficulties were highlighted by Brennan J in *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion’s case*).[6] Brennan J observed that “in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of power”.[7]

Further, Brennan J quotes from Professor Ian Kennedy:[8]

> "The best interests formula may be beloved of family lawyers but a moment's reflection will indicate that although it is said to be a test, indeed *the* legal test for deciding matters relating to children, it is not really a test at all. . . . there is no general principle other than the empty rhetoric of best interests . . .".[9]

The Family Law Amendment (Shared Parental Responsibility) Act amendments were, among other matters, an attempt to provide greater guidance and remedy the situation identified above by establishing primary and secondary principles to explain how the best interests principle is to be interpreted and operate. The aim was to give legal practitioners, mediators and counsellors greater certainty in assisting clients regarding parenting disputes.

The Family Law Amendment (Shared Parental Responsibility) Act amendments to s 60CC(2) established the two following primary considerations:

- children benefit from having a meaningful relationship with both their parents, and

- the need to protect children from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence.

These primary considerations are consistent with the objects of the Act, set out in s 60B(1)(a) and (b).[10]

Both of these primary factors have equal relevance but if family violence is substantiated, the need for protection of the child is elevated and predominates.[11] The presumption of equal shared parenting responsibility outlined in s 61DA is not applied if child abuse or family violence is substantiated (s 61DA(2)).[12]

The general principles in s 43 of the FLA acknowledge that:

- the family is the predominant place that society provides for the care and education of dependent children

- children require a safe environment, and
- families may require assistance to reconcile differences or otherwise improve relationships.

Additional considerations are relevant to the determination of a child's best interest. These include (s 60CC(3)):

- views of the child
- nature of the child's relationship with each parent, and others (including grandparents or other relatives)
- likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from either of their parents, or any other child or person (including grandparent or other relative) with whom the child has been living
- practical difficulty and expense of a child spending time and communicating with a parent
- capacity of each parent to provide for a child
- maturity, gender, lifestyle and background of the child and parents (including being Aboriginal or Torres Strait Islander)
- parental attitude toward child and parental responsibilities
- family violence involving the child or a member of the child's family, and
- whether it would be preferable to make an order least likely to lead to the institution of further proceedings in relation to the child.

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* did not change the presumption of equal shared parental responsibility, nor the legislative pathway that mandates consideration of equal shared care. It does, however, state that if there is any inconsistency in respect of the two primary considerations

stipulated in s 60CC(2), then the right of the child to be protected from harm is given greater weight over the right of the child to have a meaningful relationship with each parent.

Importantly, these amendments also provide for:

- a broader definition of family violence and abuse (s 4AB and 4(1))
- consideration of a broader scope of family violence orders (including interim and consent orders) (s 60CC(3)(k))
- disclosure of family violence and protection matters (s 60CH and 60CI)
- defined obligations of "advisers", including legal practitioners and family counsellors (s 60D)
- removal of mandatory costs orders (repeal of s 117AB), and
- immunity for state, territory and commonwealth child protection agencies regarding cost orders (s 117(4A)).

Footnotes

1 Samuel Martin, *Blackstone's Commentaries — Systematically Abridged and Adopted to the Existing State of the Law with Great Additions*, W Maxwell, London, 1855.

2 Montague Lush, *Century of Law Reform*, Macmillan Press, London, 1901, p 344.

3 Sir William Blackstone, *Commentaries on the Laws of England*, 14th ed, Clarendon Press, Oxford, 1803, p 444.

4 Child abuse was not referred to in academic literature until the 1970s.

5 *B and B: The Family Law Reform Act 1995* (1997) FLC

¶92-755.

6 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) FLC ¶92-293.

7 Ibid.

8 Professor Ian Kennedy, "Patients, doctors and human rights" in Blackburn and Taylor (editors), *Human Rights for the 1990s* (1991), Mansell, London, at pp 90–91.

9 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) FLC ¶92-293 at p 79,192.

10 *Goode and Goode* (2006) FLC ¶93-286 at p 80,887.

11 Family Law Section, Law Council of Australia, *National Seminar Series 2006, The New Family Law Parenting System Handbook*.

12 *Goode and Goode* (2006) FLC ¶93-286 at pp 80,889 and 80,891.

¶7-010 Views of children

The United Nations Convention on the Rights of the Child influenced the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to the *Family Law Act 1975* (Cth) (FLA), "reflecting changing knowledge and perception of the social effects of involving children in the family law proceedings".[13]

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* amendments fully adopted the convention by including it as an underlying principle of Pt VII of the FLA (s 60B).

The convention states that:

> "Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child in a manner consistent with the procedural rules of national law".[14]

The High Court considered the issue of "views of children" in *Bondelmonte & Bondelmonte* (2017) FLC ¶93-763. The case involved, in addition to an application pursuant to the Family Law (Child Abduction Convention) Regulations 1986, an interim application for the return of two of the parties three children, both teenage boys, who had been taken by the father to the United States. The third child had remained in Australia with the mother. One of the older children was estranged from the mother and the younger had spent increasingly sporadic time with the mother. The father asserted (and it was accepted) that both boys wished to remain living with him in the United States and was critical, on appeal, of the trial judge's decision not to have a "wishes report" prepared in the United States and that the trial judge had placed insufficient weight on the children's views. The trial judge had formed the view that such a report was not required in circumstances where the children's views were uncontroversial,

although the trial judge was concerned that those views had been "contrived" by the father given the influence he had over the children.

The weight issue before the High Court was the weight that should have attached to the children's views considering the interim nature of the proceedings, the manner in which the views had been formed, the age and maturity of the children and the matters which the children had not considered. The High Court held:

- there is no statutory requirement to ascertain the views of children
- the court is not, of itself, required to ascertain the views of children
- an Independent Children's Lawyer must ensure that any views which are expressed by children are put before the court, and
- any views of children put before the court MUST be given proper, genuine and realistic consideration of those views.

Footnotes

13 Family Law Council of Australia, *Pathways for Children: A Review of Children's Representation in Family Law*, Commonwealth of Australia, Canberra, 2004, p 12.

14 United Nations Convention on the Rights of the Child, Art 12.

¶7-020 Adverse impact of extensive litigation on children

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments provide legislative support for a less adversarial approach to be adopted in all child-related proceedings under the *Family Law Act 1975* (Cth).

> "This approach relies on active management by judicial officers of matters and ensures that proceedings are managed in a way that

considers the impact of proceedings themselves (not just the outcome of the proceedings) on the child. The intention is to ensure that the case management practices adopted by courts will promote the best interests of the child by encouraging parents to focus on their parenting responsibilities".[15]

There is also an increased focus on ensuring that families in dispute have access to quality family counselling and dispute resolution services.[16]

Footnotes

15 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum.

16 *Family Law Amendment (Shared Parental Responsibility) Act 2006*, Sch 4.

PRINCIPLES FOR CONDUCTING CHILD-RELATED PROCEEDINGS

¶7-030 Child-related proceedings and consent

What are "child-related proceedings"?

First, s 69ZM(1) of the *Family Law Act 1975* (Cth) (FLA) provides that "child-related proceedings" are proceedings which are wholly under Pt VII. Part VII relates to children and deals with proceedings for orders such as:

- parenting
- child maintenance orders
- location and recovery of children

- the enforcement of orders affecting children, and
- injunctions relating to children.

Second, s 69ZM(3) provides that “child-related proceedings” can, with the consent of the parties, extend to include any other proceedings between the parties that involve the court exercising jurisdiction under the FLA and that arise from the breakdown of the parties’ marital relationship, for example, property settlement proceedings or spousal maintenance proceedings.

Consent

Consent is to be free from coercion.[17]

The legislation is designed to ensure that the provisions regarding consent address concerns regarding power imbalances between the parties. The legislation[18] allows the court to prescribe the form by which consent must be given. This ensures that there is a standard process that will satisfy the court’s requirements that the consent of the parties is deliberate and informed.

Consent provided in the above format is held to be irrevocable without leave of the court.[19] This provision reduces opportunities to change approaches during the course of proceedings and aims to minimise both time and costs.

These provisions need to be made explicit to the parties if they are considering consenting subject to s 69ZM(6). The court will regard consent documented on the prescribed form as evidence of the agreement between the parties.

Footnotes

17 The provision outlined in Div 12A applies to Pt VII of the *Family Law Act 1975* (Cth) and to other proceedings where the parties consent, s 69ZM(5).

18 *Family Law Act 1975* (Cth), s 69ZM(5)(b).

19 Ibid, s 69ZM(6).

¶7-040 Principle 1: consider child's needs and impact of proceedings

This principle seeks to address concerns that the process of court proceedings can have negative impacts on children, and that the process as well as the outcome is relevant to children's needs.

The first principle states that "the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings" (s 69ZN(3)).

This principle is intended to ensure that the proceedings are focused on the child. The court must consider the child's needs and the impact that the conduct of the proceedings may have on the child. In particular, the court must consider the likely stress on the child of the conflict between the parents created by the proceedings and seek to minimise this.

Research has demonstrated that adversarial legal systems contribute to escalation of conflict and acrimony between parents. This has an adverse impact upon children.[20]

The approach to settling marital differences contained in Div 12A was introduced to the Family Court on a trial basis in February 2004 with the Children's Cases Project (CCP). The CCP "set about providing a highly supportive, consensual and less formal process for separating parents to follow".[21]

The key components of the CCP were:

- relaxation of the rules of evidence
- more active judicial role in deciding issues, deciding what evidence is to be called, the way it is received and the manner of the hearing itself, and

- faster resolution of disputes.

An evaluation of this project conducted by Jennifer McIntosh found:

> "With respect to conflict, both actual and psychological, three months post-court, the CCP group reported significantly lower acrimony, and lower conflict, in contrast to the Mainstream court group. Associated with these findings, the CCP group reported better emotional functioning of their children, and far greater satisfaction of parents and children with the post-court living arrangements".[22]

Many of the features of the CCP were adopted by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The court may, for example, consider making orders that the child attend family counselling to assist the child in understanding the court's orders or the trial process. The court may also, when setting hearing dates, consider the stress caused to the child by lengthy times between hearing dates and seek to minimise this impact where appropriate.[23]

Footnotes

20 JE McIntosh, *The Children's Cases Pilot Project: An Exploratory* Report to the Family Court of Australia, Family Transitions, Mell available through Family Court website — www.familycourt.gov.au/presence/connect/www/home/publicati

21 McIntosh at p 4.

22 Ibid, at p 36.

23 Ibid, at p 69.

¶7-050 Principle 2: court must actively direct, control and manage conduct of proceedings

This principle provides support to the first principle by mandating a more directed inquisitorial role for the court.

The second principle states that “the court is to actively direct, control and manage the conduct of the proceedings” (s 69ZN(4), *Family Law Act 1975* (Cth) (FLA)).

The court must play an active role in ensuring, first, that the views of the child (or children) are heard, and, second, to take charge of the proceedings to ensure that their safety is protected (Principle 3 — see ¶7-060) and that the parents cooperate in finding solutions for their children, despite their marital differences (Principle 4 — see ¶7-070). These principles overturn the usual predominant principle in litigation that each party presents their own case and the court’s role is relatively “passive”.[24]

Division 12A of Pt VII empowers the Family Court to take a more active role in creating opportunities for successful negotiations between the parties by using the procedures discussed below.

The Family Court must actively prioritise which of the issues identified in the application and in the proceedings require full investigation and hearing, and which issues may be disposed of summarily (s 69ZQ(1)(a)). Under s 69ZQ(1)(b) and 69ZQ(1)(c), the Family Court must also decide the order in which issues are to be decided and give directions about the timing of steps to be taken in the proceedings. This is intended to lead to better management of proceedings.

The Family Court has a specific duty under s 69ZQ(1)(d) to consider whether the likely benefits of taking a step in the proceedings justifies the costs of taking it. This could be relevant in a situation where parties propose to use multiple experts or call many witnesses. The court may decide that only one of the witnesses proposed will be sufficient to establish a particular fact in the case.

The court must consider appropriate use of technology, such as video-link, audio-link, or other electronic technology (s 69ZQ(1)(h)). This provision supplements the existing discretion to use such technology in Pt XI Div 2 of the FLA. This provision is intentionally wide, as it is difficult to predict the future development of technology which may

assist in the resolution of family law disputes.

The Family Court must encourage the parties to use family dispute resolution or family counselling processes if the court considers that is appropriate (s 69ZQ(1)(f)). Family disputes should be dealt with outside the legal system wherever possible. This is consistent with s 60I of the FLA, which provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application with the court. This is a key change to promote a culture of settlement and avoiding the adversarial court system.

The court must deal with as many aspects of the matter as possible on a single occasion, in order that parties attend as few court events as possible (s 69ZQ(1)(g)). This is intended to shorten proceedings overall, and thereby minimise the impact of the proceedings on the child, and help to reduce costs for the parties.

The court may deal with the matter without requiring the parties' physical attendance at court, where this is appropriate (s 69ZQ(1)(h)). It is envisaged that parties may not need to attend court in two instances:

- where the use of appropriate technology (eg video-link) has met the requirements in accordance with s 102F, the need for the party's physical attendance in the court may not be required (s 69ZQ(1)(e)). Note that the court has a positive obligation to consider the use of technology, and that the discretion for its use is deliberately wide in order to allow for the future development of useful technology,[25] and

- where the court can make decisions on the papers (where this is appropriate) without it being necessary for the court to hear more about the matter before making its decision. Any decision made by the court to deal with a case without the parties would need to be made in accordance with the principle of natural justice and procedural fairness.[26]

Practitioners must identify and prioritise each issue with their clients early in the dispute process, and anticipate how each issue may be

dealt with by the court in the most expeditious manner.

Sources of information presented to the court

Access to information required to settle disputes via mediation or negotiated process has been raised as an impediment to early resolution of matters.[27] It is difficult to gauge how much information or evidence is required to either facilitate settlement of a dispute, or take the matter to trial, balanced against the costs of obtaining the evidence. When should this information or evidence be collected and presented and in what form? How should information gathering and presentation be controlled by the court to ensure legal costs are proportionate to the issues and mode of outcome?[28]

The possible sources of information or evidence are:

- application and affidavit of each party
- expert's affidavit
- family consultant's report, including s 11F report
- oral evidence to the court, and
- independent children's lawyer.

Expert's reports

Expert evidence is commonly received by the court in the form of reports of family consultants (court-appointed experts), family and child counsellors, social workers, psychologists or psychiatrists dealing with the care, welfare and development of children.

Disclosure of experts' reports is governed by the Family Law Rules 2004 (Cth). Reports must be disclosed two days prior to the first court event and, if obtained after the case has started, within seven days of receiving the report.[29] The early exchange of information is also supported by the Family Law Council.[30]

Family consultant's report

The court can order reports to be prepared by a court-appointed family

consultant, in any proceedings where the care, welfare and development of a child under 18 is relevant. These reports are termed "family consultant's reports", and are governed by s 62G of the FLA. The relevant provisions of this section include:

- the court can direct a family consultant's report on matters the court considers relevant and desirable
- the court may adjourn proceedings while the report is being prepared
- a family consultant must ascertain the child's views
- a child cannot be compelled to give views
- the age and maturity and any other special circumstance are to be considered when accessing or attempting to access the child's views
- the report can also contain any other matters relevant to the care, welfare and development of the child, and
- the court may make a variety of orders to facilitate the preparation of the report and the family consultant must report any failures to comply with the orders to the court.

The court may:

- order that the report be given to each party
- order that the report be received into evidence
- permit oral examination of the person completing the report, and
- restrict the release of the report.[31]

Judges almost universally find "family reports extremely helpful in determining cases and many judges would not be willing to make a determination in difficult cases without the assistance of a family report . . . Family reports are usually the most cogent and relevant

independent evidence presented on parenting issues".[32]

The reports often provide independent information on the facts in issue. Warnick J has noted: "without 'running a trial' and generally after interviews measured in terms of hours, rather than days, most family reports show a great deal of perception and far more often than not, any recommendation in the report accord with the views which I have reached after a trial over some time, often days".[33]

Research conducted on the management of cases involving allegations of child abuse has found that the recommendations or findings in family reports were followed by judges in 76% of the cases for which they were prepared.[34]

Given the levels of distress and entrenched views of some family litigants, the family consultant's report is often a useful independent source of evidence about the views and interests of the child or children. Where one or both parties are unrepresented, it may be the only source of information on the best interests of the children.

The independent information provided in family reports can assist in resolving the dispute. They may also help the therapeutic process for the families. Parties are provided with independent analysis of family relationships.[35]

Timeliness of reports is important in terms of early resolution of a dispute. They can limit the dispute considerably. For example, if one parent reads that the children respond well to the other parent and like spending time with them, this may help settle the dispute. If reports are available sufficiently prior to the hearing, the parties have an opportunity to reconsider their case, and matters may settle.

The early availability of a report is particularly helpful for unrepresented litigants who are less likely to agree to a private report at an interim hearing because of the cost and their unfamiliarity with the court process. Matters involving unrepresented parties are less likely to settle. A family consultant's report can be particularly helpful if available early in the proceedings before the parties have adopted entrenched positions.

Reports prepared by family consultants or counsellors and state child

protection services can be helpful in resolving child abuse cases. In research cited by the Australian Law Reform Commission (ALRC) in cases where child abuse was substantiated, family reports assisted in settling disputes in over 80% of cases.[36]

Where there was a family report and an independent children's lawyer appointed, 50% of the child abuse cases which reached a pre-hearing conference (as they were then known) settled at that conference. This study recommended that in child abuse cases, where the family was not already known to the state child protection service, a family report should be ordered at an initial hearing.[37]

One of the difficulties for judges at interim hearings is the lack of independent evidence before the court in order to allow judges to make orders that advance the welfare of the child(ren) who are the subject of the proceedings.

As part of the comprehensive amendments to the Family Law Act in 2006, s 11F was inserted into the Act. Section 11F gives power to the court to order one or more of the parties to the proceedings to attend one or more appointments with a family consultant where the court is exercising jurisdiction in proceedings under the Act.[38]

Section 11F(2) provides that when a court is making an order under subsection (1), the court must inform the parties of the consequences of failing to comply with such order. The consequences for failing to comply with an order under s 11F are set out in s 11G of the Act. Section 11G provides that in the event of a failure to comply under s 11F, the family consultant must report such failure to the court and it is then open to the court to "make any further orders it considers appropriate". The court's discretion to fashion orders in such circumstances is unfettered and may, where appropriate, include costs orders if such failure to comply has resulted in a delay in the case.

Section 11F(1)(b) empowers the court to make an order "directing one or more of the parties to the proceedings to arrange *for a child* to attend an appointment (or series of appointments) with a family consultant."[39]

The involvement of the parties and the children with a family consultant early in the proceedings under s 11F, allows the court to obtain information in relation to the circumstances of the family which will assist the court to make orders that will advance (i) the welfare of the child(ren) who are the subject of the proceedings; and (ii) the case by making orders relevant to the circumstances of the proceedings.

The court may make an order under s 11F(1) either on its own motion or at the request of the parties, including an independent children's lawyer.[40] In circumstances where practitioners feel that a case requires a report from a family consultant under s 11F, it is usually prudent to include an order for same in any minutes of orders drafted at court.

The functions of family consultants are set out in s 11A and involve:

(a) assisting and advising people involved in the proceedings

(b) assisting and advising courts, and giving evidence, in relation to the proceedings

(c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings

(d) reporting to the court under s 55A and 62G, and

(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, program and services to which the court can refer the parties to the proceedings.

Section 11F counselling can be referred to as a "child dispute conference" or a "child-inclusive conference". The various registries of the court may have different descriptions for s 11F counselling. For example, in the Melbourne registry, it is referred to simply as "section 11F counselling", whereas in the Sydney and Parramatta registries it is known as a "child dispute conference" or a "CDC". Practitioners in cases involving an interstate registry need to be familiar with the terminology used by the registry in relation to s 11F counselling.

Interim hearings

Parties frequently obtain private reports from social workers, psychologists and psychiatrists to assist them at interim hearings, as there is otherwise generally a lack of information available to the court at this stage.[41]

A trend has been noted that parents seeking time with their children were more likely to have orders made in their favour at interim hearings than at final hearings. A reason for this was said to be the lack of information available to the court at the time of the interim hearing and an inability to test allegations of abuse.[42]

Legal practitioners have noted that demonstrating a risk of “serious violence” at an interim hearing is often determined by the quality of their written material. As the allegations are not tested at an interim hearing and there is no court-ordered family report to assist the decision-maker, the assessment of whether spending time poses a risk to the child will often hinge on the nature and the details of the allegations raised in the affidavit of the parent with whom the child lives.[43]

In the ALRC report, judges and judicial registrars generally noted that their principal concern in interim hearings is to ensure the safety of the parent and child, and to obtain enough material to assess the allegations, the effect of the violence upon the parent with whom the child lives, and the quality of the relationship between the child and parent with whom the child spends time. Most noted that such allegations present a “real problem” at the interim stage, where there are few materials upon which to base those assessments.[44]

In relation to applications for relocation, Rhoades, Graycar and Harrison noted in their Interim Report:

> “The presence of a report about the children, and the ability to test the parties’ evidence, appeared to have been the factors which made the difference between the outcomes of final hearings and interim applications where violence was an issue”.[45]

The Family Court, reviewing interim hearings in cases handled by an

independent children's lawyer, concluded that it is appropriate to have a family report as early as possible only in certain cases, such as where there are sexual abuse allegations or where there may be risk to children. Otherwise the normal options for dispute resolution should be first pursued.[46]

Section 69ZL FLA (introduced via the *Family Law Amendments (Family Violence and Other Measures) Act 2018*) provides that where interim parenting orders are made, the court may give its reasons in short form.

Direct oral evidence

Under the Family Law Rules 2004, the court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial. Evidence is generally given on affidavit unless otherwise ordered by the court. Under the Family Court's case management directions, parties are required to file a summary of case document summarising the relevant facts, orders sought, and propositions of law and authorities.[47]

Children's views are usually expressed to the court via reports, or any other means endorsed by the court.[48]

Independent children's lawyers

The amendments to Div 10 of Pt VII of the FLA implemented a number of the recommendations made by the Family Law Council[49] as to the role and basis of the appointment of an independent children's lawyer (ICL). The amendments aim to clarify and strengthen the role of the ICL for children, parties, and lawyers acting in the role.

The role of the ICL has two distinct features:

- to assist the court to make a decision in the best interests of the child, and
- to provide a voice for the child in proceedings affecting them.

The Family Law Council was concerned about the minimal direction and guidance concerning the role of the ICL given by the FLA prior to

the 2006 amendments. The role of the ICL had developed greatly over the years, but the council believed the role had progressed to a point where a basic outline of the role should be contained in the legislation.[50]

Example

***P and P* (1995) FLC ¶92-615**

The origins of the role of the independent children's lawyer (ICL) were outlined in *P and P*. The appointed lawyer was required to:

- act in an independent and unfettered way in the interests of the child
- act impartially, but, if thought appropriate, make submissions suggesting the adoption by the court of a particular course of action if it considers that the adoption of such a course is in the best interests of the child
- inform the court by proper means of the child's wishes or views in relation to any matter in the proceedings (in this regard, the ICL is not bound to make submissions on the instructions of a child or otherwise but is bound to bring the child's expressed wishes or views to the attention of the court)
- arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the welfare of the child is before the court
- test by cross-examination, where appropriate, the evidence of the parties and their witnesses
- ensure that the views and attitudes of the ICL are drawn from the evidence and not from their personal view or opinion
- minimise the trauma to the child associated with the proceedings, and
- facilitate an agreed resolution to the proceedings.

In this decision, the court clearly contemplated that the ICL would be responsible for collating relevant and probative evidence, and cross-examining on the evidence adduced by the other parties and their witnesses. In discussing this element of the role, the court declared that the ICL must "ensure that the views and attitudes brought to bear on the issues before the court are drawn from the evidence and not from a personal view or opinion of the case".[51] Flowing from this, the ICL should not become an advocate in their own cause, but rather has an obligation to collate and evaluate all of the relevant evidence in forming a proposal for the court as to the child's best interests.

While it is clear that an important aspect of the role of an ICL is the function played in court, there are still many cases involving ICLs that

do not reach trial.

Footnotes

24 Bruce Smyth, Nicholas Richardson and Grace Soriano (editors), *Proceedings of the International Forum on Family Relationships in Transition: Legislative, Practical and Policy Responses*, 1–2 December, Australian Institute of Family Studies, Melbourne, 2006.

25 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p 67.

26 Ibid.

27 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, para 8.78.

28 Ibid.

29 Family Law Rules 2004, r 15.55.

30 Family Law Council of Australia, *Pathways for Children: A Review of Children's Representation in Family Law*, Commonwealth of Australia, Canberra, 2004, pp 53 and 54.

31 Family Law Rules 2004, r 15.04.

32 Australian Law Reform Commission, note 27, at [20].

33 Ibid, at [47].

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 Section 11F(1).

39 Emphasis added.

40 Section 11F(3).

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 Rhoades, Graycar and Harrison, ibid at 66.

46 Australian Law Reform Commission, note 27, at [47].

47 Family Court of Australia, *Case Management Directions*, number 6.1.2.(q).

48 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, 14, 15 and 19. The Full Court highlighted that it was unlikely to consider that a case was afforded procedural fairness when cross-examination did not occur and a matter was heard only "on the papers": see *Miller & Harrington* (2008) FLC ¶93-383.

49 Family Law Council of Australia, *Pathways for Children: A Review of Children's Representation in Family Law*, Commonwealth of Australia, Canberra, 2004.

50 Ibid.

51 *P and P* (1995) FLC ¶92-615 at p 82,157.

¶7-060 Principle 3: safeguard against family violence, abuse and neglect

The concern of the legislature regarding protection of children from violence, abuse and neglect is made explicit in this principle.

The third principle states that "the proceedings are to be conducted in a way that will safeguard:

(a) the child concerned against family violence, child abuse and child neglect, and

(b) the parties to the proceedings against family violence" (s 69ZN(5), *Family Law Act 1975* (Cth) (FLA)).

The more active case management approach in Pt VII Div 12A ensures that allegations of violence and abuse are dealt with at an early stage in the court process. It also ensures that judicial officers are better able to ensure that appropriate evidence is before them. This assists courts to better address issues of child abuse and family violence in proceedings.

When considering an appropriate order, the court first considers what is in the child's best interests and then ensures that the order:

(a) is consistent with any family violence order, and

(b) does not expose a person to an unacceptable risk of family violence.[52]

If the court is satisfied that there are reasonable grounds to believe that there has been abuse of a child, or family violence, and, therefore, a risk of child abuse/family violence resulting from dispute resolution, the court can rule that family dispute resolution not be required (s 60J).[53]

The court has the power to make an order in child-related proceedings requiring a prescribed state or territory agency to provide the court with documents, which contain information about one or more of the following (s 69ZW):

- any notification to the agency of suspected abuse of the child or family violence affecting the child
- any assessment by the agency of investigations into a notification of that kind, and
- any report commissioned by the agency in the course of investigating a notification.

This is intended to facilitate access to files and reports that have been completed by state agencies, which was highlighted in *Northern Territory v GPAO and others*.[54] The High Court then found that the provisions of the FLA did not override provisions in the Northern Territory child welfare legislation, such that the Family Court could not compel the Northern Territory welfare authority to produce any documents it held concerning the protection of a child who was the subject of a parenting case. This decision had the effect of limiting the evidence available to the court to determine what was in a child's best interest in some cases. Section 69ZW addresses this limitation and extends it to apply to information about family violence.[55]

The court must admit into evidence all material in relation to child abuse notifications and reports that it intends to rely upon. This is to enable procedural fairness requirements to be met so that all parties have an opportunity to give a considered response.[56]

The issue of family violence has been judicially considered since the introduction of the *Family Law Amendment (Shared Parental*

Responsibility) Act 2006 amendments. In *N & M*[57] the definition of family violence in s 4 of the FLA was considered. Importantly, the definition of the "reasonable person test" (ie the fear or apprehension of violence must be reasonable) was explored, first by reference to the Explanatory Memorandum to the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

The court found that the civil standard of proof applied. Rose J found assistance from s 5B(2) of the *Civil Liability Act 2002* (NSW), and quoted "whether a reasonable person would have taken precaution against a risk of harm" which includes "the probability that the harm would occur if care was not taken".[58]

Rose J found that "for the purpose of the definition of 'family violence' the 'reasonable person' is a person of ordinary prudence and intelligence who would have the fear or apprehension in the circumstances of the person who is alleged to have it in a particular case. In this case, it is the mother".[59]

Rose J, in particular, found that "the detailed evidence of the mother is such that I am satisfied that a 'reasonable person', in accordance with section 4(1) as previously interpreted by me, would fear for, or be reasonably apprehensive about his or her personal well-being or safety in the particular circumstances described. Indeed, no contrary submission was made . . . I accept the evidence of the mother and her witnesses. That evidence was given in a detailed and consistent manner and not shaken during the course of cross-examination".[60]

The definition of family violence was also judicially considered in *Goode and Goode*.[61] Bryant CJ, Finn and Boland JJ agreed that the definition of family violence was broad.[62] This decision was an appeal from a decision of Collier J from an interim hearing that found, *inter alia*, that the evidence available was insufficient to substantiate allegations of violence.[63]

The amendments to the FLA by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* provide better protection for children and families at risk of violence and abuse. The amendments did not change the presumption of equal

shared parental responsibility, nor the legislative pathway that mandates consideration of equal shared care. It is, however, specified that if there is any inconsistency in respect of the two primary considerations stipulated in s 60CC(2), then the right of the child to be protected from harm is to be given greater weight over the right of the child to have a meaningful relationship with each parent. Since the amendments, there is a broader definition of family violence (s 4AB) and abuse (s 4(1)) and the range of family violence orders that the court may consider in forming its view (s 60CC(3)(k)).

Sections 68(2A), (2B) and 2(C) FLA (introduced via the *Family Law Amendments (Family Violence and Other Measures) Act 2018*) now provide judges with the discretion to dispense with the requirement (under the FLA) to explain an order/injunction to a child, where that order/injunction provides (expressly or impliedly) for the child to spend time with a person, where the child is protected from that person by a family violence order, if the court considers that it is in the child's best interests not to have that explanation provided to them. In determining whether or not it is in the child's best interests, the court must have regard to all or any of the matters contained in s 60CC(2) and may have regard to all of any of the matters set out in s 60CC(3).

Notice of Risk

A person who files either an Application for Parenting Orders or a Response in parenting proceedings in the Federal Circuit Court, must file the prescribed Notice of Risk in accordance with r 22A.02 of the Federal Circuit Court Rules 2001 ("the FCC Rules").

The Notice of Risk must be in accordance with Form 1 in Sch 2 of the FCC Rules.[64] The Notice must also be filed in existing proceedings where a party alleges abuse and/or neglect of a child.[65]

The Notice of Risk discharges the court's obligations to enquire as to whether or not the child who is the subject of the proceedings has been, or is at risk of being, subjected to, or exposed to abuse, neglect or family violence; and whether a party considers that he/she, or another party to the proceedings, has been, or is at risk of being subjected to family violence.[66]

The Notice of Risk is filed contemporaneously with the Initiating Application or Response and must be supported by an affidavit setting out the evidence on which the allegation(s) of abuse and/or neglect and exposure to family violence are based.[67]

The Notice of Risk requires the party to particularise allegations of any abuse and/or neglect as well as any exposure to family violence; as well as providing details of the children and adults at risk.

The Notice of Risk affords the court the opportunity of identifying allegations of abuse and/or neglect and/or exposure to family violence from the commencement of the proceedings. This provision of information will assist the court in making appropriate interim orders advancing the welfare of the child(ren) who are the subject of the proceedings, as well as the case.

Footnotes

52 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p 66.

53 *Family Law Act 1975* (Cth), s 60I(5).

54 *Northern Territory* v *GPAO and others* (1999) FLC ¶92-838.

55 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, pp 71–72.

56 Ibid, at p 73.

57 *N & M* (2006) FLC ¶93-296; [2006] FamCA 958.

58 Ibid, [114].

59 Ibid, [118].

60 Ibid, [124]–[126].

61 *Goode and Goode* (2006) FLC ¶93-286.

62 Ibid, at p 80,907.

63 Ibid, at p 80,892.

64 Rule 2.04(1B).

65 Sections 67Z(2) and 67ZBA(2).

66 Section 69ZQ(1)(aa).

67 Rule 4.05 FCC Rules.

¶7-070 Principle 4: promote cooperative and child-focused parenting

This principle is an attempt by the legislature to focus on the parties' conduct regarding their willingness to facilitate arrangements with the other parent or relative.

The fourth principle states that "the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties" (s 69ZN(6), *Family Law Act 1975* (Cth) (FLA)).

This principle arose from concerns that the traditional adversarial approach to litigation is harmful to children and can entrench conflict between parents. It can also lead to a focus on the parents and their perceptions of their rights rather than focusing on the child.

This principle relates directly to the primary consideration that underpins the "best interests" principle: the importance to the child of

developing meaningful relationships with both parents. Proceedings are therefore to be conducted in a way that encourages the parents to focus on their child or children and on their ongoing relationship as parents. The aim is to promote both a focus on the child and cooperation between the parties to allow at least a positive working relationship between them, both during and after the proceedings so that they can communicate in order to fulfil their responsibilities as parents.

Section 60I of the FLA provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application for a parenting order with the court.

Compulsory dispute resolution is supported by federal government funding of Family Relationship Centres. Competency-based accreditation standards were developed by the Community Services and Health Industry Skills Council. These standards form the minimum requirements for family counsellors, family dispute resolution practitioners and workers in funded children's contact services.[68]

The Family Court is unique in their use of counselling to achieve cooperation between the parties (ie to help parents meet the needs of their children throughout the divorce process). The reality, however, is that by the time cases reach the court the process of reaching agreement has usually been very difficult and stressful for all concerned because of entrenched conflict. The amendments strengthen the priority and role of counselling in the court process and the actions taken by the parties before proceedings are instituted.[69]

The court cannot hear an application for an order under Pt VII unless the applicant has also filed, with the application, a certificate by a family dispute resolution practitioner (s 60I(7)). This certificate must state that either:

- the applicant did not attend family dispute resolution due to the refusal or failure of the other party or parties to attend the process (s 60I(8)(a))

- the applicant attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, at

which they discussed and made a genuine effort to resolve the issue or issues to which the court application relates (s 60I(8)(b)), and

- the applicant attended family dispute resolution, conducted by the practitioner, with the other party or parties to the proceedings, but that the applicant, the other party or another of the parties did not make a genuine effort to resolve the issue or issues (s 60I(8)(c)).

Family dispute resolution is not required if people reach agreement without assistance (s 60I(9)(a)(i)).

The court's role in encouraging family dispute resolution as a means of reaching agreement is further strengthened by s 60I(10) which provides that the court must consider making an order that the person attend such a process. Any such decision is made at the discretion of the court. For example, if the applicant has claimed at the time of filing that the application was urgent under the exception in s 60I(9)(d), but the court considers that it was not urgent, it may make an order that the parties must attend family dispute resolution before the court will deal with the matter. The court can also order costs in appropriate cases.[70] This is intended to discourage parties from trying to avoid the requirement to attend family dispute resolution and ensure that the court considers carefully the reasons for any application for exemption.

In some cases, the court can require a party to attend a specific program if the court considers that the program will be beneficial to ensure that as many matters that can be resolved, are resolved outside the court system (s 60I(10)).[71]

Footnotes

68 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum.

69 Ibid.

70 *Family Law Act 1975*, s 60I(8) and 117.

71 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p 23.

¶7-080 Principle 5: reduce delays, formality, legal technicality and form

This principle has been introduced to increase efficiency of processes to reduce time taken by parties before the court in litigation.

The fifth principle states that "the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible" (s 69ZN(7), *Family Law Act 1975* (Cth) (FLA)).

The proceedings should be conducted in a way that ensures that the matter is finalised in a timely way.

Section 69ZO applies to proceedings in chambers. All of the duties and powers conferred on a "court" throughout Div 12A of Pt VII are also conferred on a judge, judicial registrar, registrar or magistrate who is hearing a child-related proceeding in chambers.

Without undue delay

An Australian Law Reform Commission Report[72] found that slightly more than 50% of applications in the Family Court were resolved in less than six months. This finding was based on research conducted on cases from the Melbourne, Brisbane and Adelaide registries. The median duration of completion for applications in the sample was 5.23 months from filing to finalisation, which is within the court's performance standards. The court's performance targets were exceeded in 25% of the sample cases. In 10% of the cases, the matters took at least twice as long, as required by the performance standards, to finalise.

As little formality and legal technicality and form

Courts in many jurisdictions have sought to include evidence regarding children by reducing formality and legal forms. It is now generally recognised that children are capable of providing trustworthy evidence, within appropriate guidelines.

Under s 69ZT, specific rules of evidence do not apply in child-related proceedings unless the court decides that there are exceptional circumstances. The high threshold for applying the rules of evidence is appropriate as the waiving of specified provisions of the *Evidence Act 1995* (Cth) (EA) is an integral element of the active judicial management necessary to achieve less adversarial court processes in child-related proceedings. However, the court is left with the discretion to apply the rules of evidence in the appropriate case where the threshold is reached. This may occur in a serious contravention case when criminal sanctions are being considered by the court.[73] It may be appropriate to apply the rules of evidence to such a proceeding due to the gravity of the potential outcome. Even where rules of evidence are applied, they may only be applied to a particular issue in a case, not the case in total.[74]

When deciding whether to apply one or more of the specified provisions found in s 190(4) of the EA to an issue in child-related proceedings, the Family Court must take into account a number of factors (s 69ZT(3)(b), FLA). These include:

- the importance of the evidence in the proceedings
- the nature of the subject matter of the proceedings
- the probative value of the evidence, and
- the powers of the court to adjourn the hearing, to make another order or give a direction in relation to the evidence.

Section 60CC(3)(a) requires the court to consider any views expressed by a child in deciding whether to make a particular parenting order in relation to the child. Section 60CD allows the court discretion on how it will inform itself of the views of the child.

Section 62G(3A) requires a family consultant who is directed to give a

report, to ascertain the child's views and include those views in the report. Section 68LA(5)(b) requires the independent children's lawyer to ensure that the child's views are fully put before the court. Children are not required or compelled to express their views.

Footnotes

72 Australian Law Reform Commission, note 27, at [8.78].

73 Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum.

74 Ibid.

MAJOR LONG-TERM ISSUES

Editorial information

Written by Anne-Marie Rice and edited by Anne-Marie Rice and Erin Shaw

¶8-000 The concept of “major long-term issues”

The concept of “major long-term issues” was introduced into the *Family Law Act 1975* (Cth) (FLA) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. However, parents, practitioners and the courts have long focused on matters affecting the long-term care, welfare and development of children, as distinct from issues that affect them on a day-to-day basis.

Section 4(1) of the FLA provides that:

> “***major long-term issues***, in relation to a child, means issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:
>
> (a) the child’s education (both current and future); and
>
> (b) the child’s religious and cultural upbringing; and
>
> (c) the child’s health; and
>
> (d) the child’s name; and
>
> (e) changes to the child’s living arrangements that make it significantly more difficult for the child to spend time with a parent.
>
> To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not, of itself, a ***major long-term issue*** in relation to the child. However, the decision will involve a ***major long-term issue*** if, for example, the relationship with the new partner involves the parent moving to another area and the move will make it significantly more difficult for the child to spend time with the other parent”.

The FLA expressly provides what is to happen where a major long-term decision is to be made. Section 65DAC(2) provides that where two or more persons share parental responsibility for a child, and the exercise of that responsibility involves making decisions about major

long-term issues, then the order is taken to require that decisions be made ***jointly***. Section 65DAC(3) imposes a further obligation on parents to consult about such decisions and make a genuine attempt to reach a joint decision. If parents are unable to reach a joint decision, they may need to attend at mediation or family dispute resolution to obtain some assistance in reaching agreement or otherwise seek the assistance of the court.

Section 65DAE expressly provides that there is no need for parents to consult on matters that are *not* major long-term issues (eg what the child wears on any given day or what time they go to bed). It is conceivable that, particularly where there are significant issues in relation to a child's health and diet, that decisions about what a child eats during time spent with a parent may actually be a major long-term issue. This is now a common issue considering the increasing prevalence of life-threatening allergies in children.

Schooling arrangements

The child's education is squarely addressed as an issue about which parents must consult. However, s 65DAC(4) provides that a third party (for example, the principal of a school who is asked to accept the enrolment of a child) need not be satisfied that the decision was jointly made before acting upon it.

¶8-010 Paternity testing

Parentage testing under the *Family Law Act 1975* (Cth) (FLA) is dealt with in Pt VII Div 12 Subdiv E.

Essentially, the court can only make an order for parentage testing at the request of a party or on its own initiative, where the parentage of a child is a question *in issue* in proceedings under the FLA (s 69W). In other words, there must be some evidence which places the parentage of a child in doubt, as there is no power under the FLA to make a "stand alone" paternity testing order simply to satisfy the doubts of a parent.

The range of persons who can be ordered to undergo parentage testing are not limited to the parties to proceedings but they must be

aged over 18 or have the consent of the relevant parent/guardian. The court can order both the child and the mother to be the subject of a prescribed parentage test (s 69W(3)(a) and (b)) and can also order any person whom it believes may assist in determining the parentage of the child to undergo such a test (s 69W(3)(c)). This could include the potential father or any other relative of the child.

Where a parent/guardian of a child refuses to facilitate testing in relation to that child or where a person over the age of 18 fails to comply with an order for testing, the court may draw such inferences as it thinks fit (s 69Y). See also *Tryon & Clutterbuck*.[1]

The implications of a failure to comply with such an order can be mitigated by circumstances where the refusal is reasonable. For example, in *F and R*,[2] Butler J found that sound religious or cultural reasons are sufficient.

Once a parentage testing procedure is ordered by the court under the FLA, the court can also make a declaration, pursuant to s 69VA, that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth. This is most notably relevant in relation to child support issues.

The FLA and Pt IIA of the Family Law Regulations 1984 (the Regulations) contain specific provisions regarding the procedures which must be followed in prescribed parentage testing (including blood group testing and what is commonly known as “genetic fingerprinting”), the form of the report as to the results, and the manner in which such reports may be introduced into evidence (Pt II of the regulations and s 69ZC of the FLA). In accepting the results of such a test, the court need only be satisfied on the balance of probabilities.[3]

It is interesting to note that a parentage testing order may be made subject to whatever terms and conditions the court may impose (s 69W(4)), and the court may make such other ancillary orders as are necessary to ensure the test is carried out in the most effective and reliable way possible. These orders may include a requirement for a person to submit to a medical procedure, or provide a bodily sample, or provide information about their medical or family history (s 69X).

The regulations provide for the accreditation of the laboratories carrying out parentage testing procedures (reg 21N). The laboratories accredited for parentage testing can be found at www.nata.asn.au.

Footnotes

1 *Tryon & Clutterbuck (No 2)* (2009) FLC ¶93-412.

2 *F and R* (1992) FLC ¶92-300.

3 *Re C (No 2)* (1992) FLC ¶92-284.

¶8-020 Changing a child's name

Section 4 of the *Family Law Act 1975* (Cth) (FLA) expressly provides that the name a child uses is a major long-term issue and, accordingly, is one which requires a joint decision to be made by each of the child's parents (or other person with parental responsibility for the child). Where no agreement can be reached, a party may bring an application for a child to be known by a certain name — generally referred to as an application to "change a child's name".

There is only one principle to be considered in these types of cases — the welfare of the child being the paramount consideration.[4]

The court has the power to make such an order subject to it being in the child's best interests. Since 1977,[5] the accepted practice has been that, on application, all the court should do is make a declaration that it is in the best interests of the child that he or she henceforth be known by the name of "X" and that the formal record of this (ie on the child's birth certificate) should be made according to the relevant law of each state.

The principles governing change of a child's surname were set out by the Full Court of the Family Court in *Chapman and Palmer*.[6] In that

case, the Full Court of the Family Court, upholding the decision of Opas J restraining the mother from using her new surname in relation to the children, said:

> "The general principle appears to be that the court will not intervene to prevent a parent from changing the surname of a child in the custody or care and control of that parent (or to direct that a name be restored where a change has occurred), unless the court is satisfied that the change was made without the consent of the other parent and that it does not promote the welfare of the child. The same principle applies when the court is asked to direct that a surname be restored where a change has already occurred. In deciding the issue in each case there is no onus of proof. It is for the court to balance in its discretion the factors for and against change. The guiding principle is that the welfare of the child is the paramount consideration. It must stand above the wishes or proprietary interests of the parents".[7]

The court further stated:

> "We believe that each such case should be approached in an even-handed manner with the object of making a decision that will promote the welfare of the child. To summarise, the factors to which the courts should have regard in determining whether there should be any change in the surname of a child include the following:
>
> (a) The welfare of the child is the paramount consideration.
>
> (b) The short and long-term effects of any change in the child's surname.
>
> (c) Any embarrassment likely to be experienced by the child if its name is different from that of the parent with custody or care and control.
>
> (d) Any confusion of identity which may arise for the child if his or her name is changed or is not changed.
>
> (e) The effect which any change in surname may have on the

relationship between the child and the parent whose name the child bore during the marriage.

(f) The effect of frequent or random changes of name".[8]

In *Beach and Stemmler*,[9] Connor J suggested that the Full Court in *Chapman and Palmer* did not mean to restrict the considerations merely to the matters listed above. Therefore, in addition to the criteria in *Chapman and Palmer*, his Honour took the following matters into account:

(a) the advantages both in the short-term and in the long-term which will accrue to the children if their name remains as it is now

(b) the contact that the husband has had and is likely to have in the future with the children

(c) the degree of identification that the children now have with their father

(d) the degree of identification which the children have now with their mother and their stepfather

(e) the degree of identification which the children will have with the child that is about to be born to their mother and any likely confusion in the future if their father's surname is restored, and

(f) the desire of the father that the original name be restored.

The Full Court in *Flanagan v Handcock*[10] also considered the issue of whether or not the best interest test applied to the granting of injunctions under s 68B. Kay and Holden JJ in separate judgments stated that if the paramountcy principle was not decisive, it was certainly relevant and needed to be given careful consideration in such cases.

See also *Darley & Darley* [2016] FamCAFC 10, where the Full Court upheld the trial judge's decision to refuse the mother's application for change of the children's surname.

Practitioners checklist for changing the name of a child

Pre-action procedures (Family Law Rules, Sch 1 Pt 2) and requirements under s 60I of the Family Law Act 1975

Rule 1.05 stipulates that parties must comply with the pre-action procedures set out in Sch 1. Practitioners should be familiar with the schedule.

Parties wishing to apply for an order under Pt VII must first attend a family dispute resolution with a registered family dispute resolution practitioner in an attempt to try and resolve the matter.

A certificate pursuant to s 60I(8) must be obtained from a registered family dispute resolution practitioner. The certificate from the family dispute resolution practitioner can be in one of four forms:

(a) that the person did not attend family dispute resolution because of the other parties' failure to attend (s 60I(8)(a))

(b) that the person did not attend family dispute resolution because the practitioner considers it would not have been appropriate (s 60I(8)(aa))

(c) that the person attended family dispute resolution and all attendees made a genuine effort to resolve the issues in dispute (s 60I(8)(b)), or

(d) that the person attended family dispute resolution but that person, or the other party, did not make a genuine effort to resolve the issue (s 60I(8)(c)).

The only exceptions to the requirement to attend family dispute resolution before filing an application are set out in s 60I(9). The requirement to file a certificate from a family dispute resolution practitioner does not apply if:

(a) the application is made by consent of all parties or in response to an application made by another party, or

(b) the court is satisfied, on reasonable grounds, that there has

been abuse/family violence or there is a risk of abuse/family violence of the child by a party, or

(c) the application relates to a particular issue AND a Pt VII order has been made in the preceding 12 months AND the application relates to contravention AND there are reasonable grounds to believe that the respondent has shown a serious disregard for their obligations under the order, or

(d) the application is urgent, or

(e) one or more of the parties is unable to participate effectively in family dispute resolution (including for reasons associated with remoteness), or

(f) by reason of any other circumstance set out in the regulations.

Relevant sections of the Family Law Act

Section 68B of the FLA provides the court with the power to make such an order or grant such injunction as it considers appropriate for the welfare of the child.

Section 60CA deals with the child's best interests being the paramount consideration in deciding whether to make a particular parenting order.

Section 60CC provides guidelines to assist the court in determining what is in a child's best interests.

Section 114(3) provides the court with a wide power to grant injunctions.

Section 67ZC provides the general power of the court to make orders relating to the welfare of children.

Relevant rules

For proceedings issued in the Family Court, r 18.05 and 18.06 of the FLR empower registrars to make parenting orders until further order. These powers are delegated to registrars and deputy registrars but in practice, contested interim parenting applications are generally dealt

with by a judicial registrar or registrar (r 18.04 empowers the principal registrar to decide which registrar or deputy registrar will perform the functions allocated to registrars).

Chapter 2 of the FLR sets out the documents to be filed in order to initiate proceedings for final orders (Initiating Application) and interim or procedural orders (Application in a Case). Initiating Applications and Responses to Initiating Applications are required to be sworn by the parties, although r 24.01(4) enables practitioners to execute applications on behalf of their client. When filing an Initiating Application or a Response to an Initiating Application in the Federal Circuit Court dealing with parenting matters, parties are now also required to file a *Notice of Risk* form detailing any allegations of abuse or family violence, or any risk thereof. This requirement must be met even where no allegations of abuse or family violence are made.

Rule 15.08 deals with the preparation of affidavits.

Rule 18.05 (item 13 in Table 18.2) delegates to registrars the power to grant injunctions under s 68B(1) and (2) of the FLA.

Example

Orders to be sought

> "That Jill Jones be restrained and an injunction is hereby granted, restraining her from using, or being party to or complicit in, the use of any surname for the child of the marriage, Wendy Brown, born 1 May 2010, other than the name 'Brown'".
>
> "That the child Wendy Jones be henceforth known as Wendy Brown and that the mother be at liberty to approach the Registrar of Births Deaths and Marriages in the State of Y to have such change of name recorded on the child's birth certificate".

Checklist

Material to be filed in support

Initiating Applications and/or Applications in a Case need to be filed together with supporting affidavits.

The principal affidavit needs to address:

☐ personal details

☐ history of the relationship

☐ any history of litigation

☐ contact the child has with each parent

☐ the name that the child was born with

☐ the presence of a birth certificate

☐ any changes made to the birth certificate, and the reasons for such changes

☐ any discussions and conversations involving the parents and significant others concerning the child's name (not including without prejudice negotiations). Was consent ever provided in light of these conversations?

☐ the use of the name in relation to schools, medical records, sporting clubs, etc

☐ why the name change is opposed

☐ what knowledge there is of any use of the other name

☐ perceived detriment to the child in using the other name

☐ attempts to resolve the issue

☐ family ties

☐ ties to the name

☐ how long the original name was used

☐ benefits to the child of retention of the original name, and

- ☐ any evidence of confusion in the child with the new name.

Relevant case law

The law was originally set out in *Chapman and Palmer*[11] (see above) and held that each case was to be dealt with in a way that would promote the welfare of the child.

Matters for consideration were:

- ☐ welfare of the child as the paramount consideration
- ☐ short and long-term effects of a change
- ☐ any embarrassment to the child
- ☐ any confusion of identity, and
- ☐ effect a change in name would/may have with the parent whose name the child bore in the marriage.

Additional factors were identified in *Beach and Stemmler*[12] to be:

- ☐ advantages both short and long-term in a change
- ☐ contact the parent has had with the child
- ☐ degree of identification with both the parents
- ☐ degree of identification with any new child, and
- ☐ parent's wishes.

Submissions to be made

Each of these cases is simply fact based, and the facts must be intertwined with the law, particularly to show that a change of name advances or is contrary to the best interests of the child.

In opposing any application, the link with the past experience and the present parent/child relationship must be emphasised.

What must be countered is any suggestion that the child associates with the new name to the exclusion of the older name.

Footnotes

4 Warnick J in *Fooks* v *McCarthy* (1994) FLC ¶92-450.

5 *In the marriage of Arthur and Comben* (1977) FLC ¶90-245.

6 *Chapman and Palmer* (1978) FLC ¶90-510.

7 Ibid, at p 77,674.

8 Ibid, at pp 77,675–77,676.

9 *Beach and Stemmler* (1979) FLC ¶90-692.

10 *Flanagan* v *Handcock* (2001) FLC ¶93-074.

11 *Chapman and Palmer* (1978) FLC ¶90-510.

12 *Beach and Stemmler* (1979) FLC ¶90-692.

¶8-030 Relocation

No section of the *Family Law Act 1975* (Cth) (FLA) refers specifically to the difficult subject of relocation. In fact, there is no such thing as a "relocation case". In *B and B*: *Family Law Reform Act 1995*,[13] their Honours Chief Justice Nicholson and Justices Fogarty and Lindenmayer, made it clear that:

> "Relocation cases are not a separate category within the Family

> Law Act . . . each is a case under Part VII relating to the best interests of the children but within a particular context and, . . . is to be determined in accordance with the principles contained in that Part".[14]

As a result of the complexities associated with parenting cases involving the proposed relocation of children, the Full Court of the Family Court and the High Court have given careful, and repeated, consideration to the approach to be adopted in these difficult cases.

On 1 August 2000, the Full Court of the Family Court delivered its reasons for judgment in *A v A: Relocation Approach*,[15] and formulated a guideline judgment to be applied when determining parenting cases of this sort. That decision draws together the principles enunciated by the Full Court in *B and B: Family Law Reform Act 1995*[16] and the 1999 High Court decision in *AMS v AIF*; *AIF v AMS*.[17]

The decision in *A v A* is authority for the principle that, in reaching a decision in cases where one party proposes to relocate with a child or children of the relationship:

1. The court cannot proceed to determine the issues in a way that separates the issue of relocation from that of residence and the best interests of the child.

2. Compelling reasons for, or indeed against, the relocation need not be shown.

3. The best interests of the child are to be evaluated taking into account considerations including the legitimate interests of both the residence and non-residence parent.

4. Neither the applicant nor respondent bears an onus.

5. Treating the welfare or best interests of the child as the paramount consideration does not oblige a court to ignore the legitimate interests and desires of the parents. If there is a conflict between these considerations, priority must be accorded to the child's welfare and rights.

6. If a parent seeks to change arrangements affecting the residence of, or contact with the child, the parent must demonstrate that the proposed new arrangement, even if that new arrangement involves a move overseas, is in the best interests of the child.

In 2002, the High Court again had the opportunity to consider the approach to be taken in "relocation" cases, this time, in relation to a proposed international move where the mother wished for the children of the marriage to reside with her in India. In *U v U*[18] the High Court left the approach to be taken, as articulated in *A v A*, unchallenged, but considered in detail the court's power to make orders not sought by either of the parties, but which are, ultimately and in light of the particular facts of the case, in the child's best interests. In other words, the court was not bound by the proposals of the parties. Although, if it proposes to make orders which neither of the parties has proposed, it must afford the parties the opportunity to address that issue. The minority judges in *U v U* also indicated that greater regard should be had to the mobility of the parent who resists the move if a move by all parties is ultimately in the child's best interests.

Bolitho v Cohen[19] involved an appeal against the trial judge's decision to enable the applicant father to reside permanently in Japan with the two children of the relationship. In making the orders as sought by the father, the trial judge found that the children had a close relationship with both parents, but that the mother was less in touch with their views and needs and that their maturity was such that their wishes (to live in Japan with the father) should be taken into account.

In dismissing the appeal, the Full Court, comprising Chief Justice Bryant and Justices May and Boland, made reference to the correct approach to be adopted, as outlined in *A v A* and clarified that the "overarching issue", as reaffirmed by the High Court in *U v U*, is to ensure that any parenting order is in the best interests of the child.

Their Honours went on to state that:

> "the decision in *U v U* has ameliorated the somewhat rigid and/or formulaic suggested approach set out in *A v A*. In *U v U* the High Court said that the proper approach to be adopted in a relocation

> case is a weighing of competing proposals, having regard to relevant s 68F(2) factors (of the *Family Law Act 1975* prior to the shared parental responsibility amendments), and consideration of other relevant factors, including the right of freedom of movement of the parent who wishes to relocate, bearing in mind that ultimately the decision must be one which is in the best interests of the child".[20]

The Full Court was satisfied that the trial judge had considered and weighted each of the matters raised by the parties and made an ultimate finding which was within the reasonable ambit of his discretion.

This case provides a useful summary of the relevant parts of the leading judgments in *U v U*, and their Honours provide clear guidance as to the approach to be adopted in "relocation" cases in light of that decision:

> "The requirement to look beyond the proposals of the parties highlights the fundamental difference in litigation involving the welfare of a child, and ordinary inter partes litigation. This unique requirement may necessitate a trial Judge crafting orders which are outside the proposals presented by either party, subject to the caveats expressed by Hayne J [in *U v U*]. This task requires a trial Judge to afford the parties procedural fairness by indicating and inviting comment on changes to the parties' own proposals, for example, by way of additional or different contact to that proposed by the relocating party, or a limitation to a period of restraint in removing a child from its present geographical location".[21]

In the 2005 unreported Full Court decision of *H and H*,[22] the court considered the approach taken by Faulks J (as he then was) in making orders facilitating the mother and children (aged nine and twins aged six) moving from a rural area in southern New South Wales to Adelaide. In that case, the children lived with the mother and had contact with the father every Wednesday and on alternate weekends. The mother asserted that she found that living on the family property and in the region generally was isolating and distressing and that she was extremely unhappy and devoid of

support. A report from the expert psychiatrist acknowledged these issues for the mother but also expressed the view that it was better for the children to have both parents in close physical proximity. It was also accepted that the proposed move could result in a diminution of the relationship between the father and the children in light of the reduction in the time that they could spend with him.

At the trial, and indeed on appeal, much discussion took place over the significance of the mother's ability to cope were the existing circumstances to continue in light of the distress which she reported. The evidence showed, however, that there had not been any actual impairment of her parenting capacity. In considering that issue the Full Court noted the following comments of the trial judge:

> "54 The mother, essentially, had no choice and in circumstances when she was able to persist with adequately caring for the children when she was both distressed, isolated and potentially in a state of depression (if not actually in one), it is to her credit and not to be used against her for the future. To suggest that in circumstances, which I accept must be severely distressing for her and, indeed, which were conceded, (and properly conceded by the father as being distressing and isolating for her), she should remain in those circumstances simply because there is no evidence that there has been a serious breakdown in her parenting ability so far is an ungenerous submission — even if one forensically available".[23]

These findings largely underpinned the trial judge's decision to make the orders as sought by the mother, and the Full Court concluded that this view was entirely open to him and that the trial judge had not erred in approaching the issue in this way. In dismissing the appeal, the Full Court accepted that the trial judge had followed the required approach in such cases (as identified by the High Court in *AMS v AIF* (supra) and in *U v U* (supra)) and particularly noted that the suggestion that there was some onus on the mother to establish that her parenting had been impaired before asking the court to relocate was "akin to the requirement for the mother to provide 'compelling reasons' for her relocation with the child, a concept rejected by the High Court".[24]

Further, their Honours concluded that no complaint could be made that the trial judge had not adequately considered the father's position and the need for the children to have a relationship and contact with him. Significantly, and in an illustration of the need to consider *all* competing factors in these difficult cases, their Honours noted "a simple finding that the relocation would reduce the children's contact and diminish their relationship with their father could not determine this case. His Honour had to go on and balance (as he did) those matters against other matters which favoured the wife being able to move with the children to Adelaide".[25]

The first judgment on relocation following the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* was *M and S* (2007) FLC ¶93-313. The mother proposed to relocate to the United Kingdom for three years with the parties' eight-year-old daughter. The child lived with the mother in Melbourne and spent time with the father, who lived in Canberra, for two weekends each school term and for half of the school holidays. The father opposed the relocation application and sought extra time with the child. Dessau J followed the pathway as outlined in *Goode and Goode* (2006) FLC ¶93-286 and concluded that there is nothing in the new legislation which explicitly alters the previous approach to relocation except, as the Full Court outlined in *Goode*, there is now a legislative intent in favour of substantial involvement of both parties.

Taylor and Barker (2007) FLC ¶93-345, *Morgan and Miles* (2007) FLC ¶93-343, *Mulvany & Lane* (2009) FLC ¶93-404 and *McCall & Clark* (2009) FLC ¶93-405 confirm the legislative intent in favour of substantial involvement of both parties since the commencement of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

In addition, the Full Court confirmed in *Sayer and Radcliffe* [2012] FamCAFC 209, "*It is now a well established principle that whilst some special requirements may apply, relocation cases are guided and judicial officers are bound by the same legislative pathways as other cases under the Act*". [at 47]

In *Hepburn & Noble* (2010) FLC ¶93-438, the Full Court of the Family

Court of Australia discussed whether the application of the principles in *A* v *A: Relocation Approach* (2000) FLC ¶93-035 is still appropriate in light of the amendments introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Their Honours stated that they were concerned that the decision in *A & A: Relocation Approach* was still being referred to given that since then the Act has been substantially amended and there have been a number of significant decisions of the Full Court addressing the issue of relocation. Their Honours noted that it would have been more relevant for the Federal Magistrate to have had regard to the guidelines and principles emanating from the subsequent Full Court decisions. Those decisions include *Taylor and Barker* (2007) FLC ¶93-345 and *McCall & Clark* (2009) FLC ¶93-405.

In *MRR* v *GR* (2010) FLC ¶93-424, the mother successfully appealed against a decision made by the Full Court of the Family Court which dismissed her appeal against the first instance decision of FM Coker in the (then) Federal Magistrates Court for the parties to have equal shared parental responsibility and for the parties' five-and-a-half-year-old child to spend equal time with each of them. Those orders had been made on the basis that (contrary to the mother's wishes), both parents would live in Mount Isa.

The parties had originally lived in Sydney from 1993 until January 2007, when they moved to Mt Isa for the father to gain work experience as a graduate with a mining company. The parties' child was born in August 2002 while the parties were living in Sydney. The parties separated in August 2007 while attending a graduation ceremony for the father in Sydney, only six months after moving to Mt Isa. The mother returned to Mt Isa only to collect her belongings and otherwise remained living in Sydney with the child following separation.

The trial judge made orders for the child to live in Mt Isa and the mother appealed against the decision on the basis that the trial judge had not considered whether an order for equal time was reasonably practicable in the circumstances. The Full Court found that the trial judge had not erred in considering that the arrangements were in the child's best interests, and noted that although the trial judge did not

expressly address the issue of whether an equal time arrangement would be reasonably practicable, he did consider the matters set out in s 60CC in determining what arrangements were in the child's best interests.

The High Court allowed the mother's appeal and held that:

1. The trial judge treated the answer to the question of whether it was in the best interests of the child to spend equal time with each parent as determinative of whether an order should be made, and held that he failed to consider, as he was obliged to, whether such an order was reasonably practicable in all the circumstances.

2. Considerations of the (best interests) matters under s 60CC are different to those considerations required under s 65DAA(1)(b) (ie whether the child spending time with each of the parents is reasonably practicable).

3. Section 65DAA(1) is concerned with the reality of the situation of the parents and the child, not whether it is desirable that there be an equal time arrangement. The presumption of equal shared parental responsibility in s 61DA(1) is not of itself determinative that an equal time arrangement is in the best interests of the child and reasonably practicable. Section 65DAA(1)(b) requires a practical assessment of whether an equal time arrangement is feasible. As an equal time arrangement would only be possible if both parents lived in Mt Isa, the trial judge was obliged to consider the mother's true circumstances (of wishing to live in Sydney) in determining whether an equal time arrangement was reasonably practicable.

4. The evidence before the trial judge did not permit a finding that an equal time arrangement was reasonably practicable, giving consideration to:

    a. the mother's requirement to live in a caravan park while in Mt Isa (due to the unavailability, long waiting lists, and expense, of rental accommodation)

b. the mother's limited opportunities for employment in Mt Isa and the large disparity in income earning capacity while the parties both lived in Mt Isa, and

c. the mother's isolation from her family and the High Court's decision that the finding made by FM Coker that "the mother's anguish and depression in being in Mount Isa . . . can, to a significant degree if not in their entirety, be dealt with by . . . counselling" was not supported by the evidence.

5. The Full Court of the Family Court should have held that:

a. it was not open to the trial judge to make a finding that it was reasonably practicable for the child to spend equal time or substantial and significant time with each parent, and

b. accordingly it was not open to the trial judge to consider making an order for the child to spend equal time with each of the parents.

The High Court allowed the mother's appeal, and set aside both the decision of the Full Court and FM Coker. The matter was remitted to the Federal Magistrates Court (as it then was) for rehearing de novo.

In *Malcolm & Monroe and Anor* (2011) FLC ¶93-460, the majority held that just as it was not incumbent on an applicant to establish compelling reasons justifying a proposed move, neither was there an onus on the person "left behind" to demonstrate why the other parent should not move.

In *Styles v Palmer* [2014] FamCA 383, Berman J allowed the children to relocate to the United Kingdom (where they originated from) with the mother on a final basis, after a period of two years, during which time the children would live with the mother and spend five nights per fortnight with the father.

In *Oswald & Karrington* (2016) FLC ¶93-726, the Full Court allowed the mother's appeal against a coercive order made by the trial judge, which required the mother and the children (who had moved some three hours away from the family home at separation) to reside within

an 80-km radius of a particular town (which was approximately a midpoint between the town the mother and children had moved to at separation), and the town where the family resided prior to separation (where the father remained living). The Full Court found that the trial judge had erred in making that order, and remitted the matter for rehearing. The Full Court referred *D and SV* (2003) FLC 93-137 and *Sampson and Hartnett (No10)* (2007) FLC 93-350 and noted that:

- it is well established that the proper exercise of the power to make a coercive order is at the extreme end of the discretionary range;

- there needs to be rare or extreme factors that warrant the exercise of the court's discretion to make a coercive order requiring a parent to relocate, so as to continue to undertake the role of primary carer, and

- the court must explore and consider alternatives to restricting freedom of movement, particularly where the coercive order would require a party to relocate contrary to that party's proposal, and involve a primary carer undertaking the role of primary carer in a place which was not of the primary carer's choice.

The Full Court found that:

(a) none of the circumstances in the case deemed it unnecessary for the trial judge to explore and consider alternatives to the coercive order that was made.

(b) in fact, numerous circumstances brought that imperative into sharp focus.

(c) the only alternative to a coercive order (directed to the mother) that the trial judge considered was a coercive order directed to the father, which would have required him to reside in the town the mother had relocated to. The trial judge excluded that option, and proceeded to make the coercive order directed at the mother, without exploring or considering any other alternatives, and

(d) the trial judge also failed to examine and consider the s 60CC

consideration as the means by which the children's best interests were to be determined, by reference to the parties' competing proposals.

The issue of *interim relocation* was considered in *Browne* v *Keith* [2015] FamCAFC 143 where the trial judge ordered the mother to return from Western Australia to New South Wales after she unilaterally moved with the child. The Full Court found that the trial judge erred in concluding that, except in cases of emergency, a court should not readily grant interim relocations where the move has been made unilaterally, and that doing so erroneously put the onus on the mother, in that case, to prove the situation was an emergency.

Relocation cases remain difficult and finely balanced. Much turns on the quality of the evidence before the court. Careful consideration should be given by parties to all of the implications and practical effects of a move, including the impact on the child of removal from a familiar environment, in addition to a reduction in physical proximity to another parent.

Footnotes

13 *B and B*: *Family Law Reform Act 1995* (1997) FLC ¶92-755.

14 Ibid, at p 84,194.

15 *A* v *A: Relocation Approach* (2000) FLC ¶93-035.

16 *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755.

17 *AMS* v *AIF*; *AIF* v *AMS* (1999) FLC ¶92-852.

18 *U* v *U* (2002) FLC ¶93-112.

19 *Bolitho* v *Cohen* (2005) FLC ¶93-224.

20 Ibid, at p 79,699.

21 Ibid, at p 79,701.

22 *H and H*, unreported (EA 73 of 2004).

23 Ibid, at p 13.

24 Ibid, at p 16.

25 Ibid, at p 19.

CHILD ABDUCTION

Editorial information

Written by Anne-Marie Rice and updated by Louise O’Reilly

INTRODUCTION

¶9-000 The Hague Convention and the Australian Regulations

The circumstances surrounding the unilateral removal of a child by a parent to a foreign country are often complex and, understandably, emotionally fraught. The resolution of matters involving international child abduction, and the enforcement of parental rights in foreign jurisdictions, can be similarly complex and, by virtue of their international aspect, costly.

Australia is a party to the Convention on the Civil Aspects of International Child Abduction, otherwise known as the Child Abduction Convention or the Hague Convention which was signed at The Hague on 25 October 1980. Its aim is to secure the prompt return of an abducted child to their country. On 29 October 1986, the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) took effect, and enacted into Australian law the matters covered by the Hague Convention.

The Regulations came into effect on 1 January 1987, but have been amended many times, most recently in July 2007 so as to ensure the Regulations reflect the Pt VII changes to the terminology now used in parenting cases. Significant amendments took effect on 1 November 1995 as well as in December 2004. Practitioners should take care in interpreting the existing authorities in light of those legislative changes (particularly reg 14 which was amended as a direct result of the rejection of the Attorney-General's submissions in *A and GS & Ors*).[1]

Despite the international element involved in these types of cases, the Hague Convention itself has no force or effect here, and the Australian courts are bound only by the provisions of the Regulations and the case authorities determined in the Family Court of Australia and the High Court. Cases brought under the Regulations are not subject to the paramount principle of the best interests of the child being the primary consideration. They are highly technical and, for the reasons set out below, the discretion of the court is limited.

Footnotes

1 *A and GS & Ors* (2004) FLC ¶93-199.

¶9-010 Object of the Convention and Regulations

The principal object of the Hague Convention, and thus of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations), is to secure the prompt return of a child who has been wrongfully removed from one convention country to another, or who has been wrongfully retained in a convention country.

A further object of the Hague Convention is to secure recognition in all other convention countries of parental rights over a child under the law of the child's home country.

In other words, all signatory states to the Hague Convention accept that disputes regarding children are best determined by courts in the country with which the child has the most obvious and substantial connection, following the child's return to that country.[2]

By providing a mechanism for the prompt return of a child who has been removed from his or her home country, the Hague Convention and the Regulations seek particularly to discourage child abduction, a course of action which may often seem attractive to a disgruntled parent given the ease with which international travel is now possible.

Consistent with the provisions of the Hague Convention, the Regulations expressly provide for the prompt return of a child who has been wrongly removed to, or retained in, Australia from another convention country, or who has been wrongly removed to, or retained in, another convention country from Australia.

The Regulations compel Australian courts to order the return of a child to their home country unless certain specific and exceptional circumstances exist. Unlike in matters pursuant to Pt VII of the *Family Law Act 1975* (Cth), the best interests of the child are not the paramount consideration, and the discretion of a court to refuse to order the return of a child to his or her home country is very limited.

Pursuant to reg 2(1) of the Regulations, a convention country means any country in respect of which the Convention has entered into force with Australia. A list of countries in respect of which the Convention has entered into force with Australia can be viewed on the Attorney-

General's website at:
https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFam

Note

At the date of publication, the countries which have, according to the Commonwealth Attorney-General's Department, ratified the Hague Convention are (in alphabetical order):

Albania	Luxembourg
Argentina	Macedonia, Fmr Yugoslav Republic of
Armenia	Malta
Austria	Mauritius
Bahamas	Mexico
Belarus	Moldova, Republic
Belgium	Monaco
Belize	Montenegro
Bosnia and Herzegovina	Netherlands
Brazil	New Zealand
Bulgaria	Nicaragua
Burkina Faso	Norway
Canada	Panama
Chile	Paraguay
China (Hong Kong and Macau only)	Peru
Colombia	Poland
Costa Rica	Portugal

Croatia
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
El Salvador
Estonia
Fiji
Finland
France
Georgia
Germany
Greece
Guatemala
Honduras
Hungary
Iceland
Ireland
Israel
Italy
Japan
Latvia
Lithuania
Korea (Republic of)
Romania
Saint Kitts and Nevis
San Marino
Serbia
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Thailand
Trinidad and Tobago
Turkey
Turkmenistan
Ukraine
United Kingdom
United States of America
Uruguay
Uzbekistan
Venezuela
Zimbabwe

The mere signing of the Hague Convention by another country, without ratifying it by enacting it in domestic law, does not make the country one in respect of which the Hague Convention has entered into force for Australia: *Hooft van Huysduynen and van Rijswijk (No 1)*.[3]

According to the Commonwealth Attorney-General's Department, the following countries have acceded to the Convention but it is not yet in force between that country and Australia:

- Seychelles — acceded in May 2008
- Morocco — acceded in March 2010
- Russia — acceded in July 2011
- Andorra — acceded in April 2011
- Gabon — acceded in December 2010
- Guinea — acceded in November 2011
- Lesotho — acceded in June 2012
- Kazakhstan — acceded in June 2013
- Iraq — acceded in March 2014, and
- Zambia — acceded in August 2014.

For more information on the Hague Convention, including a status table for each signatory country and the most up-to-date country information, visit the Hague Conference on Private International Law website at: https://www.hcch.net/en/instruments/conventions/full-text

Australia also has bilateral agreements on child welfare with Egypt and Lebanon: the Australia-Egypt Agreement and the Australia-Lebanon Agreement.

Footnotes

Footnotes

2 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081.

3 *Hooft van Huysduynen and van Rijswijk (No 1)* (1990) FLC ¶92-119.

¶9-020 Key concepts of the Regulations

A child

The Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) apply to a child under the age of 16 years who has been habitually resident in Australia, or in another convention country, immediately before their removal or retention.

Habitual residence

A person, institution or other body has rights of custody in relation to a child only if (inter alia) the child was habitually resident in Australia or in another convention country immediately before the child's removal or retention.

[Wrongful] removal or retention

Removal and retention are mutually exclusive concepts. "Removal" involves the physical removal of a child to another country. "Retention" occurs when a child remains in another country beyond the period consented to by the other parent (or person/entity with rights of custody relating to that child). The Regulations apply where a child is:

- removed from a Hague Convention country to Australia
- removed from Australia to a Hague Convention country
- retained in a Hague Convention country, or

- retained in Australia.

The removal or retention is “wrongful” where a child has been removed from his or her place of habitual residence, or retained in a place in which they are not habitually resident, in breach of a parent’s (or other’s) rights of custody, which were actually being exercised at the time of removal or retention.

Rights of custody

For the purposes of the Regulations, “custody” includes the guardianship of the child, responsibility for the long-term or day-to-day care, welfare and development of the child, and responsibility as the person with whom the child is to live: reg 18(2). It expressly does not refer to the concept of the time a child is to spend with a parent.

Eligible applicants

Applications for an order for the return of the child may be brought by a Central Authority or a person, institution or other body with rights of custody in relation to a child.

Central Authority

The formal procedures for the return of a child under the Regulations are ordinarily undertaken, not by the private individual who seeks the child’s return (although this is possible in light of the 2004 amendments to the Regulations), but by an official government body formally known as “the Central Authority”. Each Hague Convention country is required to establish a Central Authority which may then act at the request of a Central Authority from another signatory state. In Australia there is a Commonwealth Central Authority — the Secretary to the Attorney-General’s Department. There is also a Central Authority for each state and territory, the details of which are in ¶9-110.

Return is to a country, not a person

An order for “the return of a child” under reg 14(1)(a) simply requires the return of the child to the country of its previous habitual residence, not to a particular person. An order made pursuant to that regulation does not determine who will be the child’s custodian, guardian or

person with parental responsibility upon the return of a child to the country of habitual residence.[4] That is an issue to be dealt with by a court of competent jurisdiction in the place to which the child is returned.

Note

The Commonwealth Attorney-General's Department publishes a free International Child Abduction Kit which provides much useful practical information for those whose children have been taken from Australia to another convention country. It contains, among other things, a copy of an application for the return of a child, and details of financial assistance that might be available. Information is also available on the Attorney-General's Department website. See: https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFa

Footnotes

4 Family Law (Child Abduction Convention) Regulations 1986, reg 18(1)(c).

¶9-030 What happens if the Regulations apply?

The effect of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) is clearly, and logically, articulated in reg 16, which provides:

> "(1) If:
>
> (a) an application for a return order for a child is made; and
>
> (b) the application (or, if regulation 28 applies, the original

application within the meaning of that regulation) is filed within one year after the child's removal or retention; and

(c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);

the court must, subject to subregulation (3), make the order.

(1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:

(a) the child was under 16; and

(b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

(e) at the time of the child's removal or retention, the person, institution or other body:

(i) was actually exercising the rights of custody (either jointly or alone); or

(ii) would have exercised those rights if the child had not been removed or retained.

(2) If:

(a) an application for a return order for a child is made; and

(b) the application is filed more than one year after the day on

which the child was first removed to, or retained in, Australia; and

(c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;

the court must, subject to subregulation (3), make the order.

(3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:

(a) the person, institution or other body seeking the child's return:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms".

Each of the important issues and concepts contained within these Regulations are discussed in detail below.

¶9-040 When do the Regulations apply?

There are four primary requirements for an application for the return of a child to another country, or to Australia from another country, to fall within the scope of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations), namely:

1. there must be an *eligible applicant*

2. there must be a *relevant child*

3. the child must have been either:

   – *wrongfully removed to, or retained in*, Australia from another convention country, *or*

   – *wrongfully removed to, or retained in*, another convention country from Australia, and

4. the application is made *within one year* of the date of removal or retention.

¶9-050 Eligible applicants

Prior to amendments to the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) in December 2004, there was some uncertainty as to who had standing to bring an application for the return of a child who had been abducted from another convention country to Australia.

In *Panayotides v Panayotides*,[5] the Full Court held that a parent had standing to bring an application under the Regulations. However, in *A*

and GS & Ors,[6] the Full Court rejected the submissions made on behalf of the Commonwealth Attorney-General that the father, who had brought the application for the return of a child to the United States, had the necessary standing to do so. The Full Court held that the wording of reg 14, as it then read, made it clear that applications could only be brought by the Central Authority.

As a direct result of this decision, reg 14 was amended and now clearly provides that if a child is removed from a convention country, or retained in Australia, applications for an order for the return of the child may be brought by:

- a responsible Central Authority, or
- a person, institution or another body that has rights of custody in relation to the child for the purposes of the Convention (these are all commonly known as “Article 3 applicants”, the meaning of which is defined in reg 2).

The concept of an “institution or another body that has rights of custody” was raised in *Brooke v Director-General, Department of Community Services*,[7] where the Full Court held that a court can have rights of custody in relation to a child.

In that case, the mother of a young child had applied to the Supreme Court of British Columbia for orders that the child live with her and for the father to spend time with the child in the presence of a third party. Prior to any decision being made, the father brought the child to Australia without the mother’s knowledge or consent. The Australian Central Authority received a request from the Central Authority of British Columbia for the return of the child, and an application pursuant to the Regulations was filed. The trial judge was satisfied that the child was removed from a convention country when an institution or other body (such as the Supreme Court of British Columbia) had a right of custody which would have been exercised but for the removal of the child. Accordingly, orders were made for the return of the child. The father appealed.

In dismissing the appeal, Kay, Holden and Barlow JJ said:

> "Where a foreign court is properly seized of an issue as to where a child should reside, and where, whilst those proceedings are pending the child is removed from the jurisdiction of that Court without the consent of the Court, then, where an application is properly brought under the terms of the Family Law (Child Abduction Convention) Regulations 1986 in Australia, an Australian court is bound to recognise the rights of custody that repose in the foreign court otherwise properly seised with the dispute where those rights of custody include the right to determine the place of residence of the child".[8]

The orders which any applicant may seek are set out in reg 14(1)(a)(i)–(v) and include:

- orders for the return of the child
- the issuing of a warrant to find and recover the child (see also reg 14(4))
- orders restraining the removal of a child from a certain place, and
- orders requiring the child to be placed with an appropriate person/institution/other body until further orders are made.

Regulation 14(1)(a)(vi) also empowers the court to make such orders as the Central Authority considers appropriate to give effect to the Hague Convention (this power does not, it appears, extend to an Article 3 applicant).

Where the issue involves the return of the child to Australia, reg 11 provides that a person, institution or other body claiming that their rights of custody have been breached by the removal of a child from Australia or the retention of the child in a convention country, may send a written request to the relevant Central Authority for the claim to be transmitted to the Central Authority of the country to which the child has been removed or in which they are retained (reg 11(1)).

If the Central Authority is satisfied that the request is sent in accordance with the requirements of the Hague Convention, such action as is required under the Hague Convention *must* then be taken

(reg 11(3), (4)). Regulation 14(2) also empowers the Central Authority to apply (in Form 2C) for additional orders, including a warrant pursuant to reg 14(4), and such other orders as may be necessary to secure the welfare of the child after his or her return to Australia.

Footnotes

5 *Panayotides* v *Panayotides* (1997) FLC ¶92-733.

6 *A and GS & Ors* (2004) FLC ¶93-199.

7 *Brooke* v *Director-General, Department of Community Services* (2002) FLC ¶93-109.

8 Ibid, at p 89,040.

¶9-060 Relevant child

The Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) apply only to a child who is under the age of 16 years: see reg 2(1) for the definition of “child”.

Once a child attains the age of 16 years, the Regulations no longer apply even if the proceedings have been commenced before the child turns 16. Orders for the return of the child aged between 16 and 18 must be sought under the general provisions of Pt VII of the *Family Law Act 1975* (Cth).

For a child to come within the scope of the Regulations, that child must also have been habitually resident in Australia, or in another convention country, immediately before their wrongful removal or retention. The concept of “habitual residence” is referred to in greater detail below.

¶9-070 Wrongful removal or retention

It is commonly said that for an application for the return of a child to come within the scope of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations), there must have been either a wrongful removal or a wrongful retention of the child. The expressions “wrongful removal” and “wrongful retention” are, however, not readily found in the Regulations.

The words “removal” and “retention” are no longer defined in the Regulations (they were, prior to the December 2004 amendments, defined in reg 3). In the case of *Hanbury-Brown and Hanbury-Brown; Director General of Community Services*,[9] the court identified that there must actually be a physical removal of a child to another country. Aside from this decision, there have been no other attempts by Australian courts to define these words, and it may therefore be presumed that the words “removal” and “retention” can be given their common meanings.

The Family Court has considered the concept of “removal” in circumstances where orders were made under Pt VII of the *Family Law Act 1975* (Cth) prior to the alleged wrongful removal of the child. *State Central Authority and LJK* (2004)[10] involved an application for the return of a child to the United States after his mother took the child to Australia without the father’s consent.

In that case, the child was born in Australia and, shortly after his birth, the mother obtained orders that the child live with her and for sole responsibility for the child’s long-term and day-to-day care, welfare and development. The mother subsequently travelled to the United States and resumed her relationship with the father, who was an American citizen. The parties were subsequently married in Virginia and, two years later, without the father’s knowledge or consent, the mother returned with the child to Australia and sought interim orders and directions in the Family Court. That application was stayed in light of the intervention of the State Central Authority.

In that case, Morgan J set out a useful summary of the general principles applicable to these types of cases[11] and, ultimately, concluded that, despite the orders made in the Family Court prior to the parties’ marriage, the father had, and was exercising, rights of

custody at the time of the removal of the child, and that removal was, therefore, wrongful in accordance with the Regulations. In reaching this conclusion, her Honour accepted the father's evidence that the law of Virginia was such that the parties' marriage rendered the earlier Family Court orders null and void.

The House of Lords has made it clear that a "retention" occurs only where a child has been lawfully taken from one country to another (eg for a holiday, or for the exercise of contact with the child), and there has then been a failure to return the child.[12] The person seeking the return of a child must point to a specific act of retention at a specific time in order to succeed in an application for the return of a child.[13]

When the removal or retention becomes "wrongful"

The point of time at which a child was wrongfully removed from or wrongfully retained in a country is a matter of fact. Whether or not the removal or retention of a child is wrongful, in the context of an application brought pursuant to reg 14, is to be determined by considering the criteria set out in reg 16(1A) which provides that a child's removal to, or retention in, Australia is wrongful if:

- the child was under 16
- the child habitually resided in a convention country immediately before the removal to, or retention in, Australia (even if the child was initially removed to a non-convention country — see reg 2(1C))
- the applicant had rights of custody (see reg 4(2)) under the law of the country in which the child habitually resided immediately prior to the removal to, or retention in, Australia
- the child's removal/retention was in breach of those rights of custody, and
- those rights were *actually* being exercised at the time of the child's removal, or would have been exercised but for the removal.

The removal or retention of a child may not be wrongful at the time it

occurred but may subsequently become so, and therefore fall within the scope of the Regulations. For example, if a child is taken to Australia, from a convention country, for a holiday and with the consent of the other parent but is not returned at the agreed conclusion date, the retention becomes wrongful and the parent in the child's place of habitual residence may bring an application or request that the relevant Central Authority do so. In *Director-General, Department of Families v P*,[14] Jerrard J observed that there will ordinarily be a wrongful retention if consent that a child reside in another country indefinitely is then reasonably revoked.

The date on which a child is wrongfully retained is the day after the date a child is due to be returned under any original agreement between the parents, and not from the date on which a threat to retain the child is made.

This point is made clear in the case of *Director-General, Department of Families and BW*,[15] in which the mother travelled with the parties' child to Australia from New Zealand with the father's consent. In December, the mother advised the father that the child would not be returning to New Zealand on 20 January 2002 as previously agreed. The application for the return of the child was filed on 15 January 2003. The mother asserted that the one-year limitation to bringing proceedings under the Regulations commenced from the date the father was informed of her intention to retain the child (and that the father was therefore out of time in bringing his application).

O'Reilly J found that there was no reason to support the proposition that the retention occurred on the date the mother told the father she would not return the child, as opposed to the day following the date after the parties had previously agreed the child would be returned. The application was made within 12 months of that date and was, therefore, not out of time. Although, the case involved the consideration of the now repealed reg 3, it appears that the principles of when the retention occurred remain relevant.

Actually exercising rights of custody

Regulation 16(1A) makes specific reference to the fact that rights of custody must have been "actually" exercised at the time of the

removal or retention. It is not enough for a person simply to have rights of custody, but to have elected not to exercise them. Whether a person was actually exercising, or would actually have exercised, rights of custody in relation to a child at the relevant time is a matter of fact.[16] The Full Court of the Family Court has held that, for the purposes of reg 4, a person may be regarded as actually exercising rights of custody in relation to a child even though he or she has delegated these rights to someone else (eg a relative) for the short term.[17]

There is a distinction between “actually” and “actively” exercising rights of custody. Some rights of custody may, although actually being exercised, be incapable of active exercise — for example, rights to veto a decision about where a child may live or travel.[18]

As there must be a breach of rights of custody for the removal or retention of a child to be wrongful, it follows that if no one has any such rights (because, for example, the only person who had them is now dead), there can be no wrongful removal or retention for the purposes of the Regulations.[19]

Footnotes

9 *Hanbury-Brown and Hanbury-Brown*; *Director General of Community Services* (1996) FLC ¶92-671.

10 *State Central Authority and LJK* (2004) FLC ¶93-200.

11 Ibid, at p 79,296.

12 *Re H (Minors)* [1991] 2 AC 476.

13 *Re S (Minors)* [1994] Fam 70.

14 *Director-General, Department of Families* v *P* (2001) FLC ¶93-077.

15 *Director-General, Department of Families and BW* (2003) FLC ¶93-150.

16 *Re F* [1995] Fam 224 at p 235.

17 *Director General, Department of Community Services* v *Crowe* (1996) FLC ¶92-717 at p 83,637.

18 *Re Bassi*; *Bassi and Director-General, Department of Community Services* (1994) FLC ¶92-465 at p 80,825.

19 *Re S (a Minor)* [1998] AC 750 at p 767.

¶9-080 12-month time limit

If the criteria of reg 16(1A) of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) are met, and the application is made within one year of the date the child was first removed to, or retained in Australia, then, unless one of the narrow exceptions set out in reg 16(3) applies, the court *must* order the return of the child (reg 16(1)).

If the application has been made more than a year after the date the child was first removed to or retained in Australia, and the person opposing the return has not established that the child is settled in his or her new environment, then, again subject to the limited exceptions in reg 16(3), the court *must* order the return of the child (reg 16(2)).

The time limitations for the removal or retention of children to/in other Hague Convention countries will be determined by the applicable regulations in that country.

OTHER KEY CONCEPTS

¶9-090 Rights of custody

The notion of “rights of custody” is of fundamental importance to an application for the return of a child. Unless the removal or retention of a child is in breach of a person’s/institution’s rights of custody, no relief can be granted under the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations). Unfortunately, the definition of “rights of custody” in the Regulations is, somewhat unhelpfully, circular.

Regulation 4(1) states that, provided that a child was habitually resident in Australia (or another convention country) immediately before his or her removal or retention, a person, institution or other body has rights of custody in relation to that child if “rights of custody” were attributed to that person, institution or other body. These “rights of custody” are not expansively defined, and reg 4(2) simply states that they “include rights relating to the care of the person of the child and, in particular, the right to determine the place of residence of the child” under a law in force in that convention country.

The Full Court of the Family Court has made it clear that the notion of “rights of custody” in the Regulations does not necessarily, and despite the terminology, have any connection with previous references to “custody” under Australian domestic law.[20]

However, the right to determine a child’s place of residence is a “right of custody” for the purpose of the Regulations. A court can therefore have rights of custody in relation to a child where it has been approached to make a decision in relation to the care or welfare of the child, as was the case in *Brooke v Director General, Department of Community Services*.[21]

Rights of custody may be possessed either alone or jointly with another person/body: and may arise by operation of law, by judicial or administrative decision, or by an agreement having legal effect under the law of Australia or another convention country (reg 4(1)(b) and (3)).

Further, the right of a person simply to withhold consent to a child

leaving a country (a right available to all Australian parents) gives him or her "rights of custody". This principle was enunciated in the English decision of *C v C*,[22] and has been accepted as an accurate statement of the law in Australia in many cases including *Director-General, Department of Families, Youth and Community Care v Hobbs*.[23]

In order to fall within the scope of the Regulations, it is irrelevant whether the removal or retention of a child was lawful or unlawful according to the law of the child's home country, or whether the breach was made in good faith (eg upon receipt of erroneous legal advice or a misunderstanding between parents). The essential question in any case is simply whether the conditions of the Regulations have been met.

Whether a person enjoys rights of custody in relation to a child, and whether their rights of custody have been breached, is a matter for the courts of the jurisdiction which has to determine this issue, and not for the courts of the child's home country. In Australia, whether a person has breached rights of custody in relation to a child taken from another convention country is a matter for the Family Court of Australia to decide.

Special provisions in the Family Law Act

There are special provisions in s 111B of the *Family Law Act 1975* (Cth) (FLA) which specify when a person has custody of, and access to, a child for the purposes of the Hague Convention in light of the fact that the notions of custody and access are no longer part of the law under Pt VII of the FLA.

Although it is not intended to be a complete statement of the circumstances in which a person has, for the purposes of the Hague Convention, custody of, or access to, a child, or a right or rights of custody or access in relation to a child, s 111B(4) states:

> "For the purposes of the Convention:
>
> (a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to live under a parenting order; or

(ii) who has parental responsibility for a child under a parenting order;

should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to spend time under a parenting order; or

(ii) with whom a child is to communicate under a parenting order;

should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3))".

Footnotes

20 *McCall and McCall*; *State Central Authority (Applicant)*; *Attorney-General (Cth) (Intervener)* (1995) FLC ¶92-551 at pp 81,515–81,517.

21 *Brooke* v *Director General, Department of Community Services* (2002) FLC ¶93-109.

22 *C* v *C* [1989] 1 WLR 654.

23 *Director-General, Department of Families, Youth and Community Care* v *Hobbs* (2000) FLC ¶93-007 at pp 87,171–81,173; [1999] FamCA 2059.

¶9-100 Habitual residence

A child's country of habitual residence is an essential element in determining whether a person has rights of custody in relation to the child. Regulation 4(1)(a) of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) provides that, a person, institution or other body has rights of custody in relation to a child only if (inter alia) the child was *habitually resident* in Australia or in a convention country immediately before the child's removal or retention.

Although they are often interrelated, the issue that the court must consider is the habitual residence of a child, not their parent.

The expression "habitually resident" in reg 4(1)(a) is not defined in the Regulations; but it is now well established that it comprises two elements, namely:

- actual residence in a particular country for an appreciable (but not necessarily long) period, and
- a voluntary, settled intention (ie an intention that is unlikely to change in the short term) to reside in that country habitually;[24] *Re B (Minors) (No 2)*;[25] and *State Central Authority v McCall*. See also *Zotkiewicz & Commissioner of Police (No 2)* (2011) FLC ¶93-472.[26]

The issue of a settled intention was the subject of an appeal to the Full Court in the case of *DW and Director General, Department of Child Safety*.[27] The central issue on the mother's appeal was whether her intention to reside with the father in the United States for the purpose of determining whether she could persevere with their relationship was sufficient to enable the trial judge to conclude that the child was habitually resident in the United States immediately prior to the child's removal to Australia. The majority concluded that the mother had not been habitually resident in the United States. It was described as "clearly wrong" to consider that someone going to a country to see if a relationship would "work out" had a settled intention to live there, either for the long term or as part of the regular order of their life. There was no shared intention on the part of the parents that the child's habitual residence was to be the United States. Consequently, the order providing for the child's return was dismissed.

It follows then that a person does not cease to be habitually resident in a country simply because they are out of the country temporarily. For example, an academic is not habitually resident in the country where she is simply on sabbatical leave, even for a year or more, for she does not usually have an intention that this country be her ordinary place of residence,[28] nor, for a similar reason, is an employee habitually resident in a country where he is on a short-term engagement.[29]

For the purpose of the Regulations, a person can have only one place of habitual residence at any given time: see *Hanbury-Brown and Hanbury-Brown*; *Director General of Community Services*[30] and *Commissioner, Western Australia Police v Dormann*[31] However, it is possible for a person, who lives part of each year in one country, and part of each year in another, to have different places of habitual residence at different times of the year.[32]

There is Australian authority for the proposition that habitual residence in a particular country does not depend upon the residence there being lawful. In *Department of Health and Community Services v Casse*,[33] the court found that an illegal immigrant to a country was habitually resident in this country.

Habitual residence of children is a matter of fact and law

Although the notion of habitual residence concerns first and foremost a state of fact, so far as it applies to children it also involves a matter of law.

In *State Central Authority* v *Castillo* [2015] FamCA 792 the Full Court confirmed that the onus of proving, on the balance of probability, habitual residence lies with the central authority.

Regulation 4(1)(a) requires that a child must have been habitually resident in Australia or another convention country for the Regulations to apply. The way of determining the country of habitual residence of a child was considered by both the Court of Appeal and the House of Lords in *Re J (a Minor)*.[34] There, the basic rules were enunciated for the two alternative situations in which a young child ordinarily finds themselves. These are where the child is in the custody of just one person, and where the child is in the custody of two people who live together (the references to custody must now be read in Australia as references to the person with whom a child lives).

The basic rules enunciated by the House of Lords are as follows:

- If a young child is in the custody of just one person, the child's country of habitual residence is ordinarily the same as that person's. A sole custodial parent can accordingly change the child's country of habitual residence along with their own.

- If a young child is in the custody of two people, the child's country of habitual residence is ordinarily that of the couple. Those people can change the child's country of habitual residence together along with their own, but not unilaterally.

It follows then that if one of two persons with the custody of a child abandons, or changes, their country of habitual residence, taking the child away at the same time, the child's country of habitual residence remains that of the person who has been left behind.

Justice Kent considered the concepts of habitual residence and rights of custody in the decision of *DCCSDS* v *Ibbott* [2015] FamCA 698. In that case, the mother had returned from Australia to her home country

of Ecuador prior to the child's birth and, despite her securing orders for child support in Ecuador, the father failed to meet any of his obligations or to form a relationship with the child. The mother and child subsequently travelled to Australia for the purposes of the mother's study — which had been sponsored by the Ecuadorian government on the basis that she return to work in Ecuador — and the father then sought orders for time with the child. Justice Kent found that the child's habitual place of residence was not Australia, that, n accordance with Ecuadorian law, the mother held all rights of custody in relation to the child, and that he was unable to grant the relief sought by the father.

The principles enunciated by the House of Lords in *Re J (a Minor)* were followed in Australia in *State Central Authority* v *McCall* (1995) FLC ¶92-552.[35]

Footnotes

24 *Re J (a Minor)* [1990] 2 AC 562 at pp 578–579.

25 *Re B (Minors) (No 2)* [1993] 1 Fam Law R 993.

26 *State Central Authority* v *McCall* (1995) FLC ¶92-552 at p 81,523.

27 *DW and Director General, Department of Child Safety* (2006) FLC ¶93-255.

28 *Re S (Minors)* [1994] Fam 70.

29 *Re M* [1996] 1 Fam Law R 887 at pp 892, 895.

30 *Hanbury-Brown and Hanbury-Brown*; *Director General of Community Services* (1996) FLC ¶92-671.

31 *Commissioner, Western Australia Police* v *Dormann* (1997) FLC ¶92-766 at p 84,430.

32 *Re A* [1998] 1 Fam Law R 497 at p 505.

33 *Department of Health and Community Services* v *Casse* (1995) FLC ¶92-629.

34 *Re J (a Minor)* [1990] 2 AC 562 at pp 572, 579.

35 *State Central Authority* v *McCall* (1995) FLC ¶92-552 at p 81,523. See also *Artso and Artso* (1995) FLC ¶92-566 at pp 81,637–81,638; *Cooper* v *Casey* (1995) FLC ¶92-575 at p 81,695; *De Lewinski* v *Department of Community Services* (1997) FLC ¶92-737 at p 83,940; *Department of Health and Community Services* v *Casse* (1995) FLC ¶92-629 at pp 82,313–82,315.

¶9-110 Procedure

Applications for the return of a child are made pursuant to reg 14 of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations).

Regulation 14(1) applies to applications in relation to children who have been removed to or retained in Australia. A parent, other body or the Central Authority may bring an application under this regulation. Regulation 14(2) applies to Australian children who have been removed from Australia or retained in another Hague Convention country, and only the Central Authority has standing to bring such an application. An application under either reg 14(1) or (2) must be made to the Family Court, and in accordance with Form 2 of Sch 3.

Until the Full Court handed down its decision in *A and GS & Ors*,[36] there was some uncertainty as to whether or not a person (as opposed to a Central Authority) had standing to bring an application under reg 14(1) for the return of a child removed to or retained in

Australia. Regulation 14(1) was amended following this decision, and it is now unambiguous.

In the majority of cases, the application is made to the court by the Central Authority rather than by an individual parent. Where such an application is made to the Central Authority of a state or territory, which is ultimately satisfied that the application is proper, that Central Authority must forward the application to the Commonwealth Central Authority (reg 11(3)). Provided the Commonwealth Central Authority is satisfied that the application is in accordance with the Hague Convention, it must then take action under the Hague Convention to secure the child's return (reg 11(4)).

The person on whom any application is served may file an answer, or an answer and a cross-application, in accordance with Form 2A. The Central Authority may then file a reply in accordance with Form 2B. For provisions on service of an application under reg 14, see reg 27.

In addition to seeking orders for the return of a child, a Central Authority (but not an applicant in person) may also seek other court orders in Australia under reg 14(1)(a)(vi), (2) and (3) to assist it to secure the return and subsequent welfare of the child. These orders include:

- an order for the issue of a warrant for the location and recovery of the child, including an order authorising a person to stop and search any vehicle, vessel or aircraft, or to enter and search any premises, where he or she believes the child to be, and

- any order that the Central Authority considers appropriate to give effect to the Hague Convention, including an order in relation to the welfare of the child after its return to Australia.

A court hearing an application under reg 14 may make the order sought, and it may also make any other order that it considers appropriate to give effect to the Hague Convention (reg 15(1)(a), (b)). The court may place such conditions on these orders as it considers appropriate (reg 15(1)(c)).

A court hearing an application under reg 14 must not refuse to make

an order for the return of a child simply because an order for the custody of the child is in force, or is enforceable, in Australia (reg 18(1)(a)). The court may nonetheless take into account the reasons for the making of an order relating to the custody of the child (reg 18(1)(b)) and, despite the fact that an order for the return of a child is expressly stated, not to determine the merits of any custody in relation to the child (reg 18(1)(c)). The statutory term “custody” here includes guardianship of the child, responsibility for the long-term or day-to-day care, welfare and development of the child, and responsibility as the person with whom the child is to live (reg 18(2)).

In making orders pursuant to the Regulations, a court may make a declaration that the removal of a child from Australia to a convention country, or the retention of a child in a convention country, was wrongful within the meaning of Art 3 of the Hague Convention (reg 17(1)).

Note

Action for the return of a child wrongfully removed to, or retained in, another Hague Convention country from Australia — and also for the return of a child wrongfully removed to, or retained in, Australia from another Hague Convention country — is most commonly undertaken by an official or institution formally known as a Central Authority.

In Australia there is a Commonwealth Central Authority. This is the Secretary to the Attorney-General’s Department. There is also a Central Authority for each state and territory. In an emergency, the Australian Federal Police in the nearest capital city should be contacted.

As at the date of publication, the address and contact numbers of the Commonwealth Central Authority are:
The Manager
Attorney-General’s Department
International Family Law Section
Access to Justice Division

Robert Garran Offices
3-5 National Circuit
Barton ACT 2600
Phone: (02) 6141 6666
Phone: Freecall 1800 100 480
Fax: (02) 6141 5900
Detailed information in relation to the process for making an application can be found at:
https://www.ag.gov.au/FamiliesAndMarriage/Families/InternationalFa

Duties of the Central Authority

If an application is received by the Commonwealth Central Authority for the return of a child who has been wrongfully removed to, or wrongfully retained in, Australia, and the authority is satisfied that the request is made in accordance with the Hague Convention, the Central Authority *must* take action to secure the return of the child.

It should be noted that the Commonwealth Central Authority is required to take action to secure the return of the child simply to the *country* in which the child had previously habitually resided, not necessarily to the *person* whose rights of custody in relation to the child have been breached. If the Central Authority refuses to accept a request that is not in accordance with the Hague Convention, the person, institution or other body, or Central Authority making the request must be informed as soon as possible (reg 13(3)).

In the event the Central Authority is satisfied that the request is in accordance with the Hague Convention, the action that may, in accordance with reg 13(4) be taken, includes:

- transferring the request to a responsible Central Authority (eg the appropriate state or territory Central Authority)
- seeking an amicable resolution of the differences between the applicant for the return of the child and the person opposing the child's return

- seeking the voluntary return of the child, and
- applying a court order under Pt 3 of the Regulations.

The Full Court of the Family Court has held that there is no requirement that the Commonwealth Central Authority attempt to comply with the first two forms of action specified in reg 13(4) before seeking an order under Pt 3.[37]

The orders that the Central Authority may seek under Pt 3 are set out in reg 14(1). These include:

- an order for the return of the child under the Hague Convention
- an order for a warrant for the location and recovery of the child, including an order to stop and search a vehicle, vessel or aircraft, or to enter and search premises
- an order that the child not be removed from a place specified in the order and that members of the Australian Federal Police prevent the child from being removed from that place
- an order for the placement of the child with an appropriate person, institution or other body pending the determination of a request made to the Central Authority under reg 13, and
- any other order that the Central Authority considers to be appropriate to give effect to the Hague Convention.

Footnotes

36 *A and GS & Ors* (2004) FLC ¶93-199.

37 *MHP* v *Director-General, Department of Community Services* (2000) FLC ¶93-027 at pp 87,438–87,442.

GROUNDS FOR DECLINING TO ORDER THE RETURN OF A CHILD

¶9-120 Introduction

There are six grounds under the Regulations on which the court has a discretion whether to order the return of a child to its home country even though the child has been wrongly removed to, or retained in, Australia. These are the only grounds on which the court *can* refuse to order the return of a child who has been wrongfully removed to, or retained in, Australia.

The grounds are as follows:

1. Where the person, institution or other body applying for the return of the child was not actually exercising rights of custody when the child was removed to, or first retained in, Australia, and would not have exercised those rights had the child not been so removed or retained (reg 16(3)(a)(i)).

2. Where the person, institution or other body applying for the return of the child had consented to, or subsequently acquiesced in, the child being removed to, or retained in, Australia (reg 16(3)(a)(ii)).

3. Where there is a grave risk that the return of the child under the Hague Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (reg 16(3)(b)).

4. Where the child objects, with a strength of feeling beyond the mere expression of a preference or ordinary wishes, to being returned and has attained an age and degree of maturity at which it is appropriate to take into account his or her views (reg 16(3)(c)).[38]

5. Where the return of the child would not be permitted according to the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms (reg 16(3)(d)).

6. Where the application for the return of the child was filed at least one year after the day on which the child was removed to, or first retained in, Australia, and the court is satisfied that the child is settled in its new environment (reg 16(2)).

The mere fact that a person opposing the return of a child establishes one of the grounds does not mean that the court must then refuse to make an order for the child's return. If a ground is established, the court has a discretion whether to order the return of the child.[39]

The onus of establishing one of the discretionary grounds for declining to order the return of a child lies on the person opposing the child's return.[40]

This is made clear from the opening words of reg 16(3) which state:

> "A court may refuse to make an order [for the return of a child] under subregulation (1) *. . . if a person opposing return* establishes that . . . " [emphasis added][41]

Where the application is brought more than a year after the removal or retention of the child, the onus of establishing that the child is settled in his or her environment also falls on the person opposing the child's return ("the abducting parent"). In somewhat confusing terms, reg 16(2)(c) provides that the court must (subject to the reg 16(3) exceptions) order the return of the child if the court is "satisfied that the person opposing the return has not established that the child has settled in his or her new environment". This appears to remain consistent with the requirements under the previous reg 16(1)(b).[42]

Although the opening words of reg 16(3) make it clear that it is the person who opposes the child's return who must establish any of the conditions set out in reg 16(3), this does not mean that this person alone must adduce the relevant evidence. Evidence on point can be obtained from other sources. This is clear, for example, from reg 16(4). All that the opening words of reg 16(3) do is identify the person who must convince the court that from the evidence before it one or other of the conditions in this subregulation is satisfied. Similarly, reg 16(1)(c) makes it clear that the onus of establishing that a child has been wrongfully removed or retained falls on the party seeking the

child's return.

Footnotes

38 See *Garning & Director-General, Department of Communities* (2012) FamCAFC 35.

39 *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011 at p 87,230; *SCA* v *Sigouras* [2007] 37 Fam LR 364 at p 421.

40 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 at pp 88,389–88,390, 88,403; [2001] HCA 39.

41 See generally on this matter: *Gsponer* v *Director General, Department of Community Services, Vic* (1989) FLC ¶92-001 at p 77,158; *Director General of Family and Community Services* v *Davis* (1990) FLC ¶92-182 at pp 78,226–78,227; *Director General, Department of Community Services* v *De Lewinski* (1996) FLC ¶92-674 at p 83,018 (but cf p 83,014); *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at p 83,463.

42 *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,669.

¶9-130 Ground 1: no actual exercise of rights of custody by applicant

A court can elect to decline to make an order for the return of a child if

the person, institution or other body applying for the child's return was not actually exercising rights of custody when the child was wrongfully removed to, or first retained, in Australia, and would not have exercised those rights had the child not been so removed or retained. This is specified by reg 16(3)(a)(i) of the Family Law (Child Abduction Convention) Regulations 1986.

A distinction is drawn between the actual exercise of rights of custody, and the active exercise of them. There is probably no requirement that rights of custody were actively being, or would actively have been, exercised at the relevant time. Some rights of custody are not capable of active exercise, at least on a regular basis (eg those which effectively involve no more than a right of veto).[43]

It is also likely that a person will be regarded as actually exercising rights of custody in relation to a child even though the child was being cared for by some other person on his or her behalf (eg a relative).[44]

Footnotes

43 See on this matter (though in a different context under the Regulations) *Re Bassi*; *Bassi and Director-General, Department of Community Services* (1994) FLC ¶92-465 at p 80,825.

44 See on this matter (though again in a different context under the Regulations) *Director General, Department of Community Services* v *Crowe* (1996) FLC ¶92-717 at p 83,637.

¶9-140 Ground 2: consent or acquiescence in removal of the child

A court can refuse to make an order for the return of a child if the person, institution or other body seeking the child's return had

consented to, or subsequently acquiesced in, the child being removed to, or retained in, Australia. This ground is set out in reg 16(3)(a)(ii) of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations).

The inclusion of the word “may” in reg 16(3)(a)(ii) gives the court discretion, allowing it to make a return order even where consent or acquiescence is shown.[45]

“Consent” and “acquiescence” are distinct notions

The notions of “consent” and “acquiescence” in reg 16(3)(a)(ii) are distinct (see *P v P*),[46] although both concern the state of mind of the person who seeks the return of the child.

Consent concerns the state of mind of this person before the child was removed to, or retained in, Australia. Acquiescence concerns their state of mind after the child’s removal or retention.

Consent in reg 16(3)(a)(ii) relates to agreement or permission by a person who has rights of custody in relation to a child that the child be removed to, or retained in, Australia even though this prevents this person from exercising these rights. Consent must be informed, genuine and unequivocal. This means that the person whose consent is under consideration must have known at the time of the child’s removal or retention that without their permission, the removal or retention of the child would be in breach of their rights of custody. It would appear that there is no requirement of knowledge of the Hague Convention, or that relief is available pursuant to it.

It is reasonable to conclude that consent cannot be a real consent if it results from fraud, duress, deceit or undue influence (but compare the possible implication to the contrary of Lindenmayer J in *Regino and Regino*),[47] nor can consent be a real consent if it results from mistaken advice of their legal position.[48]

There is no requirement that consent be in writing, or that it be the product of an express statement. Consent can be inferred from words and actions provided that the inference of consent is clear.[49]

In case there be any doubt on the matter, consent does not imply that

the person concerned is happy or content with the outcome that has been agreed but, once given and acted upon, it cannot be annulled by a change of mind.

The Family Court has considered the issue of when retention becomes wrongful where consent to the removal of a child to Australia for a fixed period was given.[50]

The notion of *acquiescence*, as used in reg 16(3)(a)(ii), was first considered in detail in Australia in *Police Commissioner of South Australia* v *Temple, MA*.[51] There, Murray J, drawing on the decision of the English Court of Appeal in *Re A & anor (Minors)*,[52] indicated that acquiescence can be either active or passive, expressed or implied, but that it must involve an appreciation by the person concerned that whoever has removed the child has done so unlawfully and that there are remedies against that person. In particular, her Honour said:

> "1. In determining whether a parent could be said to have acquiesced in the unlawful removal or retention of a child by the other parent within art 13 of the Convention each case has to be considered on its own special facts.
>
> 2. Acquiescence can be either
>
> (a)
>
> (i) active acceptance signified either by express words of consent, in which case there has to be clear and unequivocal words, or
>
> (ii) by conduct and the other party has to believe that there has been an acceptance, or
>
> (iii) conduct inconsistent with an intention by the aggrieved parent to insist on legal rights and consistent only with an acceptance of the status quo, or
>
> (b) passive acquiescence inferred from silence and inactivity for a sufficient period in circumstances where

different conduct is to be expected on the part of the aggrieved parent.

3. A parent cannot be said to have acquiesced in the unlawful removal or retention of a child within art 13 unless

(a) he is aware of the other parent's act of removing or retaining the child

(b) is aware that the removal or retention was unlawful

(c) is aware, at least in general terms, of his rights against the other parent, although it is not necessary that he should know the full or precise nature of his legal rights under the Convention".[53]

This interpretation of the notion of acquiescence was subsequently adopted by Treyvaud J in *State Central Authority v McCall*.[54]

Acquiescence can exist only if the person concerned knows that the child's removal to, or retention in, Australia is wrongful (in the sense that it deprives them of the ability to exercise rights of custody in relation to the child).[55] Acquiescence must thus always be informed acquiescence.

In *Police Commissioner of South Australia v Temple, MA*,[56] Murray J indicated that acquiescence requires an appreciation that there are remedies against the person who has removed the child. It is not, however, necessary to know that remedies exist under the Hague Convention.

Also in *Police Commissioner of South Australia v Temple, MA*,[57] Murray J said that acquiescence for the purposes of the Regulations must be clear, total and unqualified. It is accordingly not sufficient that acquiescence be qualified in some way. In the subsequent case of *Department of Health and Community Services v Casse*,[58] Kay J agreed that any acquiescence must be clear and unequivocal.

It would seem to follow from this that acquiescence concerns a resolved state of mind, and that it cannot, without more, be deduced

from a single, isolated statement or a statement made on the spur of the moment. It is, like consent, not a continuing state of mind. As a result, once given, acquiescence cannot be withdrawn.

The Full Court of the Family Court has held that mere passivity, even for a period of eight months, does not constitute acquiescence, especially where this involves confusion, uncertainty and emotional turmoil on the part of the person subsequently seeking the return of a child.[59]

In *Emmett* v *Perry*; *Director-General, Department of Family Services and Aboriginal and Islander Affairs*; *Attorney-General of the Commonwealth of Australia (Intervener)*,[60] Jordan J said that writing a reassuring letter to the child concerned does not constitute acquiescence if other action by the person in question indicates otherwise.

Circumstances which might lead a court to order the return of a child notwithstanding acquiescence were considered by Lindenmayer J in *Regino and Regino*.[61] There the judge said that they probably include duress, undue influence or deceit influencing acquiescence, or the fact that the person ostensibly acquiescing was suffering from such emotional distress or other instability of mood or temperament as to be incapable of giving a rational and informed consent to the removal or retention of the child.

However, in *Department of Health and Community Services v Casse*,[62] Kay J said that if the mind of a person is in a state of confusion or emotional turmoil, there cannot be acquiescence for the purpose of the Regulations. This is almost certainly the better view.

A prompt withdrawal of acquiescence in the wrongful removal or retention of a child might be relevant to the court's exercise of discretion.[63]

Other considerations that might be relevant to the exercise of the court's discretion are the reason for any withdrawal of acquiescence, and the consequences of the acquiescence.[64]

Footnotes

Footnotes

45 *Department of Community Services and Frampton* (2007) FLC ¶93-340 at p 25; In *Re D (a Child)* (2006) UKHL 51 at p 55.

46 *P* v *P* [1998] 1 Fam Law R 630 at p 631.

47 *Regino and Regino* (1995) FLC ¶92-587 at p 81,820.

48 *Re S (Minors)* [1994] 1 Fam Law R 819 at p 831.

49 *Re C* [1996] 1 Fam Law R 461; *Re K* [1997] 2 Fam Law R 212 at pp 217–218; *P* v *P* [1998] 1 Fam Law R 630 at p 633.

50 O'Reilly J in *Director-General, Department of Families and BW* (2003) FLC ¶93-150.

51 *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365.

52 *Re A (Minors)* [1992] 2 Fam Law R 14.

53 *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365 at p 79,828.

54 *State Central Authority* v *McCall* (1995) FLC ¶92-552 at pp 81,525–81,526. See also *Regino and Regino* (1995) FLC ¶92-587 at p 81,820; *Emmett* v *Perry*; *Director-General, Department of Family Services and Aboriginal and Islander Affairs*; *Attorney-General of the Commonwealth of Australia (Intervener)* (1995) FLC ¶92-645 at p 82,523; *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at pp 84,672–84,674.

55 *Re A & anor (Minors)* [1992] 2 Fam Law R 14.

56 *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365 at p 79,828.

57 Ibid.

58 *Department of Health and Community Services* v *Casse* (1995) FLC ¶92-629 at p 82,311.

59 *Laing* v *The Central Authority* (1996) FLC ¶92-709 at p 83,507.

60 *Emmett* v *Perry*; *Director-General, Department of Family Services and Aboriginal and Islander Affairs*; *Attorney-General of the Commonwealth of Australia (Intervener)* (1995) FLC ¶92-645 at p 82,523.

61 *Regino and Regino* (1995) FLC ¶92-587 at p 81,820.

62 *Department of Health and Community Services* v *Casse* (1995) FLC ¶92-629 at p 82,311.

63 *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365 at p 79,828; *Re A & anor (Minors)* [1992] 2 Fam Law R 14.

64 *Re A & anor (Minors)* [1992] 2 Fam Law R 14; *W* v *W* [1993] 2 Fam Law R 211 at p 219; *Re K* [1997] 2 Fam Law R 212 at p 220.

¶9-150 Ground 3: grave risk of physical or psychological

harm

A court can refuse to order the return of a child if it is satisfied that there is a grave risk that the return of the child to the country in which they habitually resided immediately before wrongful removal or retention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Interestingly, in the case of *E (Children) (FC)* (2011) FLC ¶93-471, the court chose to return the children to their father in Norway (after the mother had removed them to England) as the threat of violence was to the mother and not to the children. The appeal court held that the Hague Convention was for the benefit of children, not of adults. Given that violence and abuse between parents can constitute a grave risk to children, where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The court, in this case, was satisfied that the trial judge had adequate material upon which to conclude that sufficient protective measures were in place.

The provisions of reg 16(3)(b) (before the amendments made in 2004) were considered by the High Court in *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services*.[65] The majority held that the words are not to be afforded either a particularly narrow or a particularly broad interpretation, but the words are to be given simply their ordinary meaning.

The High Court also made it clear that reg 16(3)(b) does not require certainty that the return of the child will expose the child to physical or psychological harm, but simply a “grave risk” of this occurring.[66] The majority also emphasised that this part of the regulation requires a grave risk of “exposure” to harm, and not a grave risk of harm.[67]

In his dissenting judgment, Kirby J made the observation that the adoption of the word “grave” to qualify “risk” contemplates that in some cases an order for the return of a child will be made although there is a real, and even a significant, risk of harm to the child, but not a “grave” risk of harm.[68]

The Full Court of the Family Court had cause to consider this issue in *Director-General, Department of Families and RSP*[69] which was a case involving allegations that the mother was at serious risk of committing suicide if the child was ordered to return to Australia. The trial judge accepted the psychiatric evidence that the mother's mental health was such that her suicide was a significant and real possibility. Should this eventuate, it would, in accordance with the psychologist's evidence, expose the child to serious psychological harm. His Honour exercised the discretion contained in reg 16(3) not to order the return of the child, and the Central Authority appealed.

In making reference to the High Court's decision in *JLM*, the Full Court noted "the risk of harm to the child in this case was more than the 'disruption, uncertainty and anxiety' which the High Court majority described as 'well-nigh inevitable' when a child is taken from one country to another without the agreement of one parent" (see p 78,510). The Full Court dismissed the appeal on this point accepting that the trial judge was, in all the circumstances, entitled to find as he did.

It is important to note that, in light of the allegations raised by the mother in that case, both the trial judge and the Full Court made repeated reference to the "degree of disquiet" with which the trial judge's conclusions were reached, and the court's "real concern about the disingenuous adoption of stances designed to achieve the purposes of abductors in resisting orders for the return of children".

In the earlier case of *Gsponer v General, Department of Community Services, Vic*,[70] the Full Court of the Family Court observed that para (b) sets out three distinct situations which may lead a court to decline to return a child. These are that there is a grave risk that the return of the child to his or her country of previous habitual residence would:

- expose the child to physical harm
- expose the child to psychological harm, or
- otherwise place the child in an intolerable situation.

The Full Court also observed in this case that, by virtue of the initial words concerning the third situation ("or otherwise place the child in an intolerable situation"), the first two situations concern not simply a grave risk of any physical or psychological harm, but a grave risk of substantial or weighty physical or psychological harm.[71]

This decision was discussed in the Full Court decision of *Bennett & Ors and Secretary, Attorney-General's Department*[72] which involved the application for the return of a child to New Zealand.

Who is to be at risk of harm?

The "grave risk" referred to in reg 16(3)(b) is one that might arise from the return of the child to its country of previous habitual residence, although the grave risk can relate to harm or an intolerable situation for any person and not just the particular child concerned.

Prior to the 2004 amendments to the Regulations, the terms of reg 16(3)(b) made specific reference to the return of the child "to the country in which he or she habitually resided immediately before the removal or retention". Those words have been replaced simply by "under the Convention".

This issue was considered in *Genish-Grant v Director-General, Department of Community Services*,[73] where the Full Court upheld the trial judge's decision not to order the return of two children to Israel. The children were Israeli citizens and had been brought to Australia by their mother. Their father sought their return and, although satisfied that the matter came within the scope of the Regulations, the court accepted the mother's position that the return of the children exposed them to an unacceptable risk of harm in light of the conflict in Israel at the time. The mother produced evidence of travel advice from the Department of Foreign Affairs and Trade cautioning Australians from undertaking non-essential travel to Israel. By the time of the appeal this warning had been upgraded and the mother sought to adduce further evidence in this regard. The trial judge accepted that the ground under reg 16(3)(b) had been made out and elected not to order the return of the children.

In dismissing the father's appeal, the majority (Finn and Barlow JJ)

held that it was not necessary for the mother to prove that a return to Israel would expose the children to a grave risk of harm over and above the risk of harm to which any individual in Israel is exposed.[74]

The High Court has previously indicated that despite the reference to grave risk in the previous version of reg 16(3)(b), being a risk that might arise from the return of the child to its country of previous habitual residence, and not to a place or person within that country, consideration has nonetheless to be given to the actual situation in which the child will find itself upon its return.[75]

Clear evidence required of grave risk of harm

The Full Court of the Family Court has held that clear and compelling evidence is required before a court can find that there is a grave risk that a child would be exposed to harm if they were to be returned to their home country, and that such a finding is likely to be made only in exceptional circumstances.[76]

The fact that the return of a child to their home country might involve some distress to the child is not, without more, sufficient to bring the case within the scope of reg 16(3)(b).[77] This is an obvious consequence of the fact that for the purposes of para (b), any psychological harm must be of a substantial or weighty kind.[78]

The decision in *State Central Authority & Papastavrou* [2008] FamCA 1120 relied heavily upon the unique factual circumstances and, particularly, the absence of evidence contrary to that produced by the mother. The case involved an Australian mother, a Greek father and their two children who were born in Greece. The mother moved to Australia with the children following advice from her doctor that she required the physical and emotional support of her family. Bennett J accepted the mother's evidence that the father had repeatedly abused her, often in the presence of the children, and had also occasionally abused one of the children. Her Honour dismissed the father's application for the return of the children to Greece on the basis that it would cause a grave risk of harm to the children. Her Honour found the father's past behaviour constituted a future risk of harm to the children, especially as it was accepted that the mother could not rely

on the Greek authorities to protect her and the children from future violence based on her evidence that when she had contacted the police in Greece they informed her that they could do little besides talk to the father and also expert evidence that there were inherent problems with the laws against enforcement of domestic violence in Greece. Her Honour also found that the mother had developed a medical condition which made her more vulnerable to secondary injury in the event of future violence which compounded the impact future violence may have on the children. Her Honour further accepted that there was a serious risk due to the possibility that the mother would be incarcerated upon her return to Greece as the father had brought criminal proceedings against her for the children's abduction.

Criteria under reg 16(3)(b) to be determined objectively

The criteria under reg 16(3)(b) are all to be determined from an objective point of view.[79] See also *Director-General, Department of Families and RSP*[80] and particularly the trial judge's disquiet about making orders in favour of a mother who alleged that there was a serious risk of suicide in the event the orders sought by her were not made.

Local courts may be able to remedy any risk to the child

In *Gsponer v Director General, Department of Community Services, Vic*,[81] the Full Court of the Family Court indicated that Australian courts should be slow in finding that there would be a grave risk to a child if he or she were to be returned to a convention country, at least where it is reasonable to expect that the prospective harm could be prevented by appropriate judicial remedies in that country. In particular, the Full Court said:

> "There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian Government is satisfied to that effect".[82]

Similarly, in *Murray* v *Director, Family Services, ACT*,[83] the Full Court

of the Family Court said in respect of the return of a child to New Zealand:

> "It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts".[84]

In *Murray's* case, the Full Court concluded that, in accordance with the views expressed in *Gsponer's* case, the circumstances referred to in reg 16(3)(b) should be largely confined to situations where protection orders are not available in the country to which the child is to be returned. Another situation might be where the prospective harm cannot be remedied by any judicial or administrative remedy (eg where the harm concerned is psychological and unpreventable).[85]

In *State Central Authority & Papastravou*,[86] Bennett J found the mother could not rely on Greek authorities and legislation to protect her and the children from future acts of violence by the father if they were returned to Greece. This finding was based on expert evidence that there were inherent problems with the enforcement of laws against domestic violence in Greece.

Harm caused by refusal of a parent to return with the child

It would appear that a refusal by an abducting parent to return home with a child can create a grave risk of harm to the child for present purposes if the non-return of the parent would cause the child severe emotional or psychological trauma. In England, it has been held that a child may be placed in an intolerable situation in their home country if they were to be deprived for an appreciable period of the day-to-day care of the person who had previously been their primary care-giver.[87] It would also appear that, in extreme circumstances, a grave risk of psychological harm can occur to a child as a result of a parent suffering from severe mental distress upon returning home with the child, as was the case in *Director-General, Department of Families and RSP*.[88]

The comments by the Full Court in *RSP* reflect the position made

clear in previous decisions, that the court will not ordinarily allow a refusal by an abducting parent to return home, or a claim that they will suffer severe mental distress if required to return, with resulting deleterious effects on the child, to thwart the aim and purpose of the Convention and Regulations.[89]

Inability of a parent to return to the child's country of habitual residence can result in an intolerable situation

The Full Court of the Family Court has held that an abducting parent's inability to return to the child's home country can result in an intolerable situation for the child, though whether this is so depends upon the facts and circumstances of the case.[90] So, for example, an abducting parent may be precluded from entering the child's home country and thus be unable to take part in any proceedings there concerning who should have the care of the child. However, even in such a case, alternative arrangements (eg the conduct of the proceedings by telephone or television) may reduce the significance of that fact.

No intolerable situation by prospect of parent's arrest upon return to home jurisdiction

English courts have held that the fact that an abducting parent who is currently caring for the child faces the prospect of arrest should they return to the child's home jurisdiction does not, without more, signify that an order for the child's return will result in an intolerable situation for the child, though other factors may lead to the conclusion that it will do so.[91]

However, in *State Central Authority & Papastavrou*,[92] Bennett J found, among other factors, there was a serious risk to the children if the mother would be incarcerated upon her return to Greece.

No intolerable situation on account of the standard of justice in the child's country of habitual residence

It has been held in England that criticism of the law of the child's home country — for example, that it is discriminatory against women, or that the abducting parent is unlikely to receive a fair hearing there — cannot support a claim that an order for the return of a child would

result in an intolerable situation, as it must be presumed that convention countries meet minimum standards of justice in respect of the welfare of children.[93]

Footnotes

65 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 per Kirby J at p 88,390; but cf pp 88,403, 88,407.

66 Ibid, at p 88,390.

67 Ibid, at p 88,393.

68 Ibid, at p 88,403.

69 *Director-General, Department of Families and RSP* (2003) FLC ¶93-152.

70 *Gsponer* v *Director General, Department of Community Services, Vic* (1989) FLC ¶92-001 at p 77,159.

71 Ibid.

72 *Bennett & Ors and Secretary, Attorney-General's Department* (2006) FLC ¶93-252.

73 *Genish-Grant* v *Director-General, Department of Community Services* (2002) FLC ¶93-111.

74 Ibid, at p 89,059.

75 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001)

FLC ¶93-081 at pp 88,393, 88,404, 88,411–88,412.

76 *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011 at pp 87,227–87,228. See also discussion in *Director-General, Department of Families and RSP* (2003) FLC ¶93-152.

77 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 at p 88,390.

78 See also *C* v *C* [1989] 1 WLR 654 at p 664; *Director General, Department of Community Services* v *Crowe* (1996) FLC ¶92-717 at pp 83,642–83,643; *Re C* [1999] 1 Fam Law R 1145 at p 1154.

79 *Director-General, Department of Community Services* v *M and C* (1998) FLC ¶92-829 at p 85,494.

80 *Director-General, Department of Families and RSP* (2003) FLC ¶93-152.

81 *Gsponer* v *Director General, Department of Community Services, Vic* (1989) FLC ¶92-001.

82 Ibid, at p 77,160.

83 *Murray* v *Director, Family Services, ACT* (1993) FLC ¶92-416.

84 Ibid, at p 80,259.

85 *Cooper* v *Casey* (1995) FLC ¶92-575; *Emmett* v *Perry*; *Director-General, Department of Family Services and Aboriginal and Islander Affairs*; *Attorney-General of the*

Commonwealth of Australia (Intervener) (1995) FLC ¶92-645; *Laing* v *The Central Authority* (1996) FLC ¶92-709.

86 *State Central Authority & Papastravou* [2008] FamCA 1120.

87 See *Re O* [1994] 2 Fam LR (Eng) 349 at p 362.

88 *Director-General, Department of Families and RSP* (2003) FLC ¶93-152; [2003] FamCA 623.

89 *C* v *C* [1989] 1 WLR 654 at pp 661, 664; *Director General of Family and Community Services* v *Davis* (1990) FLC ¶92-182 at p 78,228; *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365 at p 79,829; *Re G* [1995] 1 Fam Law R 64; *Director General, Department of Community Services* v *Crowe* (1996) FLC ¶92-717 at p 83,643; *Re C* [1999] 2 Fam Law R 478; *Director-General, Department of Families, Youth and Community Care* v *Hobbs* (2000) FLC ¶93-007 at pp 87,177–87,178.

90 *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011.

91 *Re L* [1999] 1 Fam LR (Eng) 433; *Re M and J* [2000] 1 Fam LR (Eng) 803.

92 *State Central Authority & Papastavrou* [2008] FamCA 1120.

93 *Re S* [2000] 1 Fam LR (Eng) 454 at pp 461–463. Compare, however, Kirby J's statements in respect of reg 16(3)(b) in *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 at p 88,399 and Bennett J's

approach to expert evidence regarding domestic violence enforcement in *State Central Authority & Papastavrou* [2008] FamCA 1120.

¶9-160 Ground 4: objection by the child to its return

A court may refuse to order the return of a child if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take their views into account, and the objection shows a strength of feeling "beyond the mere expression of a preference or of ordinary wishes".[94]

It is clear from the terms of reg 16(3)(c) that the court must adopt a four-step approach. First, the court must determine whether the child objects to being returned to their home country. If the child does object, the court must then determine whether the objection shows the requisite "strength of feeling", and also whether the child has attained an age and degree of maturity at which it is appropriate for the court to take their into account. Finally, if the child has attained such an age and degree of maturity, the court must exercise its discretion whether or not to order the return of the child.[95]

Meaning of "objects"

The 2004 amendments to reg 16(3)(c) remove any doubt about the strict interpretation of the word "objects".

The meaning of the term "objects" in reg 16(3)(c) has previously been considered by the High Court in *De L* v *Director General, NSW Department of Community Services*.[96] There, the majority of the High Court held that this term must be given its ordinary meaning, and, in particular, that it should not be afforded either a particularly strict meaning, like vehement opposition, or a liberal interpretation to include a mere wish or preference.[97] However, as Bracewell J observed in respect of the latter point in the English case of *Re R (a Minor)*,[98] "[t]he word 'objects' imports a strength of feeling which goes

far beyond the usual ascertainment of the wishes of the child in a custody dispute".

Nature of the objection

The objection with which reg 16(3)(c) is concerned is that of being returned under the Hague Convention — that is, to the country of the child's previous habitual residence. It is not objection to living with the person who is seeking the child's return or who otherwise has rights of custody in relation to the child.

It should be noted in this regard that the primary purpose of the return of the child to their home country is not to return the child to the person, institution or other body that has rights of custody in relation to the child, but to enable the courts of that country to determine any dispute about who shall have parental responsibility for the child. It should be emphasised, however, that reg 16(3)(c) concerns only the child's objection to be returned to the country of their previous habitual residence, and not an objection to being returned to this country for the purpose of litigation.[99]

Objection by a child to being returned to their home country and objection to its being returned to a particular person who lives there can nonetheless be linked. The Full Court found this was so, in *De Lewinski v Department of Community Services*.[100]

Whether a child objects to being returned to their home country is a matter of fact. The Full Court of the Family Court has indicated that for the purposes of reg 16(3)(c) (in the pre-2004 form), a child's objection need not be formulated or articulated in a manner expected of adults. What is required is simply an effective objection, taking into account the whole of the evidence.[101] The objection must be made at the time of the hearing which means that the court might also need to take into account the fact that the child has been under the sole influence of one parent to the exclusion of the other, and the possibility of the manipulation of the child by that parent.[102]

Whether a child has attained an age and degree of maturity which makes it appropriate to take their views into account is a matter of fact to be determined in light of the circumstances of the case.[103]

Age is not by itself an indicator of maturity. A child might be of an age when some, or many, children have sufficient maturity to form a view on where they should live, but might be lacking such maturity. Conversely, a child might have sufficient maturity even though the child is of an age where possession of such maturity is exceptional.

Exercise of the court's discretion where child objects

The fact that, by virtue of reg 16(3)(c), a court might be required to take a child's views into account does not mean that it must then give effect to the child's wishes. Whether it does so is a matter for its discretion.

In considering whether to order the return of the child, the court may naturally take into account the reason for the child's objection to being returned. For example, a child might object to being returned to their home country simply because the child prefers to remain with the person with whom they are presently living. Further, the recent amendments to reg 16(3), and particularly the addition of reg 16(3)(c)(ii), make it clear that the objection of a child, to their return, must be of sufficient veracity to constitute an *objection* rather than a mere preference.

The court is, in these types of cases, acutely aware of the possibility that the child's views might be strongly influenced by the views of some other person. In *Re Bassi*; *Bassi and Director-General, Department of Community Services*,[104] Johnston JR observed that the court is likely to give little or no weight to the views of a child that have been influenced by some other person — for example, the abducting parent — or to an objection to returning that rests simply upon a wish by the child to remain with the abducting parent.

Another reason for the court giving little or no weight to a child's views is where they are not reasonably founded: for example, where they are based simply on rebelliousness.[105]

Independent representation of children

In *De L v Director General, NSW Department of Community Services*,[106] the majority of the High Court expressed the view that a child should ordinarily be separately represented in at least those

cases where it is claimed that the child objects to being returned and has attained an age and degree of maturity where it is appropriate to take his or her views into account. An independent children's lawyer was indeed then appointed in this case when the matter was reheard.[107]

In 2006, s 68L was introduced into the *Family Law Act 1975*. Section 68L(3) expressly provides that the independent representation of children in Convention matters will occur only if exceptional circumstances justify it (see s 68L(3)(a)).

In the decision of *RCB as litigation guardian of EKV, CEV, CIV and LRV* v *The Honourable Justice Colin James Forrest* [2012] HCA 47, the High Court considered the question of whether the statutory limitations in s 68L(3), which permit or compel the court to act contrary to the principles of natural justice, in fact contravene Ch III of the Constitution (which relates to a court exceeding the judicial power conferred by parliament). Essentially, the question was whether the threshold for allowing the independent representation of children in contravention proceedings is too high and, as a consequence, denied the children the fundamental right to be heard. After that part of the application was withdrawn based on constitutional considerations, the High Court quickly dismissed the balance of the application. The majority stated at [46]:

> "Contrary to the plaintiff's central submission, resolution of questions about a child's objection to return does not in every case require that the child or children concerned be separately represented by a lawyer. A universal proposition of that kind may be thought to assume, wrongly, that the child whose maturity is at issue in the proceeding can nonetheless instruct lawyers to advocate a particular position. And to the extent to which the proposition depended upon the lawyer for the child making his or her own independent assessment of the child's views, it was a proposition which assumed, again wrongly, that only a lawyer could sufficiently and fairly determine the child's views and transmit that opinion to the court for the court to take into account in deciding, on the whole of the material before it, whether the requirements of reg 16(3)(c) are met".

Footnotes

Footnotes

94 Family Law (Child Abduction Convention) Regulations 1986, reg 16(3)(c)(ii).

95 *Re S (Minors)* [1994] 1 Fam Law R 819 at p 826.

96 *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706.

97 Ibid, at p 83,453. See also pp 83,469–83,471 and *Re S (a Minor)* [1992] 2 Fam Law R 492.

98 *Re R (a Minor)* [1992] 1 Fam Law R 105 at p 108.

99 *Agee and Agee* (2000) FLC ¶93-055 at pp 87,905–87,906. See also generally: *Director General, Department of Community Services* v *De Lewinski* (1996) FLC ¶92-674 at p 83,019; *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at pp 83,453–83,454; *Director General, Department of Community Services* v *Crowe* (1996) FLC ¶92-717 at p 83,641; *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,678.

100 *De Lewinski* v *Department of Community Services* (1997) FLC ¶92-737 at p 83,939.

101 Ibid.

102 *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,676; *Agee and Agee* (2000) FLC ¶93-055 at p 87,902 (cf *Emmett* v *Perry*; *Director-General, Department of Family Services and Aboriginal and Islander Affairs*; *Attorney-General of the Commonwealth of Australia*

(Intervener) (1995) FLC ¶92-645 at p 82,526).

103 *Re S (a Minor)* [1992] 2 Fam Law R 492; *Police Commissioner of South Australia* v *Temple, MA* (1993) FLC ¶92-365; *Re Bassi*; *Bassi and Director-General, Department of Community Services* (1994) FLC ¶92-465.

104 *Re Bassi*; *Bassi and Director-General, Department of Community Services* (1994) FLC ¶92-465 at pp 80,830–80,831.

105 *Re HB* [1997] 1 Fam Law R 392 at pp 398–399.

106 *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at pp 83,455–83,456.

107 *De Lewinski* v *Department of Community Services* (1997) FLC ¶92-737 at p 83,931.

¶9-170 Ground 5: protection of human rights and fundamental freedoms

A court may refuse to order the return of a child if the child's return would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms. This is made clear by reg 16(3)(d) of the Family Law (Child Abduction Convention) Regulations 1986. The introductory words of reg 16(3) state:

> "A court may refuse to make an order [for the return of the child] . . . if a person opposing return establishes that:
>
> . . .
>
> (d) the return of the child would not be permitted by the

> fundamental principles of Australia relating to the protection of human rights and fundamental freedoms".

The terms of reg 16(3)(d) were considered by the Full Court of the Family Court in *McCall and McCall*; *State Central Authority (Applicant)*; *Attorney-General (Cth) (Intervener)*.[108] There, the Full Court said that reg 16(3)(d) requires not simply that the return of the child would be incompatible — even manifestly incompatible — with human rights and fundamental freedoms, but that these rights and freedoms simply do not permit the child's return at all. The Full Court noted that this provision was intended to cover the rare situation where the return of the child would utterly shock the conscience of the court or offend all notions of due process.[109]

In the High Court case of *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services*,[110] Kirby J expressed the view that reg 16(3)(d) would include a case where it can be demonstrated that, notwithstanding formal adherence to the Hague Convention, the authorities and officials of the child's country of habitual residence are corrupt, that due process would be denied to the child or to the custodial parent, or that basic human rights would not otherwise be respected.

The Full Court of the Family Court has held that the return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country is not by itself in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms.[111]

Footnotes

108 *McCall and McCall*; *State Central Authority (Applicant)*; *Attorney-General (Cth) (Intervener)* (1995) FLC ¶92-551 at pp 81,518–81,519.

109 *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011 at pp 87,232–87,234.

110 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-General, NSW Department of Community Services* (2001) FLC ¶93-081 at p 88,399.

111 *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011 at pp 87,234–87,235.

¶9-180 Ground 6: child settled in new environment

There is no obligation on a court to order the return of a child under the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) if the application for the child's return was filed at least one year since the child was wrongfully removed to, or retained in, Australia, and the court is satisfied that the child is settled in his or her new environment. This is clear from the proviso of reg 16(2).

Prior to the amendments to the Regulations in December 2004, this ground was contained in reg 16(1)(b), and it was clear that the onus of establishing that a child was settled in its new environment was on the party asserting this.[112] The amendments, now somewhat confusingly couched in "double negative" terms, seem to have retained this onus, save that the requirement is now for the court to be satisfied that it has not been established that the child is settled.

It should be observed that a court is not released from its obligation to order the return of the child if the application is filed less than one year since the child's wrongful removal to, or retention in, Australia, even though the child is settled in his or her new environment. This is made clear by reg 16(1)(b), which states that, where an application under reg 14 is made, the court *must* make an order for the return of the child if:

> "the application . . . is filed made within one year of the child's removal or retention . . ."

Uncertainty on the consequence of establishing ground in reg 16(2)

There is presently some uncertainty about the consequence of establishing that an application for the return of a child was filed at least a year after the day of the child's wrongful removal or retention and that the child is now settled in its new environment. According to one school of thought, the result of meeting these conditions is that the court then has a discretion whether to order the return of the child or allow the child to stay in this country. This is the interpretation that was given to reg 16(1)(b) (as the relevant provision then was) in *Graziano and Daniels*.[113]

Kay J disagreed with that interpretation in *State Central Authority v Ayob*.[114] His Honour there held that, if a situation comes within the scope of reg 16(1)(b) (as the relevant provision then was), the Hague Convention and the Regulations simply no longer apply. In this case, relief for the return of a child must be sought under Pt VII of the *Family Law Act 1975* (Cth). The issue was left open by the Full Court in the subsequent cases of *Director-General, Department of Community Services v M and C*,[115] and see also *Director-General, Department of Families, Youth and Community Care* v *Moore*.[116] In the former case, the Full Court nonetheless indicated some doubt about the correctness of the interpretation by Kay J in *State Central Authority* v *Ayob*.[117]

Kay J remained steadfast in his view expressed in *Ayob*, in the subsequent case of *State Central Authority and CR*,[118] stating:

> "If the intention of the Regulations was to permit a discretion to return to exist even though the settled exception was established, then I would expect to find that power somewhere within Regulation 16(5). It is not surprising that it is absent given that the Regulations are seen as giving effect to the preamble and the objects of the Convention namely to secure the prompt return of children wrongfully removed to or retained in any Contracting State".

In *Director-General, Department of Community Services v Moore*,[119]

Steele J found that reg 15 gives the court a general discretion to make an order for the return of a child. His Honour noted that reg 15 should be read in conjunction with reg 16, but that, where reg 16 leaves the question open, reg 15 provides the court with the necessary discretion.

When does the one-year period commence?

It would appear from a literal interpretation of reg 16(1) that the one-year period commences at the time a child is wrongfully removed to, or first retained in, Australia. However, in *State Central Authority v Ayob*,[120] Kay J held that, taking into account the terms of Art 12 of the Convention, from which (the then) reg 16(1) derived, the one-year period commences at the time a child is first wrongfully removed, or first wrongfully retained, even though the country to which the child was removed, or in which it was retained, was not Australia.

Kay J confirmed his interpretation in *Ayob* in *State Central Authority and CR*,[121] stating that the critical date is the date the child is removed from his or her place of habitual residence. In that case, the child was taken onto a plane by the mother on 20 July 2004. The application for the child's return was made on 21 July 2005. Kay J determined that the removal took place at the time the United States frontier was crossed, which was on 21 July 2004 according to the time in the United States. Te application was made within the one-year period.

A child can be wrongfully removed from a convention country on more than one occasion. For example, a child may be wrongfully removed from a convention country, returned there for a short period, and then wrongfully removed again. In such a case, the one-year period ordinarily commences from when the child was removed on the second occasion.[122]

In the case of the retention of a child, time runs not from the date of first retention in any broad sense, but from the date of first wrongful retention.[123] This was also clear in the definition of "retention" in reg 3(2) of the Regulations before it was omitted in the 2004 amendments.

The statutory expression "first retained" would appear to signify the date on which the child commenced to be wrongfully retained in

another country.

The meaning of "is settled in his or her new environment"

In the early case of *Graziano and Daniels*,[124] the Full Court said that for a child to be settled in his or her new environment, something more is required than that the child be happy and secure in, and adjusted to, their new environment; the child should also be physically and emotionally integrated into their new environment, and this integration encompasses such elements as home, school, people, friends and activities.[125]

The foregoing interpretation of reg 16(1)(b) was, however, doubted in the subsequent case of *Director-General, Department of Community Services* v *M and C*.[126] There, the Full Court indicated that the term "settled" in para (b) (in the then reg 16(2)(b)) should be given simply its ordinary meaning. The court said:

> "The test, and the only test to be applied, is whether the children have settled in their new environment".

This interpretation was upheld by the Full Court in *Director-General, Department of Families, Youth and Community Care* v *Moore*,[127] and *Townsend* v *Director-General, Department of Families, Youth and Community Care*.[128]

The Full Court said, in *Graziano and Daniels*,[129] that the fact that the child enjoys a good and happy relationship with the abducting parent is insufficient for the purposes of reg 16(1)(b) (now reg 16(2)), as this requires that the child be settled in a new environment.

For the purposes of reg 16(2), a child's environment is "new" if it is not the same as their previous environment. There is, however, no requirement that the new environment be fundamentally different in nature from the previous environment.[130]

A child can be settled in their new environment even though the child is still experiencing problems, and even severe problems.[131] While the decisions in both *Thorpe* and *M and C* were made by way of reference to the old reg 16(1)(b), the principles remain the same in the context of reg 16(2) as amended in 2004, as do other principles discussed in this

chapter.

There is no requirement that the child be settled in their new environment from any long-term point of view.[132] In that case, the Full Court left open the question of the effect of any threat to the child continuing to be settled in their new environment: for example, by not being allowed to remain in Australia. It is probable that any such threat would be relevant only to the exercise of the court's discretion.

Despite the capacity to bring applications under the Regulations up to 12 months after the date of removal or retention, there is no presumption that, after a year in a new environment, a child is settled there.[133]

In *Dept of Family and Community Services & Magoulas* (2018) FLC ¶93-856, the Full Court provides a historical review of the authorities which dealt with reg 16(2) both prior and subsequent to the relevant amendments, with emphasis on whether a child is settled and the discretionary power, if any, that may exist.

Time for considering whether a child is settled in new environment

It is uncertain whether the time for considering whether the child "is settled" in its new environment is the time the proceedings are commenced or the time of the hearing. In *Director General, Department of Families, Youth and Community Care* v *Thorpe*,[134] Lindenmayer J was of the view that the relevant time is the time of the hearing. This question was, however, left open by the Full Court in *Director-General, Department of Community Services* v *M and C*.[135] For further consideration of this matter, see *Director General, Department of Community Services* v *Apostolakis*.[136]

Meaning of "environment"

It would appear that the word "environment" in reg 16(2) can signify quite different situations surrounding a child depending on the child's age. As Kay J observed (in relation to the then reg 16(1)(b)), in *Townsend* v *Director-General, Department of Families, Youth and Community Care*:[137]

> "The essential environment for a babe in arms would most likely be the immediacy of its principal caregiver no matter where that care is provided. The environment for a teenager may well be dependent on other relationships and more material factors including education, housing and the like".

It follows from the foregoing that a child of any age can be settled in a new environment.[138]

Footnotes

112 *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,669.

113 *Graziano and Daniels* (1991) FLC ¶92-212 at p 78,437; *Director General, Department of Community Services* v *Apostolakis* (1996) FLC ¶92-718 at pp 83,647, 83,651; *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at pp 84,671–84,672; *Secretary, Attorney-General's Department* v *TS* (2001) FLC ¶93-063 at pp 88,173, 88,175–88,176.

114 *State Central Authority* v *Ayob* (1997) FLC ¶92-746 at pp 84,072–84,073.

115 *Director-General, Department of Community Services* v *M and C* (1998) FLC ¶92-829 at pp 85,491–85,492.

116 *Director-General, Department of Families, Youth and Community Care* v *Moore* (1999) FLC ¶92-841 at p 85,845.

117 *State Central Authority* v *Ayob* (1997) FLC ¶92-746 at p 85,492.

118 *State Central Authority and CR* (2005) FLC ¶93-243 at p 80,016.

119 *Director-General, Department of Community Services* v *Moore* (2003) FLC ¶93-132.

120 *State Central Authority* v *Ayob* (1997) FLC ¶92-746 at p 84,072.

121 *State Central Authority and CR* (2005) FLC ¶93-243.

122 *Re S* [1998] 1 Fam LR (Eng) 651.

123 See *In re H (Minors)* [1991] 2 AC 476 at pp 499–500; *Re S (a Minor)* [1998] AC 750 at pp 767–768.

124 *Graziano and Daniels* (1991) FLC ¶92-212 at pp 78,436–78,437.

125 See also *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,670.

126 *Director-General, Department of Community Services* v *M and C* (1998) FLC ¶92-829 at p 85,491.

127 *Director-General, Department of Families, Youth and Community Care* v *Moore* (1999) FLC ¶92-841 at p 85,843.

128 *Townsend* v *Director-General, Department of Families, Youth and Community Care* (1999) FLC ¶92-842 at pp 85,852–85,853.

129 *Graziano and Daniels* (1991) FLC ¶92-212 at p 78,436.

130 *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,670.

131 *Director-General, Department of Community Services* v *M and C* (1998) FLC ¶92-829 at p 85,489.

132 Ibid, at p 85,491.

133 *Graziano and Daniels* (1991) FLC ¶92-212 at p 78,437.

134 *Director General, Department of Families, Youth and Community Care* v *Thorpe* (1997) FLC ¶92-785 at p 84,669.

135 *Director-General, Department of Community Services* v *M and C* (1998) FLC ¶92-829 at p 85,491.

136 *Director General, Department of Community Services* v *Apostolakis* (1996) FLC ¶92-718 at pp 83,649–83,650.

137 *Townsend* v *Director-General, Department of Families, Youth and Community Care* (1999) FLC ¶92-842 at pp 85,859–85,860.

138 *Secretary, Attorney-General's Department* v *TS* (2001) FLC ¶93-063 at pp 88,174–88,175.

OTHER MATTERS TO BE AWARE OF

¶9-190 Citizenship is irrelevant

A majority of the Full Court of the Family Court has held that an order can be made for the return of a child from Australia to another Hague Convention country even though the child is an Australian citizen.[139]

Interestingly, one of the central facts relied upon in the application to the High Court in *Garning & Director-General, Department of Communities (Child Safety Services)* [2012] FamCAFC 35 was the fact the children were Australian citizens and that the order to remove them from Australia without their consent and without them being heard is a breach of Ch III of the Constitution. The application was dismissed.

Footnotes

139 *Laing* v *The Central Authority* (1999) FLC ¶92-849 at pp 85,954, 85,995, 85,997.

¶9-200 When the court must refuse to order the return of a child

As one would expect, although no longer expressly stated in the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations), a court must *refuse* to order the return of a child under the Regulations if it is satisfied that the case is not one to which the Regulations apply.

The obligation on the court to order the return of a child is couched in positive terms provided that the matters set out in reg 16(1) are met: that is, that a child was wrongfully removed or retained, and the application was brought within one year of that wrongful removal or retention. If the factors set out in reg 16(1), (2) and (3) are met, the court *must* order the return of the child.

In addition, a court must refuse to order the return of a child under the Regulations if it cannot be satisfied that the case is one to which the Regulations apply.[140]

The fact that a case before a court is not one to which the Regulations apply does not mean that the court cannot order the return of the child to the child's home country. It can do so, but under some other law (Pt VII of the *Family Law Act 1975* (Cth)) and not under the Regulations.

If a court is unsure whether the removal of a child from a convention country to, or the retention of a child in, Australia was wrongful, it may request the Commonwealth Central Authority, or the Central Authority of a state or territory, to arrange for the person, institution or other body seeking the return of the child to obtain a declaration to this effect from the other convention country involved. See also the case of *Director-General of the Department of Community Services & Timms (aka Black)* (2008) FLC ¶93-376.[141]

Footnotes

140 *Director-General, Department of Community Services* v *SHR* (2001) FLC ¶93-082 at p 88,430.

141 Family Law (Child Abduction Convention) Regulations 1986, reg 17(2).

¶9-210 Regulations are not exclusive

Despite their rather unique nature, the provisions of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) do not have exclusive operation, and reg 6(1) expressly states that they are:

> ". . . not intended to prevent a person, an institution or other body that has rights of custody in relation to a child . . . from applying to a court if the child is removed to, or retained in, Australia in breach of those rights".

There are restrictions, however, on the types of parenting orders that a court can make if an application has been made under the

Regulations for the return of a child. Regulation 19 provides that, if an application has been made for the return of a child, a court must not make an order providing for the "custody" of the child, other than an interim order, until the application under the Regulations has been determined.

¶9-220 Relevance of an existing parenting order

A court must not refuse to make an order for the return of a child simply because an order for the custody of the child is in force, or is enforceable, in Australia under reg 18(1)(a) of the Family Law (Child Abduction Convention) Regulations 1986. The court may nonetheless take into account the reasons for the making of an order relating to the custody of the child.[142] The meaning of the term "custody" is discussed at ¶9-090.

Notwithstanding the broad terms of reg 18(1)(b), it seems clear that a court may take into account the reasons for making a custody order only if it has a discretion whether to order the return of the child to their home country. If there is no discretion, an order for the return of the child is mandatory.[143]

Footnotes

142 Ibid, reg 18(1)(b).

143 Ibid, reg 16(1).

¶9-230 Proceedings under the Regulations should be heard before proceedings for a parenting order

The Full Court of the Family Court has held that proceedings under the Family Law (Child Abduction Convention) Regulations 1986 should normally be heard ahead of, and not along with, proceedings for a parenting order under Pt VII (Children) of the *Family Law Act*

1975 (Cth).[144]

The issue of the application of Pt VII of the FLA in circumstances where proceedings under the Regulations have been, or are being, applied was considered by Murphy J in *Garning and Department of Communities, Child Safety and Disability Services (No 2)* [2012] FamCA 482. The mother's application for orders that the children live with her pending the determination of the matters before the High Court (see ¶9-160 and ¶9-190) was rejected on the basis that:

- Regulation 18 makes it clear that parenting orders in courts of the forum to which children have been removed or retained, are not to defeat the purpose of the Regulations.

- Regulation 19 provides that courts of the forum will not make parenting orders until a decision has been made about the return of the child, save for orders governing the situation until that order is made.

- Regulation 19A provides for the very limited circumstances in which orders can be made prior to an order being made for the return of a child. There is no provision in reg 19A for the making of Pt VII orders.

- The proceedings under the Regulations had not been determined and this can be so even if an order has been made for the return of a child. In this case, an order had been made for the return of the children and they were subsequently placed in the care of the Department. It was that decision that prompted the mother's application.

- The court did not accept the assertion that the pending High Court decision were separate proceedings and that the proceedings under the Regulations had been determined such as to enable Pt VII to apply.

Footnotes

144 *Director-General, Department of Families, Youth and*

Community Care v *Moore* (1999) FLC ¶92-841 at p 85,833.

¶9-240 Situation in the case of siblings

One problem arising from the limited grounds on which the court either must or may refuse to order the return of a child under the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) is that they make no provision for a case where siblings are involved, and the Regulations do not cover all children. This problem arose for consideration, but did not require resolution, in *Graziano and Daniels*[145] and *Re Bassi*; *Bassi and Director-General, Department of Community Services*.[146]

In *Re C*,[147] an English court held on the facts of that case that where the Convention applies to only one child, the provisions of the Convention should be applied in respect of that child alone. For other English decisions involving siblings, see *Re HB*;[148] *The Ontario Court v M and M*.[149]

Footnotes

145 *Graziano and Daniels* (1991) FLC ¶92-212 at p 78,437.

146 *Re Bassi*; *Bassi and Director-General, Department of Community Services* (1994) FLC ¶92-465 at pp 80,831–80,832.

147 *Re C* [1999] 2 Fam Law R 478.

148 *Re HB* [1997] 1 Fam Law R 392 at p 400.

149 *The Ontario Court* v *M and M* [1997] 1 Fam Law R 475 at p 485.

¶9-250 Relevance of the best interests of the child

Proceedings under the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) are not proceedings for either a parenting order or a welfare order under Pt VII of the *Family Law Act 1975* (Cth). Because of this, and by virtue of the terms of the Regulations, the best interests of the child are not the paramount consideration in proceedings for the return of a child under the Regulations;[150] *De L* v *Director General, NSW Department of Community Services*;[151] *Re Evelyn (No 2)*.[152]

In *DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services*,[153] Kirby J observed that the Regulations are concerned not with the best interests of the child, but with the forum most appropriate to determine this issue.

The court may nonetheless regard the best interests of the child as a relevant consideration in the exercise of any limited discretion that it may have under reg 16(3) on whether to order the return of a child to their home country: see *Regino and Regino*;[154] *De L v Director General, NSW Department of Community Services*.[155]

Footnotes

150 *McCall and McCall*; *State Central Authority (Applicant)*; *Attorney-General (Cth) (Intervener)* (1995) FLC ¶92-551 at pp 81,510–81,511, 81,513–81,514.

151 *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at pp 83,468–83,469.

152 *Re Evelyn (No 2)* (1998) FLC ¶92-817 at p 85,295.

153 *DP* v *Commonwealth Central Authority*; *JLM* v *Director-*

General, NSW Department of Community Services (2001) FLC ¶93-081 at pp 88,402–88,403.

154 *Regino and Regino* (1995) FLC ¶92-587 at pp 81,820–81,821.

155 *De L* v *Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at p 83,456.

¶9-255 Court's discretion

Where reg 16(3) of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) affords a court a discretion whether to order the return of a child to their home country, this discretion is at large. As the majority of the High Court said in *De L v Director General, NSW Department of Community Services*:[156]

> "The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the 'discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]' enable it to be said that a particular consideration is extraneous."

However, the majority then went on (loc cit):

> "That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion." (see ¶9-250)

Despite the lack of legislative guidance, case law has begun to establish criteria relevant to consideration of this discretion. In *SCA* v *DB* [2002] FamCA 804 at [34], Kay J referred to the following list of factors applied by English judgments:

(a) the comparative suitability of the forum to determine the child's future in the substantive proceedings

(b) the likely outcome (in whichever forum) of the substantive proceedings

(c) the consequences of the acquiescence

(d) the situation which would await the absconding parent and the child if compelled to return

(e) the anticipated emotional effect upon the child of an immediate return (a factor which is to be treated as significant but not paramount), and

(f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

These factors were subsequently referred to in *Kilah and DG, Department of Community Services* (2008) FLC ¶93-373; *Department of Community Services and Frampton, Re* (2007) FLC ¶93-340 at p 81,830; *Zafiropoulos and Secretary, Department of Human Services State Central Authority* (2006) FLC ¶93-264 at p 80,494; and *SCA* v *Sigouras* [2007] 37 Fam LR 364, pp 421–423.

Footnotes

156 *De L v Director General, NSW Department of Community Services* (1996) FLC ¶92-706 at p 83,456

¶9-260 Relevant evidentiary provisions

Where the applicant to proceedings pursuant to the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) is the Central Authority, the rules of evidence are very different from those usually applicable in the Family Court. Regulation 29(2) makes it clear that usual rules of evidence continue to apply where applications

under reg 14 are brought by a parent or any other body.

Certain evidentiary matters in proceedings are covered by reg 29:

- the admissibility of facts stated in the application or in a document attached to or in support of it
- the admissibility of the affidavit evidence of a witness who resides outside Australia and who is not in attendance for the purposes of cross-examination
- the admissibility of statements contained in a document which sets out or summarises evidence given or taken in a convention country in relation to the custody of a child or proceedings under the Regulations
- judicial notice of the law in force in, and of a judicial or administrative decision made in, a convention country, and
- the admissibility of a judicial order or decision of a competent authority in a convention country in relation to the custody of a child.

The term “custody” in the context of reg 29 includes the guardianship of a child, responsibility for the long-term or day-to-day care, welfare and development of a child, and responsibility as the person or persons with whom a child is to live.[157]

Regulation 29(1)(a) (as it then was) has been held not to be invalidated by s 8(2) of the *Evidence Act 1995* (Cth).[158]

The Full Court of the Family Court has made it clear that, as the purpose of the Hague Convention is to provide for the speedy return of a child to their home country, proceedings should ordinarily be heard summarily and without the cross-examination of deponents on their affidavits.[159]

The Full Court has said, however, that there might be circumstances where the cross-examination of deponents should be allowed, and indeed where the cross-examination of deponents might be essential

in the interests of justice.[160] In cases where affidavit evidence is insufficient, leave may be sought for cross-examination.[161]

In ordinary circumstances, it would seem reasonable to expect a court not to allow the cross-examination of either the abducting parent or the parent seeking the return of the child unless both are available for cross-examination and this will not unduly delay a decision on whether the child be returned to their home country;[162] *Re K*.[163]

Circumstances, however, might justify an order for cross-examination where the deponents of only one side are available. Thus, it would seem reasonable for a court to allow the cross-examination of an expert who has given evidence on matters that might support a decision not to order the return of a child. It might also be appropriate for a court to allow a parent to be cross-examined on an issue of whether they consented to the removal or retention of the child.[164] Where cross-examination of a witness is allowed, the Family Court has cautioned that it must not allow this to unfairly disadvantage the absent party by the court giving greater credit to the evidence of the party who is before the court.[165]

Regulation 29(3) provides that if an affidavit of a witness residing outside Australia is filed in proceedings under the Regulations, it is admissible as evidence in the proceedings despite their non-attendance for cross-examination.

Where evidence is given entirely on papers, then it may be open for appeal courts to substitute their own findings of fact.[166]

Footnotes

157 Family Law (Child Abduction Convention) Regulations 1986, reg 29(5).

158 *Director-General, Department of Community Services* v *SHR* (2001) FLC ¶93-082 at pp 88,422–88,423.

159 See *MW* v *Director-General, Department of Community*

Services [2008] HCA 12 at pp 37–40.

160 See generally *Gazi and Gazi* (1993) FLC ¶92-341 at p 79,623; *Police Commissioner of South Australia* v *Temple (No 2)* (1993) FLC ¶92-424 at pp 80,362–80,363; *Hanbury-Brown and Hanbury-Brown*; *Director General of Community Services* (1996) FLC ¶92-671 at pp 82,946–82,947; *Director-General, NSW Department of Community Services and JLM* (2001) FLC ¶93-090 at p 88,603. See also *Director-General, Department of Families, Youth and Community Care* v *Bennett* (2000) FLC ¶93-011 at p 87,223.

161 *MW* v *Director-General, Department of Community Services* [2008] HCA 12 at p 44.

162 *Regino and Regino* (1995) FLC ¶92-587 at p 81,814.

163 *Re K* [1997] 2 Fam Law R 212 at p 214.

164 Ibid.

165 *Regino and Regino* (1995) FLC ¶92-587 at p 81,814.

166 *Wenceslas* v *Director-General, Department of Community Services* (2007) 211 FLR 357 at p 394; *MW* v *Director-General, Department of Community Services* [2008] HCA 12 at p 40.

¶9-270 Admission into evidence of a counsellor's report

Regulation 26 of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) enables the court to direct a family

consultant to prepare a report on such matters as are relevant to any proceedings under the Regulations. This report can then be received in evidence of the court's own motion.

The Full Court of the Family Court has held that, provided it is relevant to matters in issue, a report prepared under s 62G of the *Family Law Act 1975* (Cth) (FLA) may also be received in evidence in proceedings under the Regulations, even though the report was prepared only for the purpose of proceedings for a parenting order under the FLA (and thus not for the purpose of proceedings under the Regulations).[167]

Footnotes

167 *Director-General, Department of Families, Youth and Community Care* v *Moore* (1999) FLC ¶92-841 at pp 85,836–85,837.

¶9-290 Costs — general

The Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) provide that neither a Central Authority nor a court can require any security or bond for the payment of the costs or expenses of proceedings under the Regulations (reg 21). A court can nonetheless make an order that an abducting parent pay the "costs of the application" incurred by the Central Authority or the applicant (reg 30(1)). Regulation 30(2) provides that the "costs of the application" means the necessary expenses incurred in making the application and may include travelling expenses, costs incurred in locating the child, costs of legal representation, and costs incurred for the return of the child.

A court can ordinarily make an order for litigation costs under s 117 of the *Family Law Act 1975* (Cth): see *MHP* v *Director-General, Department of Community Services*[168] (concerning costs on an appeal). The general power in s 117, however, is now limited by s 117AA. This provides, in s 117AA(1), that in proceedings under

regulations made under Pt XIIIAA of the FLA — which covers the Regulations — a court can only make an order for costs in favour of a party who has been substantially successful in the proceedings, and against a person or body who holds an office or appointment under the Regulations and is a party to the proceedings in that capacity. Moreover, by s 117AA(2), a costs order can be made against a person or body only if this person or body put forward an unreasonable meaning or operation of the Act or Regulations, or a meaning or operation that is unreasonable for the purpose of giving effect to the Convention itself.[169]

Footnotes

168 *MHP* v *Director-General, Department of Community Services* (2000) FLC ¶93-027 at p 87,447.

169 *Director-General, NSW Department of Community Services and JLM* (2001) FLC ¶93-090 at pp 88,606–88,607.

¶9-300 Costs against the Central Authority

Except in proceedings in the High Court, a costs order cannot ordinarily be made against a Central Authority. This results from both reg 7 of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) and s 117AA of the *Family Law Act 1975* (Cth) (FLA).

A broad interpretation of reg 7 to that effect was upheld by the High Court in *De L* v *Director General, NSW Department of Community Services*.[170] The court said that reg 7 protects a Central Authority from an order for costs not only in a personal capacity but also in an official capacity. This is to ensure that the Central Authority can perform its statutory functions without the fear of being ordered to pay costs. However, in light of the limits of the statutory powers and functions of

a Central Authority as set out in reg 5(1), and particularly reg 5(1)(c), the majority of the High Court said that the immunity from costs in reg 7 did not extend to any part of proceedings in which a Central Authority asserts a meaning or operation of the Regulations which their terms do not bear or which is neither necessary nor appropriate to give effect to the Convention (p 84,038).

The effect of s 117AA of the FLA, which came into effect on 27 December 2000, was considered by the High Court in *Director-General, NSW Department of Community Services and JLM*.[171] There, the Full Court concluded (albeit, as the court said, "shortly and imprecisely") that "an order for costs cannot be made against the Central Authority unless the Central Authority has, in the proceedings, asserted powers or functions outside the scope of the Regulations". In fact, even where the Central Authority has failed to ensure that return orders were properly executed, s 117AA(3) does not permit an order for expenses to be made against it.[172] However, in such circumstances, the party may have a claim in tort in a court of competent jurisdiction against the State Central Authority.[173]

In proceedings in the High Court, an order for costs can always be made against a Central Authority by virtue of s 26 of the *Judiciary Act 1903* (Cth).[174]

Footnotes

170 *De L* v *Director General, NSW Department of Community Services* (1997) FLC ¶92-744 at pp 84,031–84,032, 84,035.

171 *Director-General, NSW Department of Community Services and JLM* (2001) FLC ¶93-090 at p 88,607.

172 *Re F (Hague Convention: Claim for Expenses)* (2007) FLC ¶93-335 at p 33.

173 Ibid, at p 34.

174 *De L* v *Director General, NSW Department of Community Services* (1997) FLC ¶92-744 at pp 84,036, 84,038.

PRACTICAL TIPS FOR PRACTITIONERS

¶9-310 Introduction

Legal practitioners should note that these checklists have been prepared in light of practices adopted in New South Wales. There is nothing to suggest that the practical approach to these applications varies markedly between states, but practitioners should liaise with the relevant Central Authority in their state or territory in the event of concerns.

¶9-320 Threshold issues

A request (3 in a form approved, in writing, by the Minister in subregulation (2A)) to the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) and supported by an affidavit) can be made to a state Central Authority where:

- the child is under 16
- immediately upon the wrongful removal or retention, the child was habitually resident in a convention country
- the party making the request had, and was actually exercising, “rights of custody” (parental responsibility) at the time of the wrongful removal or retention, or
- the party making the request has not subsequently acquiesced to the removal or retention.

If the matter comes within the scope of the Regulations the Central Authority *must* take all action required under the Hague Convention,

reg 11(4) (where the child is taken *from* Australia) and reg 13(1) (where the child is taken *to* Australia).

¶9-330 Practicalities

Where the Central Authority is satisfied that the requirements of reg 11 or 13 of the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations) have been met, an application for the return of the child will be filed in the Family Court of Australia (or the appropriate court in the convention country where the child is). The application must have attached to it a copy of the law of the country of the child's habitual residence.

In preparing the application, the Central Authority will give consideration to a request for ex parte orders where the respondent may be assessed as a flight risk. A PACE alert may also be obtained (see ¶9-370). It is rare for the Central Authority to seek a warrant taking the child into care pending a hearing, but the Regulations clearly empower the Central Authority to seek such orders.

Once the application has been served on the respondent, the matter is listed for hearing within 42 days. If the matter is not determined within this time, the overseas Central Authority is entitled to seek reasons for the delay.

The matters are listed before a judge or judicial registrar and are dealt with on the papers and without cross-examination of witnesses. Regulation 29 sets out the evidentiary requirements in these cases. The Central Authority is not limited to the instructions of the parent seeking the return of the child. The Central Authority has an obligation to be "an honest broker", and to put all relevant information before the court to enable it to implement the Convention.

Costs orders are not generally sought against a respondent who cooperates and responds meaningfully to the application. Costs are more often sought where the respondent deliberately evades service, and costs are incurred in effecting service of the application.

¶9-340 Children removed from Australia

Where a parent in Australia requests that the Central Authority bring an application in a foreign jurisdiction for the return of a child, the Central Authority will forward a request that proceedings be commenced to the Central Authority in the convention country.

If the parent is unsure where the child is, the Commonwealth Attorney-General or the foreign Central Authority can conduct a number of searches in an attempt to locate the child. The state Central Authority is funded to meet the costs of such applications and associated enquiries, searches and preparatory work.

The affidavit accompanying the request is of particular importance, as it will be relied upon by the court in the country where the child is to determine whether the Australian applicant had rights of custody in relation to the child. The overseas Central Authority will communicate with the Australian Central Authority in relation to the application. Personal applications to foreign Central Authorities are not encouraged. The Australian Central Authority communicates with the relevant Central Authority overseas.

An application to spend time with a child living in another convention country, pending their return, is made by the filing of an application in Form 3 of Sch 2a form approved, in writing by the Minister under Regulation (2A) to the Family Law (Child Abduction Convention) Regulations 1986.

¶9-350 Proceedings where the Regulations do not apply

If a child has been wrongfully removed to, or retained in, Australia, and relief is not sought under the Family Law (Child Abduction Convention) Regulations 1986, then, with just one exception, the ordinary law relating to children applies in respect of proceedings concerning the child and an application may be made under Pt VII of the *Family Law Act 1975* (Cth) (FLA). This includes proceedings in which orders are sought for the return of the child to its home country. If the ordinary law applies, the proceedings are usually determined on the basis that the best interests of the child are the paramount consideration. This is so even if there is an overseas order in existence concerning parental responsibility for the child.

The sole exception to the rule that the ordinary law relating to children applies concerns those cases where the court is required to recognise a *registered overseas order* in respect of the child by virtue of Pt VII, Div 13, Subdiv C ("Registration of overseas orders") of the FLA.

The principle that the best interests of the child are the paramount consideration applies not only to issues concerning the future care and welfare of a child who has been abducted to Australia, but probably also to a determination of the appropriate forum to entertain these proceedings.

SOME PRACTICAL STEPS IN EVENT OF CHILD ABDUCTION

¶9-360 Giving notice to the Australian Federal Police

A person with whom a child lives, or with whom a child spends time and/or communicates, under a current Australian court order (or who has instituted proceedings for such an order), and who has a suspicion that the child may be removed from Australia, may give notice of the order or proceedings and details of the child to the Australian Federal Police for inclusion in the warning list at departure points in Australia.

The police have indicated that, to assist identification, a party seeking this assistance in preventing an apprehended offence under s 65Y or s 65Z of the *Family Law Act 1975* (Cth) (FLA) should send them full details, as set out in the note below, to their nearest office. As soon as possible thereafter, a certified copy of the relevant order or application for an order is to be delivered to the police. The police should also be informed immediately if any change is made to the order.

Note

Information requested by Australian Federal Police for inclusion of children on warning lists

- the full name, address and date of birth of the person giving notice
- court proceedings number
- name of the applicant’s solicitors
- place of issue of court order or filing of application
- details of court order or application
- details of child (attach a recent photo if possible):
  - full name
  - any other names used
  - address
  - date of birth
  - gender
  - height
  - build
  - visible marks (eg moles, scars)
  - identity document type (eg passport)
  - identity document number (eg passport number)
  - nationality
  - any other nationality
  - country of birth
  - race

– complexion

– colour of eyes

– colour of hair

- whether the child has been abducted, and, if so, whether a warrant has been issued
- details of person or persons who may have the child (attach a recent photo if possible). Give the same information as for the child (or each child) and also:
  – name before marriage (if applicable)

  – occupation

  – names of any other children (of either or both parties to the proceedings).

Details of this child will be maintained on warning lists for a period of three months unless a further request is received by the Australian Federal Police.

That limitation period of the listing of only three months makes it important to see that other longer term preventative measures are taken (eg deposit of passports) if abduction is still feared or that the listing is renewed by a fresh application.

While the institution of proceedings is enough to bring s 65Y or s 65Z of the FLA into effect and therefore to give the Australian Federal Police proper reason to take preventative measures, it also seems wise to seek orders expeditiously if the abduction is feared to be imminent.

¶9-370 Giving notice to Department of Foreign Affairs and Trade

Parents concerned about the abduction of children from Australia can also apply to the Commonwealth Department of Foreign Affairs and Trade (DFAT) for the child to be placed on the department's warning list to prevent the issuing of a passport or other travel documents to a particular person. This is known as a "PACE" or Child Alert.

Applications for PACE Alerts can be made by any person with the parental responsibility for a child by completing the Child Alert Request (details are available on the DFAT website: www.dfat.gov.au).

An Alert Request will remain valid for 12 months. Where a court order is made (whether expressly for a PACE Alert or, it would seem, merely for sole parental responsibility), the alert will remain in force until the child is 18 years, legally marries or a further order is made. Where PACE Alerts are made as part of interim hearings, and DFAT is provided with a copy of those orders, practitioners should be particularly mindful of the need for DFAT to be expressly informed (and provided with a copy of the order) if the alert is to be lifted.

¶9-380 Action in respect of carriers of children

A person who takes a child out of Australia in breach of an order or while proceedings are pending commits an offence. That gives some degree of security that children will not be taken out of the country. To reinforce the position, offences are also created by s 65ZA and 65ZB of the *Family Law Act 1975* (Cth) (FLA). These sections provide that the captain, owner or charterer of an aircraft or a vessel, who is given notice that a relevant order has been made or that a relevant application is pending, commits an offence if a child is taken out of Australia on the aircraft or vessel.

The primary requirements of the sections are:

- the party desiring to prevent the child being taken out of the country must have a parenting order in their favour or have an application pending

- the captain/owner/charterer or agent of the owner of the aircraft or

vessel must have been served with a statutory declaration

- the statutory declaration must be made by the party to the order or relevant application — it seems a statutory declaration by the solicitor is not enough

- the statutory declaration must have been sworn no earlier than seven days before service

- the statutory declaration must set out:
  - full name and date of birth of the child
  - full names of the parties to the order or the pending proceedings
  - the terms of the order made, or full details of the pending proceedings
  - in the case of pending proceedings, that the proceedings are in fact still pending at the date of the declaration

- service of the declaration may be personal or by registered post

- the provision relates to any child up to the age of 18 years

- if the carrier then carries the child they commit an offence carrying a penalty of 60 penalty units (s 4AA of the *Crimes Act 1914* provides that a penalty unit means $210), and

- that it provides for a somewhat vague defence for the carrier of "reasonable excuse".

Although s 65ZA and 65ZB do not make the offence indictable — in contrast to the equivalent offences under s 65Y and 65Z (taking or sending a child outside Australia which are offences punishable by up to three years' imprisonment) — it still seems that prosecution for any offence under this section is not within the jurisdiction of courts exercising jurisdiction under the FLA, but the ordinary criminal courts.

It may be expected that s 65ZA and 65ZB will only be used rarely. It will only be really effective if the carrier involved is known with certainty. Otherwise notifying the Australian Federal Police, or securing a PACE Alert, is far more effective and very much quicker and cheaper. It is almost impossible to serve every possible carrier with the notice. There are numerous commercial airlines with regular scheduled flights out of Australia and numerous unscheduled charter flights sometimes by different carriers. There are numerous shipping lines which routinely or only occasionally carry passengers. Being certain that all have been covered by a distribution of statutory declarations is very difficult.

One advantage of the statutory declaration method of preventing a child from being taken out of the jurisdiction over notifying the Australian Federal Police is that the section does not place any limitations on the duration of the effectiveness of the notice — it does not seem to be necessary to re-do it every three months.

A curious omission from s 65ZB is any obligation upon the party who serves the declaration to notify the recipients of the declaration of the discharge of the order should it occur or the dismissal of the pending proceedings should that occur. Presumably, if the person who serves the declaration fails to give notice of the discharge of the order or the dismissal of the proceedings, and an application to a court is in consequence necessary, the party who made the court application necessary would be responsible for the costs.

Service of the declaration is not required on the other party to the relevant proceedings, so that the other party may not even know of the need to get the consent of the party who has served the declaration until perhaps it is inconveniently late. This absence of any requirement for notice is presumably intended to add to the effectiveness of the security method by not giving the other party warning of the need for evasive action.

¶9-390 Passport controls

Section 11 of the *Australian Passports Act 2005* (Cth) provides that an Australian passport will not be issued to a child (defined in s 6 as a

person under the age of 18 who has never been married), unless:

- each parent with parental responsibility consents to international travel (s 11(1)(a)), or
- a court order relating to international travel has been made (s 11(1)(b)).

Section 11(2) gives the minister the discretion to also issue a passport despite the absence of a parental consent or a court order if the minister is satisfied that:

- the case is exceptional
- not permitting the child to travel internationally would adversely affect the child's welfare (physically or psychologically), or
- the child needs to travel urgently because of a family crisis, and the person with parental responsibility for the child cannot be contacted within a reasonable period.

The minister may refuse to exercise this discretion if it is preferable for the matter to be dealt with by a court, including, for example, in cases where the persons with parental responsibility for the child do not agree to the issuing of a passport.

In a significant addition to the *Australian Passports Act 2005*, s 11(5) now expressly provides that, for the purposes of s 11, a person has "parental responsibility" for a child *only* if:

- the person is the child's parent (including by virtue of a presumption made under Pt VII, Div 12, Subdiv D of the *Family Law Act 1975* (Cth) (FLA)) and the person has not ceased to have parental responsibility for the child because of an order made under the FLA
- under a parenting order, the child is to live with or spend time with that person, or that person is to be responsible for decisions affecting the long-term or day-to-day care, welfare and development of the child (note the express use of these words

which no longer appear in the FLA), or

- the person is entitled to guardianship or custody of, or access to, the child under a law of the Commonwealth, a state or a territory.

Where a parent suspects that the other parent might apply for a passport for a child, or for endorsement of details of the child on the parent's passport, in order to remove the child from Australia without the first-mentioned parent's consent, he or she should lodge with the Consular Operations section of the Department of Foreign Affairs in Canberra (phone (02) 6261 3305; fax (02) 6261 3111) an objection to the issue of a passport for the child or to endorsement of details of the child on the parent's passport. Further, if the child is an Australian citizen and has no current Australian passport, a parent may lodge an alert with the Passport Office to prevent a passport being issued without that parent's knowledge. The form which must be completed is called a "Travel Document Inquiry" or Form PC9. It is available from any Australian Passport Office. If the child is not an Australian citizen, it is advisable to discuss the matter with the relevant embassy or consulate. The appropriate way of resolving a dispute over the issue of passport facilities in respect of a child would be for the parties to take proceedings for specific issues parenting orders.

Where there is a current Australian (or foreign) passport in respect of a child, s 67ZD of the FLA provides that a court exercising jurisdiction under the FLA may order the delivery to the court of a passport, where the court is of the opinion that there is a possibility or threat that a child will be removed from Australia.

ORDER ENFORCEMENT AND NON-COMPLIANCE IN CHILDREN'S CASES

DIVISION 13A AND THE COMPLIANCE REGIME

SUMMARY OF PT VII DIV 13A

FAMILY LAW RULES

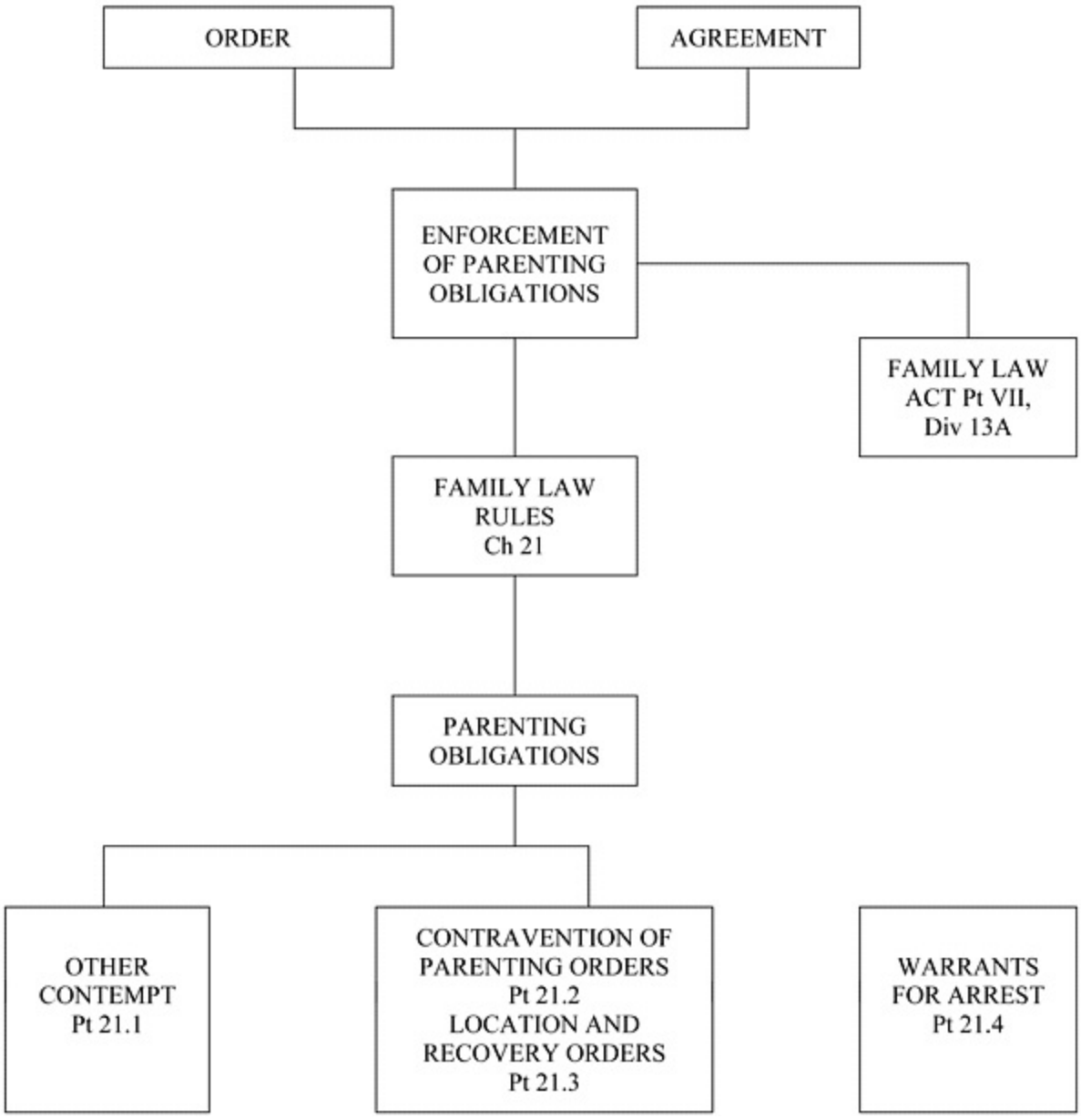
Editorial information

Written by William Keough and edited by Anne-Marie Rice and Louise O'Reilly

¶10-000 Enforcement of orders affecting children

Diagram

The machinery for the enforcement of orders affecting children under Pt VII Div 13A of the *Family Law Act 1975* (Cth) (FLA) is represented below.[1]



Footnotes

1 This schematic is based on the chart representing the court's overall enforcement powers as set out in Wolters Kluwer's *Australian Family Law and Practice* at ¶55-100.

¶10-010 Significance of non-compliance

In *D and C* (Imprisonment for Breach of Contact Orders),[2] Kay J made the following comments in relation to the purpose of enforcement proceedings:

> "The primary purpose of enforcement proceedings for non-compliance with an order is to try to ensure compliance with the order . . . There are circumstances where it is important to uphold the authority of the court and impose a penalty as a specific or general deterrent".[3]

Indeed, in *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*,[4] the High Court stated that the purpose of proceedings for civil contempt is as follows:

> "Although the primary purpose of committing a defendant who disobeys an injunction is to enforce the injunction for the benefit of the plaintiff, another purpose is to protect the effective administration of justice by demonstrating that the court's orders will be enforced".[5]

The Australian Law Reform Commission in its 1987 report, *Contempt*,[6] drew a distinction between the considerations associated with non-compliance in family law and general civil law. In contrast to the view expressed by the High Court in *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*, the ALRC took the view that the purpose of punishment in family law proceedings was not so much upholding the court's authority as an end in itself, but fulfilling the expectations of the litigants themselves that court orders will be obeyed and sanctions would be imposed if this does not occur.[7]

It is suggested that the significance of non-compliance lies in maintaining the proper working of the court system so that court orders are obeyed. If such orders are defied, the system of dispute resolution by litigation will cease to function.

Indeed, in *Tate and Tate (No 3)*,[8] the Full Court said on this matter:

> "While there are other means of dispute resolution available, in

the final analysis a citizen has the right to approach a court to determine a dispute and the court has a duty to do so".[9]

Footnotes

2 *D and C* (Imprisonment for Breach of Contact Orders) (2004) FLC ¶93-193; [2004] FamCA 814.

3 Ibid, at p 79,230.

4 *Australian Meat Industry Employees' Union* v *Mudginberri Station Pty Ltd* (1986) 161 CLR 98.

5 Ibid, at p 107.

6 ALRC Report 37, *Contempt*, Australian Government Publishing Service, Canberra, 1987.

7 Ibid, at [623]. See also *G and G* (1981) FLC ¶91-042 at p 76,361.

8 *Tate and Tate (No 3)* (2003) FLC ¶93-138; [2003] FamCA 112.

9 Ibid, at p 78,229.

DIVISION 13A AND THE COMPLIANCE REGIME

¶10-020 Introduction to Div 13A

Part VII, Div 13A was originally inserted into the *Family Law Act 1975* (Cth) (FLA) by the *Family Law Amendment Act 2000* which created a

three-tiered parenting compliance regime. Division 13A was significantly revised by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which, while retaining the general approach of Div 13A to parenting compliance, reorganised it and made numerous changes to the provisions within the division.

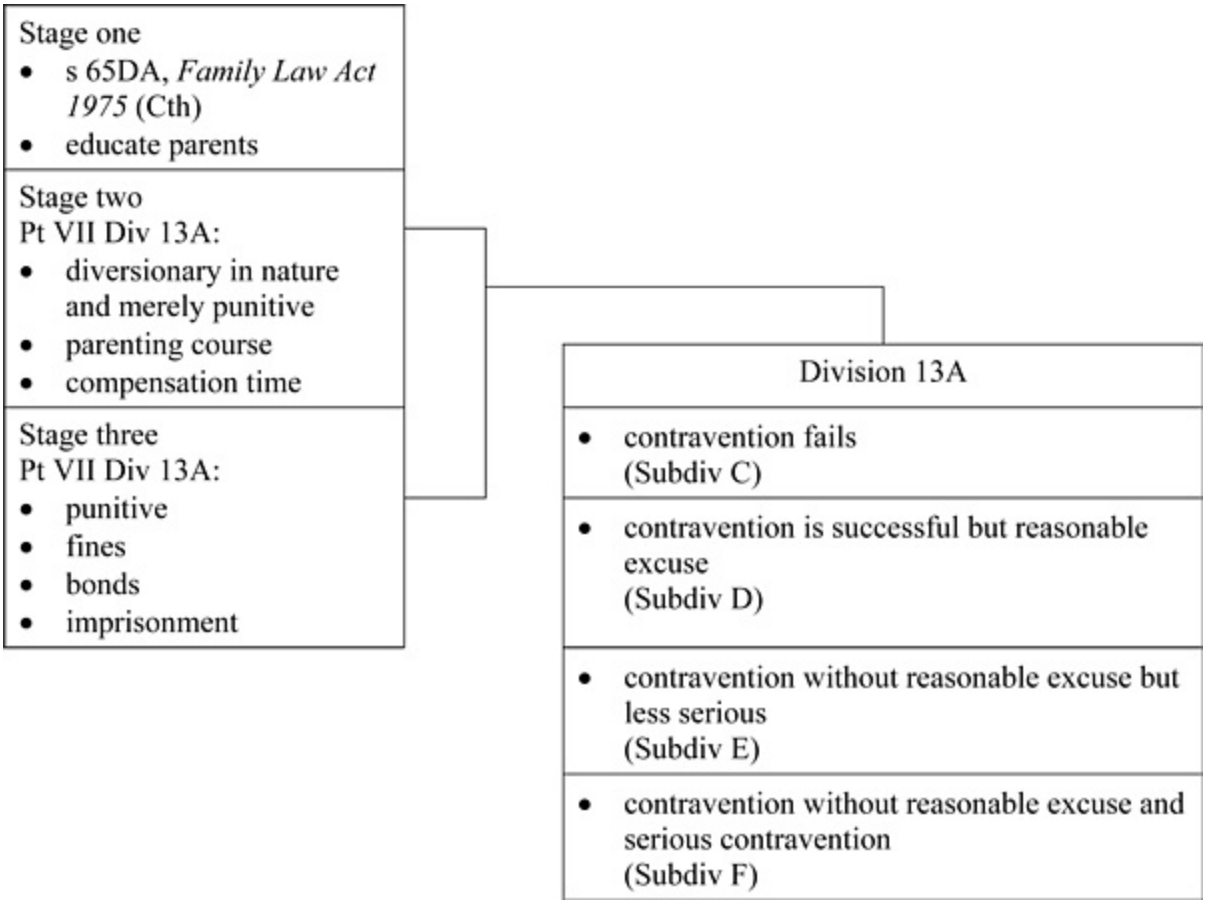
Division 13A deals with the consequences of failure to comply with orders and other obligations affecting children. Prior to the introduction of Div 13A, a party complaining of a breach of such orders could commence proceedings under Pt XIIIA of the FLA. Part XIIIA provided for sanctions for breach of court orders.

Part VII, Div 13A entirely superseded the enforcement powers in Pt XIIIA insofar as orders affecting children are concerned. Indeed, despite the general reference to “an order under this Act”, s 112AD of the FLA, like the rest of Pt XIIIA, does not apply to sanctions for parenting orders and certain other orders relating to children (s 112AA).

¶10-030 Three-stage parenting regime

The three-stage approach to parenting compliance is designed to educate parents about their responsibilities under parenting laws and to impose sanctions for breaches of such orders.

The three-stage approach to the parenting compliance regime can be illustrated as follows:



Stage one

The first stage can be found in s 65DA of the *Family Law Act 1975* (Cth) (FLA), which sets out the court's obligations to explain the nature and effect of any parenting order made to the parties. The rationale behind the first stage of parenting compliance is to ". . . improve communication between separated parents and educating parents about their respective responsibilities in relation to their children".[10]

The explanation should include particulars of obligations under orders, and the consequences of contravening such orders (s 65DA(2)). These particulars must be included in the orders and must be expressed in language that can be clearly understood by the person to whom the order is directed (s 65DA(8)).

Unlike other matters dealt with in s 65DA, these particulars cannot be provided by way of a pamphlet,[11] but such particulars can be given by way of standard clauses in the orders.[12]

The explanation should include information about parenting courses designed to assist parties to understand their obligations under parenting orders (s 65DA(3)).

The obligations extend to legal representatives involved in the court process. The court may make a request for a practitioner to explain to a party the obligations under the orders, and the consequences of breaching such orders (s 65DA(5)). Once requested to provide such an explanation, a legal representative has a duty to do so (s 65DA(6)).

It is suggested that the first stage of the parenting compliance regime is of paramount significance to the effective operation of Pt VII, Div 13A, in that the application of the division is predicated on a party's understanding of the obligations created by the orders. Division 13A assumes that both parties are aware of their respective obligations under the relevant law and that the court and the legal representatives of the parties have complied with the obligations imposed by s 65DA to ensure that each party understands the effect of the orders made by the court.

Stage two

The second stage of the parenting compliance regime is invoked if a breach of the orders occurs. Where the breach complained of is the first such breach of the order, the court is required to make an order requiring the defaulting party to attend an approved parenting course. The aim of this disposition is to educate parties about the obligations under such orders and to prevent any further breaches (s 70NEB).

In addition, it is open to the court to make an order compensating the innocent party for any loss suffered as a result of the breach, such as additional periods of time with the child(ren) as compensation for such period(s) lost as a result of the breach (s 70NDB and 70NEB(1)(b)).

Stage three

The third stage involves the imposition of serious sanctions such as fines and imprisonment as a result of a second or subsequent breach of an order. A "stage three" sanction can be imposed for a first breach if the breach is of a sufficiently serious nature that it warrants the imposition of such penalties (s 70NFB).

Organisation of Div 13A

The compliance regime is complex and divided into six subdivisions. The organisation of Div 13A represents a progression from lesser to greater seriousness and punitiveness, and mirrors the same structure found overall in the three-tiered approach to parenting compliance. In summary, it deals with:

- preliminary issues such as defining terms such as “contravention” and “reasonable excuse”, as well as establishing a provision relating to the standard of proof (Subdiv A)
- varying parenting orders (Subdiv B)
- where the contravention allegation fails (Subdiv C)
- where the contravention allegation succeeds, but a reasonable excuse is established (Subdiv D)
- where there is a contravention without reasonable excuse but it is of a less serious nature (Subdiv E), and
- where there is a contravention without reasonable excuse and it is of a serious nature (Subdiv F).

The powers of the court increase as the outcomes (which can range from the dismissal of an application to a finding that there has been a serious disregard for an order) become more serious.

Indeed, even if a court finds that a contravention allegation is unproven, it can still vary the primary order (s 70NAA(2) and 70NBA(1)(b)(i)). If the court finds that there has been a more serious contravention, then a community services order or imprisonment are possible outcomes (s 70NFB(2)).

The threat of costs

The regime uses the threat of a costs order in the following ways:

- if a court dismisses a contravention allegation or finds that no action is required against the respondent, then the court must

consider making a costs order against the applicant if the applicant has previously taken contravention proceedings that were not successful or that resulted in no action (s 70NDC), and

- if the court finds that there has been a more serious contravention of an order, then it must consider costs against the respondent save where it would not be in a child's best interests to do so (s 70NFB(1)(a) and (2)(g)).

Footnotes

10 Explanatory Memorandum to the Family Law Amendment Bill 2000 at p 1.

11 However, s 65DA(4) provides that the court may cause to be prepared, and be given to persons to whom a parenting order is directed, a document setting out particulars of the matters mentioned in s 65DA(3)(a)–(b).

12 The Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* is consistent with this approach, providing that stage one makes provision for standard clauses in parenting orders setting out the obligations the orders create and the consequences of failing to observe its terms. See Explanatory Memorandum at General Outline.

¶10-040 Subdivision A — preliminary issues

Section 70NAA sets out a simplified outline of Pt VII Div 13A of the *Family Law Act 1975* (Cth) (FLA).

Application of the division

Section 70NAB deals with the application of Div 13A. In particular:

> "Despite anything contained in any other provision of this Division, this Division does not apply in respect of a contravention, committed before this Division commences, of an order under this Act affecting children if a court made an order, in respect of that contravention before this Division commences, under this Act as previously in force".

Despite its somewhat clumsy drafting, the section says that the amendments to Div 13A do not apply to a contravention of an order affecting children where the contravention was committed before 1 July 2006, and a court made an order before 1 July 2006 under the FLA in respect of that contravention.

In the July 2006 decision of *NP and AP (No 2)*,[13] Mullane J considered the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to the FLA dealing with contraventions. His Honour declined to apply those provisions, holding that as the contraventions in the case before the court occurred and orders were made before 1 July 2006, the old provisions applied. His Honour then went on to deal with the contravention in accordance with the old provisions.

Meaning of "contravened" an order

Section 70NAC sets out to provide a meaning for the term "contravened" in relation to an order. In particular:

> "A person is taken for the purposes of this Division to have contravened an order under this Act affecting children if, and only if:
>
> (a) where the person is bound by the order — he or she has:
>
> (i) intentionally failed to comply with the order; or
>
> (ii) made no reasonable attempt to comply with the order; or
>
> (b) otherwise — he or she has:
>
> (i) intentionally prevented compliance with the order by a person who is bound by it; or

(ii) aided or abetted a contravention of the order by a person who is bound by it".

A key feature of the section is that it distinguishes between persons who are bound by an order and those who are not.

Example

Assume that X is spending time with child Y pursuant to operative parenting orders. X's adult child from a previous relationship, Z, and X conspire to take Y interstate in contravention of the orders. Would Z's position be any different if Z had a reasonable (albeit mistaken) belief that X was allowed to take Y interstate?

In circumstances where a party deliberately refuses to make a child available to spend time with the other party, it should present no problem to a court in arriving at a decision that an order has been contravened as a matter of fact.

However, a key question in determining whether an order has been breached is must an order be expressed in clear and unambiguous terms if it is to be enforced under Div 13A, or is an implicit obligation on the part of a party to take reasonable steps to hand a child over to the other party sufficient to attract the court's jurisdiction under Div 13A?

In *Stavros and Stavros*,[14] the Full Court said that it was implicit in an access order (as it was then known) that there is an obligation cast upon the parent with whom the child lives to take reasonable steps to deliver the child to the other parent at the commencement of the access period.

Other cases have confirmed that such obligations are positive obligations on the part of parents. They must genuinely comply with the order by encouraging a child to spend time with the other parent.

In *O'Brien and O'Brien*,[15] Smithers J held that compliance with an order must be genuine. In this case, the court was satisfied that the wife did not take reasonable steps to deliver the child to the other party. What the wife did was to allow the husband to talk to the child and she made it clear to the child that it was the child's decision as to

whether or not the child should spend time with the other party. The wife argued that she did not understand the obligations which the order placed upon her. The court rejected her argument.

In *Daly and Campbell*[16] (a case that involved a contact exchange centre), the trial judge was not convinced by the mother's evidence that she took any steps to genuinely encourage the child to go on contact other than taking the child to the centre and telling her "off you go".

The trial judge found that the mother was required to take "an active role with an obligation to positively encourage access", which she did not do. On appeal, the mother raised the question of her belief as to her obligations under the contact orders. The Full Court found that this was a relevant consideration which was not addressed by the trial judge.

In remitting the matter for a retrial, the Full Court stated:

> "Questions of a parent's understanding of obligations cast upon that parent to provide a child for contact, and whether that person has done all that could reasonably be expected, may often be inter-related".[17]

Cases such as these vindicate the rationale behind stage one of the parenting compliance regime — that is to educate parties as to the obligations arising out of orders.

The extent to which a party is justified in contravening a parenting order on the ground of a belief that to comply with such order would be contrary to the welfare of a child is discussed below.

Requirements taken to be included in certain orders

Section 70NAD provides that Div 13A proceedings can be taken if a party fails to comply with the requirements of s 65M, 65N, 65NA and 65P of the FLA. Those sections provide, in brief, that parties must not act in a manner that will frustrate the operation of parenting orders.

Meaning of reasonable excuse

Section 70NAE sets out the meaning of reasonable excuse in relation

to contravening an order.

For the purposes of Div 13A, the circumstances in which a party may be taken to have had a reasonable excuse for contravening an order are as follows:

- the respondent contravened the order because, or substantially because, they did not, at the time of the contravention, understand the obligations imposed by the order on the party who was bound by it (s 70NAE(2)(a))

- the court is satisfied that the respondent ought to be excused in respect of the contravention (s 70NAE(2)(b))

- the respondent believes on reasonable grounds that the contravention was necessary to protect the health or safety of a party (including that party or the child), and the period over which the breach extended was not longer than was necessary to protect the health or safety of a party in danger (s 70NAE(4)–(7)).

While s 70NAE sets out the circumstances which can give rise to a "reasonable excuse", the section does not limit the meaning of reasonable excuse to those circumstances.

It is suggested that, given the effect of s 65DA, at least in circumstances where the parties are legally represented, or the relevant order is made by the court with the parties present, few parties could rely upon the first category of reasonable excuse as set out in this section. Indeed, there may be other circumstances falling outside the scope of s 70NAE which may provide a reasonable excuse for the contravention.

Warning

It would be a mistake to assume that because a respondent cannot find a category within s 70NAE to support a defence of reasonable excuse that no such defence exists. Indeed, the range of possible reasonable excuses has been said to be "as

wide as the field of potential human mishaps and misunderstandings".[18]

Example

In *O* v *M* [2006] FMCAfam 297, a Federal Magistrate found that not making a child available for handover due to the lack of road worthiness of a vehicle (damaged windscreen) might amount to a reasonable excuse for one or two weekend visits, but not beyond.

Reasonable excuse where the respondent fears for a person's health or safety (s 70NAE(4)–(7))

The provisions contained in s 70NAE(4)–(7) seem to mean rather simplistically that a party who contravenes a parenting order has a reasonable excuse if he or she believed on reasonable grounds that the contravention was necessary to protect the health or safety of a party, including a respondent or a child, and that the contravention was for a period no longer than necessary (on the basis of the respondent's belief on reasonable grounds) to protect the health and safety of that party.

Indeed, the issue of the "health of a child" as the basis for a reasonable excuse was examined by the Full Court in *Childers and Leslie*.[19] This was an appeal by the father against an order of a Federal Magistrate (as judges were then known) dismissing a contravention application commenced by him. In accordance with operative orders, the father was entitled to spend time with the child, aged five. On one occasion, the child was ill and the mother kept the child from spending time with the father on a weekend. It was common ground between the parties that the child was ill, however, the medical advice was that the child only required rest and minimal activity for a few days. The father was a doctor and argued that he could care for the child. The mother relied upon her own medical advice as well as the child's wish to be cared for by her mother as forming the basis for a reasonable excuse for contravening the order. The Federal Magistrate found that the mother had a reasonable excuse and

dismissed the father's application.

A central point in the father's appeal was that the Federal Magistrate should not have found that the mother's excuse was made out because her own evidence did not meet the terms of s 70NAE(5). The father also argued that the child had been unwell for a week following the contravention and other individuals had cared for the child during that time. Therefore, the Federal Magistrate ought to have been satisfied that the child did not need to be withheld from the father.

In allowing the appeal, the Full Court said that the correct approach would have been to at least attempt to measure the mother's excuse against the terms of s 70NAE(5) and to explain why the subsection did not apply, should that be the case.

The key issues on appeal were:

- the scope of the "reasonable excuse", and
- whether circumstances after the alleged contravention are of relevance to any reasonable excuse.

The Full Court specifically recognised that s 70NAE(5) provides an inclusive definition in respect of reasonable excuse, so that circumstances other than those set out in that section can constitute a reasonable excuse.[20] The health of a child is one of the matters specifically provided for in s 70NAE(5). The subsection provides for a reasonable excuse in circumstances where the person believes on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health of the child.

The Full Court found that the Federal Magistrate had not addressed s 70NAE(5) nor had the Federal Magistrate made any finding that keeping the child at home was necessary to protect the child's welfare.[21] Similarly, there was no finding about any belief on the part of the mother about that.

The Full Court found that instead of attempting to measure the mother's excuse against the terms of s 70NAE(5), the Federal Magistrate applied too loose a test of reasonableness, namely the

terms of s 70NAE(2)(b),[22] that a person is taken to have a reasonable excuse if the court is satisfied that the respondent ought to be excused in respect of the contravention.

The second issue on appeal was whether circumstances after the contravention could be relevant. The Full Court held that ex post facto events were relevant in that the mother's decision to place the child in the care of others and away from her home in the days following the contravention was relevant to her state of belief on the weekend. The Full Court concluded that the mother did not believe that the over holding was required to protect the child's health.

Warning

Practitioners acting for a respondent in a contravention application need to take care in taking instructions in relation to the circumstances of the alleged contravention, including the circumstances leading up to, and preceding, the alleged contravention as well as the belief of the respondent at the time of the contravention.

Reasonable excuse where the respondent has concerns for a child's interests outside (s 70NAE(4)–(7))

This issue gives rise to an area of some practical importance.

Example

Assume that there is an order that a child spend time with the father (who is a dual United States and Australian citizen) inter alia for one-half of the long summer vacation. The mother discovers by stealth that the father is planning to return to the United States over the coming summer holidays. The mother believes that the father plans to take the child to the United States. The mother fails to make the child available to spend time with the father.

Can such a belief ever constitute a reasonable excuse to an application under Div 13A given that such action on the part of the father could not be shown to be placing the *health* and *safety* of the child at risk?

For a consideration of this issue, one should look to the cases about the meaning of "reasonable excuse" arising out of the earlier legislation — the former s 112AD (see below).

In *Gaunt and Gaunt*,[23] the Full Court held that a person cannot claim that he or she sincerely believed that the order was contrary to the welfare of the child as a reasonable excuse for contravening a custody and access (now parenting) order.

As the Full Court said:

> "To allow a party to arrogate to himself a supervening power to make an independent decision on that issue [the welfare of the child] and to rely on that decision to escape from compliance with the court's order or from the consequences of non-compliance would undermine the purpose and intentions of the Act. . . . A party's *subjective view* of the rights and wrongs of a decision cannot be relied on as 'just cause or excuse' or 'reasonable excuse'. Evidence of changed circumstances or of matters not considered when the order was made might be" (emphasis added).[24]

Despite the Full Court's dicta in *Gaunt*, in *Cavanough and Cavanough*,[25] Connor J accepted that the husband had a just cause or excuse for not complying with the terms of a parenting order where he had an honest and reasonable belief that the children did not wish to be with their mother and that it was not in their interests that they should be subjected to embarrassment as a result of their mother's conduct during access (now spending time).

Connor J concluded:

> "I am prepared to accept that the husband had an honest and reasonable belief that the children did not wish to be with their mother on the terms stated in the order and that it was not in their interests that they should be subjected to embarrassment during access . . . Where the welfare and interests of the children are the paramount considerations, and where the husband believes that to act in accordance with the order would be against the

children's interests, the husband's failure to act is excused".[26]

Connor J essentially reconciled his decision with *Gaunt* on the grounds that, in the case before him, the husband had not suggested that the order was wrong ab initio, but rather the situation had changed since the orders were made and, therefore, he had a reasonable belief that access in the form ordered was no longer in the best interests of the children.

It is suggested that the rationale for not complying with the order was thus more than the father's mere "subjective view of the rights and wrongs" of the order.

Both *Gaunt* and *Cavanough* were considered prior to the enactment of the former s 112AC, the precursor to the current s 70NAE. The provisions of the legislation considered in *Gaunt* and *Cavanough* required the applicant to merely establish that there was a contravention "without just cause or excuse". Section 112AC, however, was considered in *O'Brien and O'Brien*[27] *(O'Brien)*, where Smithers J commented:

> ". . . Whatever one may say about *Cavanough's* case, and the suggestion that one has to take into account the welfare of the child in determining whether a person has a reasonable excuse for not complying with the access order . . . the passing of s 112AC(3) makes it clear that a reasonable excuse in respect of concern as to the welfare of a child, is limited to a belief, on reasonable grounds, that depriving a person of access pursuant to an order was necessary to protect the health and safety of a person. It is not a question as to whether in the view of the custodial parent, or in the view of the custodial parent on reasonable grounds, that the carrying out of the access order might not be in the best interests of the child. The question is whether it is necessary to protect the health or safety of a person, including the child".[28]

On the facts set out in *O'Brien*, there can be no doubt that the decision of Smithers J was correct — his Honour found that there was no basis upon which the wife might have believed on reasonable grounds that the contact order was not in the child's best interests. It is respectfully

suggested that the test enunciated by Smithers J in *O'Brien*, that a reasonable excuse relating to the welfare of a child is *limited* to a belief that it was "necessary to protect the health or safety of a person", is difficult to reconcile with s 70NAE(1) which provides that the matters set out in the various subsections of s 70NAE are *not* entirely exclusive.

It is submitted that the law relating to the implications of s 70NAE(4)–(7) for the scope of the defence of "reasonable excuse" in relation to parenting orders is not wholly settled.

Summary

The current state of the law can be summarised as follows:

- the mere ill health of a child per se may not constitute a reasonable excuse
- the respondent has a reasonable excuse if the facts fall within s 70NAE(4)–(7)
- the subjective views of the respondent that compliance with the order would be against the child's interests do not constitute a reasonable excuse per se
- there may be circumstances that fall outside the scope of s 70NAE(4)–(7) relating to the interests of the child which can provide a reasonable excuse
- the court adopts a generally cautious approach towards finding that there is a "reasonable excuse" in cases where respondents contravene parenting orders on the basis that to comply is contrary to the best interests of the child.

Footnotes

13 *NP and AP (No 2)* [2006] FamCA 869.

14 *Stavros and Stavros* (1984) FLC ¶91-562.

15 *O'Brien and O'Brien* (1993) FLC ¶92-396.

16 *Daly and Campbell* (2005) FLC ¶93-236; [2005] FamCA 1046.

17 Ibid, at p 79,926.

18 Wolters Kluwer's *Australian Family Law and Practice* at ¶56-186.

19 *Childers and Leslie* (2008) FLC ¶93-356.

20 At p 83,332 per Warnick J.

21 At p 82,331.

22 At p 82,332.

23 *Gaunt and Gaunt* (1978) FLC ¶90-468.

24 Ibid, at p 77,398.

25 *Cavanough and Cavanough* (1980) FLC ¶90-851.

26 Ibid, at p 75,371.

27 *O'Brien and O'Brien* (1993) FLC ¶92-396.

28 Ibid, at p 80,045.

¶10-050 Standard of proof

The standard of proof for all compliance proceedings, including determining if there has been a reasonable excuse for contravention, is the balance of probabilities under s 70NAF of the *Family Law Act 1975* (Cth).

However, in proceedings where a serious sanction is contemplated such as a bond, community service order, major fine or prison, the court must be satisfied of the contravention beyond reasonable doubt (s 70NAF(3)).

Section 70NAF is consistent with the overall structure of Div 13A — that is the highest standard is more appropriate for the more punitive types of orders.

In *Dobbs and Brayson*,[29] the mother was sentenced to a period of imprisonment by a Federal Magistrate who found that, without reasonable excuse, she had contravened an order for time to be spent by the father with the children. On appeal, the Full Court found that the Federal Magistrate had failed to identify and apply the proper standards of proof and to adequately set out reasons for imposing a term of imprisonment.

Warning

Where there is some prospect that a court might impose a serious sanction, practitioners ought to keep in mind that the overall outcome of the proceedings might depend on the application of the criminal as well as the civil standards of proof. Advice to clients and submissions to the court might have to cover the fact that necessary findings can be made on both standards of proof.

Footnotes

29 *Dobbs and Brayson* (2007) FLC ¶93-346.

SUBDIVISION B: COURT'S POWER TO VARY PARENTING ORDERS

¶10-060 Stage two of parenting compliance regime

The second stage of the parenting compliance regime is designed to assist and educate parents about their obligations under parenting orders and the effect of a breach. Stage two is set out in Pt VII Div 13A Subdiv B of the *Family Law Act 1975* (Cth) (FLA) and applies where:

- a primary order under the FLA affecting children has been made, whether before or after the commencement of Div 13A
- a court is satisfied that a person has contravened the primary order
- the respondent does not establish that he or she had a reasonable excuse for the current contravention, and
- no court has previously determined that the party has, without reasonable excuse, contravened the primary order or, where a court has previously determined that the party has, without reasonable excuse, contravened the primary order, the court dealing with the current contravention is satisfied that it is more appropriate for that contravention to be dealt with under Subdiv B.

If a court is satisfied that the nature of the contravention demonstrates a serious disregard for a party's obligations under the primary order, the court will decline to deal with the contravention under stage two and deal with it in accordance with stage three of the parenting compliance regime.

¶10-070 Court's power to vary a parenting order

Part VII Div 13A Subdiv B of the *Family Law Act 1975* (Cth) (FLA) provides the court with the power to vary existing parenting orders. Section 70NBA(1) provides that the court has the power to vary a primary order even if the contravention is unproven, or if it is proven but a reasonable excuse is found.

In the case of *Irvin and Carr* (2007) FLC ¶93-322, the Full Court of the Family Court of Australia considered an appeal by the mother against orders made by a Federal Magistrate at a contravention hearing. The child lived with the mother and spent time with the father. The mother relocated with the child from the Sunshine Coast in Queensland to the New South Wales North Coast but did not disclose this to the court. The father brought contravention proceedings at which time the Federal Magistrate ordered that the mother enter into a bond by way of sanction pursuant to s 70NFE of the *Family Law Act 1975* and, pursuant to s 70NBA of the FLA, varied the parenting orders with the ultimate effect that the child live with the father and spend time with the mother.

The court found that the Federal Magistrate made a finely balanced decision to change the parent with whom the child lives following the contravention hearing and that the Federal Magistrate's approach in dealing with the mother for contravention and the variation of parenting orders pursuant to s 70NBA was entirely appropriate in the circumstances.

Similarly, in the case of *Sandler and Kerrington* (2007) FLC ¶93-323, the Full Court of the Family Court of Australia considered an appeal by the mother against orders made by a Federal Magistrate following a contravention hearing. Parenting orders in the matter had been made nine months prior to the contravention hearing which ordered that the child live with the mother and spend time with the father. At the contravention hearing, the Federal Magistrate altered the parenting order pursuant to s 70NBA of the FLA on an interim basis placing the child in the father's care.

In *Dobbs and Brayson*,[30] a Federal Magistrate reversed a parenting

order resulting in the children living with the father indefinitely and not just for the period of the mother's imprisonment for contravention.

On appeal, the Full Court was satisfied that the Federal Magistrate's treatment of the matters relevant to the variation of the parenting order fell well short of that required under the FLA. The mother's appeal was allowed.

Warning

It is to be noted that an order varying a parenting order is itself a parenting order under s 64B(1)(a) and that in considering whether or not to vary a primary order, the court must treat the child's best interests as the paramount consideration under s 60CA.

Section 70NBA(2) recognises this and provides that if Subdiv F (more serious contraventions without reasonable excuse) applies, the court must also take into account the behaviour of a party who has contravened an order in relation to post-separation parenting programs. The court will also consider whether the primary order was a compensatory parenting order.

These grounds could be relevant, for example, in assisting a court in formulating an order limiting the amount of time a person spends with a child in circumstances where such party has not benefited from a parenting program, or has refused to attend one.

The significance of parenting plans

Section 70NBB(2) provides that, in considering whether to vary a parenting order, the court should have regard to anything of relevance in any registered or unregistered parenting plans, and in particular should consider whether to vary the primary order to make it consistent with the parenting plan.

The plan must have been in force at the time the alleged or proven contravention took place.

Section 70NBB is not inconsistent with s 64D which provides that normally a later parenting plan will prevail over a parenting order.

Warning

An action that would otherwise contravene a parenting order may not be a contravention, because of a subsequent (albeit inconsistent) parenting plan. Whether this is the case will depend on the terms of both instruments.

Footnotes

30 Ibid.

SUBDIVISION C: CONTRAVENTION ALLEGED BUT NOT ESTABLISHED

¶10-080 Part VII Div 13A Subdiv C

Section 70NCA of the *Family Law Act 1975* (Cth) (FLA) provides that Pt VII Div 13A Subdiv C applies in contravention proceedings in circumstances where the court does not find that the respondent contravened the primary order.

Under this subdivision, the court's powers are limited to varying the primary order under s 70NBA.

This subdivision raises, for the first time, the issue of costs as a consideration in contravention proceedings.

Under s 70NCB(2), the option of ordering costs against the applicant *must* be considered if there has been a previous contravention allegation, and either the court was not satisfied that there had been a

contravention, or it was satisfied but it did not make an order for either variation, compensatory time, costs or post-separation parenting program attendance, or the court did not impose a penalty or a sanction.

It is suggested that the rationale behind the threat of costs is to deter a party from making repeated contravention applications.

> **Note**
>
> Section 70NCB makes no mention of the main costs section in the FLA, being s 117. Given that s 70NCB(2) provides that the court must *consider* making a costs order, and does not attempt to state all the principles that will apply in relation to the making of such order, it is suggested that the court will need to be guided by s 117.

SUBDIVISION D: CONTRAVENTION ESTABLISHED BUT REASONABLE EXCUSE FOR CONTRAVENTION

¶10-090 Part VII Div 13A Subdiv D

Section 70NDA of the *Family Law Act 1975* (Cth) (FLA) explains that Pt VII Div 13A Subdiv D applies in circumstances where there has been a contravention of a parenting order, whether before or after the commencement of Div 13A, and the respondent has a reasonable excuse.

Under Subdiv D, the court's powers are more extensive than under the previous subdivisions. In addition to being in a position to vary an existing parenting order under s 70NBA, the court must consider making an order for compensatory time under s 70NDB, and may in

fact make an order providing for compensatory time. Section 70NDB provides as follows:

> "(1) If:
>
> (a) the primary order is a parenting order in relation to a child; and
>
> (b) the current contravention resulted in a person not spending time with the child (or the child not living with a person for a particular period);
>
> the court:
>
> (c) may make a further parenting order that compensates the person for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention; and
>
> (d) must consider making that kind of order.
>
> (2) The court must not make an order under paragraph (1)(c) if it would not be in the best interests of the child for the court to do so".

It should be noted that, as s 70NDB(1)(c) clearly states that a compensatory order is a parenting order, by s 60CA[31] the court must regard the best interests of the child as the paramount consideration in making an order for compensatory time.

In *Childers and Leslie*,[32] the Full Court noted that compensatory time is not to be ordered by way of retribution without regard as to the child's best interests.

Warning

Practitioners must not assume that compensatory time will be automatically awarded by the court.

Given the requirements of s 60CA, it is submitted that s 70NDB(2) is an unnecessary restatement of the law included in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to the FLA for the purpose of additional clarity or emphasis.

One further point of note in relation to the provision of compensatory time is its justification in circumstances where the respondent has been able to establish a reasonable excuse.

Example

Assume that there are orders which provide for a child to be with her father on a weekend. The father has led the mother to believe, incorrectly, that he would not be available on the weekend. The child is not made available and the father brings contravention proceedings. The court finds that the mother has contravened the order as a matter of fact, but was satisfied that she had a reasonable excuse, given that she believed that the father would not attend.

By s 70NDB(1)(c) the court makes a further parenting order that *compensates the father* for the lost time with the child.

This may seem harsh on the mother who has been able to establish a reasonable excuse, and it was clearly not her fault that the child did not spend the weekend with the father. The legislator's justification for the provision of compensatory time can be found in the Explanatory Memorandum which provides:

> ". . . This is appropriate given that the original parenting order for contact was made in the best interests of the child, that contact with both parents is an important aspect of ensuring that a child maintains a meaningful relationship with both parents and that parents are able to fulfil their parental responsibilities in relation to their child".[33]

Footnotes

31 Section 60CA provides: "In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration".

32 *Childers and Leslie* (2008) FLC ¶93-356.

33 Explanatory Memorandum to *Family Law Amendment (Shared Parental Responsibility) Act 2006*, at [279].

¶10-100 Costs

When the court declines to make an order for “compensatory time”, the court may order the applicant to pay some or all of the other party’s costs in accordance with s 70NDC of the *Family Law Act 1975* (Cth).

The court must consider making an order to that effect if the applicant has previously brought contravention proceedings and, on the previous occasion, the court was not satisfied that there had been a contravention or did not otherwise make an order dealing with the respondent (s 70NDC(2)).

The justification for this provision seems to be that the failure to make such an order, where there has been a reasonable excuse established, may suggest that the proceedings should never have been brought. Accordingly, it is appropriate that the applicant pay the respondent’s costs.

Note

Practitioners will note that this section, like s 70NCB, does not refer to the main costs section, s 117, and merely refers to the making of a costs order under subsection (1). Given under this provision that the court must *consider* making a costs order, it is suggested that the court will continue to be guided by s 117.

SUBDIVISION E: LESS SERIOUS CONTRAVENTION WITHOUT REASONABLE EXCUSE

¶10-110 Part VII Div 13A Subdiv E

Part VII Div 13A Subdiv E of the *Family Law Act 1975* (Cth) (FLA) commences the third stage of the parenting compliance regime (see ¶10-030), which is primarily the punitive stage where the court is empowered to punish a respondent for initial and ongoing breaches of parenting orders by the imposition of specific sanctions.

Section 70NEA explains the scope of Subdiv E. By this section, the subdivision applies to less serious contraventions without reasonable excuse. Section 70NEA is a complicated section, the scope of which can be summarised as follows:

If:

- there has been a contravention of a parenting order, and
- the respondent has not established a reasonable excuse, and
- this is the first established contravention of the parenting order, or
- although it is not the first *established*[34] contravention, the court is satisfied that it is appropriate to apply this subdivision,

the subdivision will apply, and the court is empowered to make orders under s 70NEB requiring attendance at a post-separation parenting program. The court is also empowered to make other orders such as for compensatory time, costs and bonds.

The subdivision does *not* apply if the court is satisfied that the respondent has behaved in a manner that shows a serious disregard for his or her obligations under the primary order (s 70NEA(4)). In such circumstances, the court can deal with such contravention under the more serious Subdiv F.

Footnotes

34 Which means that no court has previously made an order imposing a sanction or taken an action in respect of a contravention by the respondent of the primary order.

¶10-120 Powers of the court

Section 70NEB of the *Family Law Act 1975* (Cth) (FLA) is a complex section which sets out an array of possible orders the court can make. The court can order one or more of the following:

- attendance at a post-separation parenting program
- compensatory parenting order
- adjournment of proceedings pending an application to vary a primary order
- that the party who contravened the order enter into a bond
- compensation of expenses
- costs against the respondent, and
- costs against the applicant.

Attendance at a post-separation parenting program (s 70NEB(1)(a))

This can be made not only against the respondent, but also against another specified person, if the following conditions are met (s 70NEB(2)):

- the specified person brought the proceedings before the court in relation to the current contravention or is otherwise a party to the proceedings, and
- the court is satisfied that it is appropriate to direct the order to the specified person because of the connection between the current contravention and the carrying out by the person of his or her parental responsibilities in relation to the child to whom the primary order relates.

Section 70NEB(3) provides that, in the event the court makes an order in accordance with s 70NEB(1)(a), the principal executive officer of the court must ensure that the provider of the parenting program is notified of the making of the order.

Section 70NEG provides that in the event that a person ordered to attend a parenting program does not attend such program, or is assessed as unsuitable to attend a program, the court "may make such orders as it considers appropriate" in respect of such person.

Compensatory parenting order (s 70NEB(1)(b))

This type of order was discussed at ¶10-090 in relation to s 70NDB. Reference to the child's best interests is made in s 70NEB(5).

Adjournment of proceedings pending application to vary primary order (s 70NEB(1)(c))

In contravention proceedings, the court can always make a further parenting order varying a primary order under s 70NBA. The court is empowered to adjourn the proceedings to allow either or both of the parties to the primary order to prepare the relevant evidence in respect of such proceedings.

In considering whether to adjourn the proceedings, the court must have regard to:

- whether the primary order was made by consent
- whether either or both of the parties to the proceedings that gave rise to the primary order were represented
- the length of time between the making of the primary order and the circumstances that gave rise to the contravention, and
- any other matters that the court deems relevant.

Order the person who contravened order to enter into a bond (s 70NEB(1)(d))

Section 70NEC sets out the provisions and limitations in relation to the making of bonds. The primary limitation in relation to a bond is that it

can be for a period of up to two years (s 70NEC(2)).

Section 70NEC(4) provides that a bond may include conditions (without limitation) such as:

- requiring the party to attend upon a family consultant
- requiring a party to attend for family counselling or family dispute resolution, or
- requiring the party to be of good behaviour.

The conditions that may be imposed on a party in s 70NEC(4) are not limited to those listed in that subsection. For example, a court may require a party to attend anger management or drug/alcohol counselling as part of a bond, where appropriate.

In *Elspeth & Peter*,[35] the Full Court considered that they should require the mother to enter into a bond without security. The Full Court identified certain difficulties requiring the mother to enter into such a bond. The Full Court did not consider that they could properly meet their legislative obligations under s 70NEC(5) to explain to her the consequences of her failure to enter into the bond, other than to say that there were no apparent consequences.

Warning

While the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amendments to the FLA made it clear that the court can order a party to enter into a recognisance in relation to the primary order, it should be noted that the Full Court in *Gaunt and Gaunt*[36] (see ¶10-040) expressed doubt as to whether it can require a party to enter into a recognisance in relation to a new order in substitution for the primary order.[37] This would be a relevant factor for practitioners to bear in mind given that a court can vary a primary order under Subdiv B. In *Stapleton & Hayes*,[38] the primary judge found that the mother had

contravened final parenting orders and imposed a bond on her pursuant to s 70NEC. The mother sought to appeal those orders. The court found there was insufficient evidence for the trial judge to have found some of the contraventions to be established, although on the evidence it was open to the judge to find that one contravention was established. The appeal was allowed in relation to four of the five contravention findings, and the court held that the bond could not stand.

Order for compensation of expenses (s 70NEB(1)(e))

This order can be made in circumstances where, as a result of a contravention, the applicant spends less time with the child, and has incurred out-of-pocket expenses.

The expenses incurred must be reasonable and must be referable to the contravention (eg an airline ticket purchased and wasted as a result of a child not being made available for time with the other party under a parenting order).

Costs against respondent (s 70NEB(1)(f))

The court is empowered to order the party who has contravened the order to pay some or all of the costs of the other party or parties.[39]

In *Elspeth & Peter*,[40] the Full Court considered that they should require the mother to pay the father's costs of the contravention proceedings under s 70NEB(1)(f) and to enter into a bond. After identifying certain difficulties in relation to the proposed bond, the Full Court formed the view that the only effective penalty was to require the mother to contribute to the father's costs of the contravention proceedings.

As to the relationship between this power and s 117, see ¶10-080 and ¶10-100.

Costs against applicant (s 70NEB(1)(g))

This power allows the court to order that the person who brought the

contravention proceedings pay some or all of the costs of the other party or parties. The court can exercise the power only if it makes no other orders in relation to the current contravention.

The court *must* consider ordering costs against the applicant. The justification for this provision is presumably that, where a court makes no order in relation to a contravention, notwithstanding that there has been a contravention without reasonable excuse, the applicant may have been over-zealous or otherwise unreasonable in bringing the application, and it is appropriate for the court to consider making a costs order against the applicant.

As to the relationship between this power and s 117, see ¶10-080 and ¶10-100.

Footnotes

35 (2007) FLC ¶93-341, sub nom *Elspeth & Peter; Mark & Peter and John & Peter*.

36 *Gaunt and Gaunt* (1978) FLC ¶90-468.

37 Ibid, at pp 77,399–77,340.

38 *Stapleton & Hayes* [2016] FamCAFC 171.

39 For example, where there were interveners in the proceedings that gave rise to the primary order and such person(s) have rights under such order that have been prejudiced by the contravention and they have commenced their own proceedings for contravention.

40 *Elspeth & Peter* (2007) FLC ¶93-341.

¶10-130 Duties of provider of post-separation parenting

program and evidence

Part VII Div 13A Subdiv E of the *Family Law Act 1975* (Cth) (FLA) sets out three provisions that deal specifically with certain aspects of post-separation parenting programs, such as:

- duties of a provider of a post-separation parenting program
- evidence, and
- further orders the court may make in relation to attendance at a program.

Duties of provider of post-separation parenting program

The provider of a post-separation parenting program must inform the court if:

(a) the provider considers that a party ordered to attend the program under s 70NED(a) is unsuitable to attend the program, or to continue attending the program, or

(b) a party ordered to attend the program under s 70NED(a) fails to attend the program or a part of it.

Evidence

Section 70NEF of the FLA provides that evidence of anything said or an admission made by a party attending a post-separation parenting program is not admissible. However, it does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse, or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse.

Court may make further orders in relation to attendance at program

The court may make such orders as it considers appropriate, other

than the orders referred to in s 70NFB(2), in respect of a party, if:

(a) it appears to the court that the person has not attended a post-separation parenting program that the person was ordered to attend, or

(b) the party was assessed as unsuitable to attend a program.

Section 70NEG gives the court unlimited power to make such orders as it considers appropriate. The limit of this power remains to be tested by the court.

SUBDIVISION F — MORE SERIOUS CONTRAVENTION WITHOUT REASONABLE EXCUSE

¶10-140 Part VII Div 13A Subdiv F

Part VII Div 13A Subdiv F of the *Family Law Act 1975* (Cth) (FLA) applies to circumstances where there is an ongoing breach of the order or the breach, even if it is the first, is so serious as to warrant the imposition of a penalty under the subdivision.

Section 70NFA(1) explains that the provisions of Subdiv F apply where the court is satisfied that a person has contravened a primary order without reasonable excuse, and either:

- no court has previously made an order imposing a sanction for contravention, or adjourning previous contravention proceedings, but the court is satisfied the respondent has demonstrated a serious disregard for their under the primary order (s 70NFA(2)). Whether the court will be satisfied that the respondent has demonstrated a “serious disregard” for obligations under the orders will determined upon an assessment of the facts of each individual case, or

- a court has previously made an order imposing a sanction for contravention or adjourning previous contravention proceedings

(s 70NFA(3)).

Even if either of the above considerations apply, the court still has a discretion under s 70NFA(4) to deal with the contravention proceedings under Subdiv E as a less serious contravention.

¶10-150 Available sanctions

Section 70NFB(2) of the *Family Law Act 1975* (Cth) (FLA) confirms the orders that are available to be made by the court under Pt VII Div 13A Subdiv F. The court can impose the following sanctions:

- a community service order
- an order that the respondent enter into a bond
- an order that a party be compensated for time not spent with a child, or
- a fine.

Community service order (s 70NFB(2)(a))

Section 70NFC allows the court to make a community service order where it is empowered by the law of a participating state or territory to do so (s 70NFC(1)). Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory have made appropriate arrangements with the Commonwealth Government for the imposition of community service orders by a court exercising jurisdiction under Div 13A.

The order may be expressed in terms of a community service or community-based order (s 70NFC(3)), and is governed by the law of the state or territory where the court which is determining the contravention is located (s 70NFC(4)). This could be demonstrated by reference to the example below.

Example

A court in Melbourne determining a contravention matter and applying Subdiv F

sanctions can order the respondent to serve a community-based order, which will be governed by the provisions of the *Sentencing Act 1991* (Vic).

Section 70NFC(2) provides that the total number of hours to be performed by way of a community service order cannot exceed the maximum period specified by the relevant state or territory law.

Warning

Practitioners should have regard for the relevant state and territorial law in relation to community services orders and in particular the provisions relating specifically to the maximum number of hours that can be served.

The relevant state and territorial laws governing community service orders are as follows:

- Australian Capital Territory — Pt 6.1, *Crimes (Sentencing) Act 2005* (ACT).
- New South Wales — s 8, *Crimes (Sentencing Procedure) Act 1999* (NSW).
- Northern Territory — Pt 3, Div 4, *Sentencing Act 1995* (NT).
- Queensland — Pt 5, Div 2, *Penalties and Sentences Act 1992* (Qld).
- South Australia — Pt 4, *Sentencing Act 1988* (SA).
- Tasmania — Pt 4, *Sentencing Act 1997* (Tas).
- Victoria — Pt 3A, *Sentencing Act 1991* (Vic).
- Western Australia — Pt 9, *Sentencing Act 1995* (WA).

Section 70NFC(5) provides that, before making a community service order, the court must explain to the party who will be bound by the order the consequences that may flow in the event that the order is not complied with. The explanation must be given in language the respondent is likely to readily understand.

Section 70NFD provides that a community service order can be varied or discharged by the court that made the order.

Order respondent to enter into a bond (s 70NFE)

Section 70NFE sets out the nature of bonds for the purposes of Subdiv F. The provision does not differ from the provisions governing bonds for the purposes of Subdiv E. See ¶10-120 for discussion in relation to s 70NEC(1).

Order the person to be compensated for time not spent with child (s 70NFB(2)(c))

An order for compensatory time with a child may be made unless it would not be in the best interests of the child. See the discussion at ¶10-090 in relation to this matter.

Imposition of fine (s 70NFB(2)(d))

The court is empowered to fine a respondent an amount not exceeding 60 penalty units. The definition of “penalty unit” for the purpose of Commonwealth law can be found in s 4AA(1) of the *Crimes Act 1914* (Cth), which provides that one penalty unit means $210.

It is open to a court to tailor any order in relation to the payment of fines as the court deems appropriate in the circumstances of the case. In *NP* v *AP (No 2)*,[41] in finding a mother guilty of a serious disregard for contact orders, Mullane J fined the mother the sum of $150 on each of the 26 contravention charges she was facing, being a total of $3,900.

His Honour then suspended the fines on the following conditions:

- the mother for two years from the date of judgment complies with all parenting orders concerning the child spending time with his father

- the mother attends and completes a course in parenting after separation approved or nominated by the Director of Mediation of the Family Court of Australia

- the mother contacts the Director of Mediation within seven days and obtains the necessary approval or nomination

- the mother pays any reasonable fees for the course, and

- for two years the mother does not:

  – question or converse with the child about his father or their time together

  – permit the child to be interviewed or examined by any medical practitioner, representative of DOCS or police officer or other public official in relation to any suspected abuse or mistreatment in the father's care except by the agreement of the independent lawyer for the child, or

  – record in writing, by tape recorder or video any conversations of the child or with the child about his father or their time together.

His Honour concluded his sentencing remarks by indicating to the mother that if she was to breach the conditions the court would have no discretion and she would be liable to pay the fine of $3,900.

Footnotes

41 *NP* v *AP (No 2)* [2006] FamCA 869.

¶10-160 Sentence of imprisonment

Introduction

Section 70NFG of the *Family Law Act 1975* (Cth) (FLA) sets out the

principles for determining a sentence of imprisonment.

- A sentence of imprisonment imposed on a party is to be expressed to be for a specified period of 12 months or less, for a period ending when the party complies with the order concerned or has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court (s 70NFG(1)).

- A court must not sentence a party to imprisonment unless the court is satisfied that, in all the circumstances of the case, it would not be appropriate for the court to deal with the contravention in any other way (s 70NFG(2)).

- If a court sentences a party to imprisonment, the court must state the reasons why it is satisfied as to the appropriateness of the sentence and cause those reasons to be entered in the records of the court (s 70NFG(3)). The failure of the court to comply with this requirement does not invalidate a sentence (s 70NFG(4)).

- A court, when sentencing a party to imprisonment, may, if it considers it is appropriate to do so, direct that the party be released upon the party entering into a bond after he or she has served a specified period of the term of imprisonment (s 70NFG(6)).

- A court may suspend the sentence of imprisonment upon terms and conditions determined by the court. In addition, a court may terminate a suspended sentence (s 70NFG(5)).

- The serving by a party of a period of imprisonment under a sentence imposed on the party for failure to make a payment under a child maintenance order does not affect the party's liability to make the payment (s 70NFG(9)).

In the case of *Dodds and Dale* [2007] FamCA 1304 those principles were held to apply to sentencing under Subdiv F of Div 13A. This case which was a first instance decision of a Judicial Registrar provides a useful example of the application of Div 13A.

The issue of imprisonment was examined by the Full Court in the case of *McClintock & Levier*.[42] In this case, the mother appealed against an order made by a Federal Magistrate sentencing her to six months imprisonment imposed in respect of six contraventions of parenting orders.

The mother admitted the various contraventions without reasonable excuse. The Federal Magistrate sentenced the mother under s 70NFB(2) — a provision that does not specifically include the option of a suspended sentence. In allowing the appeal, the Full Court re-exercised its discretion and sentenced the mother to six months imprisonment, wholly suspended after 16 days (having regard to time already served by the mother prior to the stay of her sentence) with a two-year good behaviour bond. The Full Court found that the sentence imposed by the Federal Magistrate was manifestly excessive.[43] The case contains a useful discussion of sentencing principles in family law. Cronin J draws a distinction between sentencing principles applicable to Div 13A and those applicable under Pt XIIIB of the FLA.[44]

Principles applicable to sentencing

Much academic ink has been spilled on the issue of the justification for the imposition of a term of imprisonment for non-compliance of an order. The principal justifications centre around the administration of justice in the context of contempt of court. The learned authors of *Law of Contempt* state:

> "Blatant and aggravated contempts particularly when repeated by a person who has clearly been warned as to the possible consequences of defying an order, will quite properly attract an immediate custodial sentence as a mark both of the gravity of the contempt and the court's disapproval and to deter contemnors and others who might be tempted to breach such an order".[45]

Indeed, the Australian Law Reform Commission states:

> "The imposition of punitive sanctions for disobedience is justified in terms of maintaining the effectiveness of court orders. In our society, courts are the ultimate arbiters of disputes. This system

> of dispute resolution depends upon, amongst other things, their making orders and, if necessary, enforcing them".[46]

The principles applicable to sentencing for non-compliance in family law have been set out by the Full Court in the context of contempt under the old legislation. In *Cummings and Cummings*,[47] the Full Court said:

> "This court has said that punitive powers should be exercised sparingly and only in exceptional circumstances . . . In deciding whether to impose imprisonment, fine or other penalty there are a number of factors which the court needs to consider:
>
> (a) the need to consider the parties' future relationships and the role of counselling;
>
> (b) the need to ensure compliance with a particular order in the future;
>
> (c) the need to protect a party from violence or interference;
>
> (d) the need to impose a punishment *appropriate to the breach*; and
>
> (e) the need to uphold the authority of the court to make effective orders" (emphasis added).[48]

In respect of contempt for a breach of an order, the Full Court said:

> ". . . the penalty imposed [imprisonment] serves more than one purpose — it is to ensure compliance with the court's order in future as well as to punish for past breaches. To meet these ends it would be preferable to consider the penalty globally".[49]

Similarly, in *Sahari and Sahari*,[50] the Full Court said that imprisonment should only be imposed if there is no alternative method available to achieve the remedy the breached order seeks to effect.[51]

In *McClintock & Levier*,[52] the Full Court said that the focus of the court in dealing with a contravention application under Div 13A[53] is towards

making orders which will enforce future compliance with its orders.[54] Indeed, Cronin J said:

> "For a court to decide to punish a party who has been found to have contravened an order . . . to make an example of them, would be an error of law".[55]

In *McClintock*, the Federal Magistrate recorded in his reasons for judgment that he proposed to approach the question of an appropriate sanction by having regard to the criminal law principles of sentencing and that he would adopt as a useful guideline s 7 of the *Crimes (Sentencing) Act 2005* (ACT).

On appeal, the mother argued that the Federal Magistrate had fallen into error by:

- having regard to general deterrence or punishment
- relying upon the ACT's legislation as a sentencing guide
- failing to consider a suspended sentence, and
- imposing a sentence that was manifestly excessive.

On allowing the appeal, the Full Court held that the Federal Magistrate gave excessive weight to the circumstances of general deterrence and imposed a sentence that was manifestly excessive. The Full Court also said that the Federal Magistrate was required to consider the option of a suspended sentence.

Finn J said:

> ". . . this case illustrates the need for at least brief reasons (as required under s 70NFG(3)) to be given explaining why the various options of s 70NFB(2), including, or as well as, a suspended term of imprisonment, were considered appropriate, with the result that a term of imprisonment is the only option".[56]

Similarly, in *Dobbs and Brayson*,[57] the Full Court found that a Federal Magistrate had failed to adequately set out his reasons for imposing a period of four months imprisonment on a mother who had contravened

parenting orders without reasonable excuse.[58]

It is argued that the principles enunciated in *Cummings* are appropriate as criteria for the imposition of a term of imprisonment under Subdiv F.

Application of sentencing principles

Subsequent cases have considered the principles enunciated in *Cummings* and *Sahari* relating to sentencing for contempt for breach of orders relating to children.

In both *Dobbs and Brayson*[59] and *McClintock & Levier*,[60] the Full Court held that a trial judge must not sentence a person to imprisonment unless the trial judge is satisfied that, in all the circumstances of the case, it would not be appropriate to deal with the contravention by means of any of the other orders provided for in s 70NFB(2).

In *Kendling and Anor & Kendling* (2008) FLC ¶93-384, the Full Court upheld an appeal by a husband that a sentence of imprisonment for contempt was manifestly excessive or unreasonable or plainly unjust. The husband and wife settled the contempt proceedings by terms of settlement and the Full Court had to consider whether it was appropriate to allow the settlement of contempt proceedings.

In *In the Marriage of M*,[61] the husband breached orders by failing to surrender passports, by removing the children from the wife, and by depriving the wife of time with the children. The husband attempted to stow away with the children on board a ship bound for Singapore.

In considering the gravity of the husband's actions, in particular his lack of remorse and the necessity to ensure both the safety of the wife and the children as well as obedience to the court's orders, Watson SJ sentenced the husband to a fixed term of imprisonment of nearly 11 months with a provision that he could apply to enter into a recognisance, and thereupon be released from prison after five months' imprisonment.

His Honour considered that the punishment imposed should be sufficient to deter others generally and to deter the husband in particular.[62]

In *U and U*,[63] the husband forcibly removed a child while in the care of his mother, and kept the child for four months until he was arrested by the Commonwealth Police pursuant to a warrant issued by Opas J. The husband was brought before her Honour, charged with contempt, and sentenced to 12 months imprisonment, with the opportunity to

apply for earlier release, on conditions, at any time after five months.

Her Honour was concerned about the gravity of the husband's actions, including the fact that the kidnapping was carried out with some degree of violence as the children were manhandled from their mother, as well as the husband's intention to retain the children permanently.

Her Honour indicated that those who keep children contrary to an order can expect to face imprisonment in a proper case.[64]

In *G and G*,[65] a husband removed his son, then aged two, from his mother with whom he lived, and retained him until apprehended by police some four years later. In considering the facts of the case as well as the facts and sentences in previous contempt cases, such as *In the Marriage of M* and *U and U*, the Full Court reduced the custodial sentence imposed on the husband by the trial judge from 2 1/2 years to 18 months, with a provision for an earlier release upon conditions after 12 months of imprisonment.

The Full Court in *G and G* indicated the following important principles that guided its decision in relation to the appropriate sentence in that case:

> "The court must balance the possible infliction of further suffering on the other party and child by the punishment of the respondent, especially by imprisonment, against the need to protect not only the individual child concerned, but also other children, by the imposition by the court of an appropriate sentence".[66]

In *D and C* (Imprisonment for Breach of Contact Orders),[67] the Family Court partially suspended a term of imprisonment imposed by a Federal Magistrate due to change in circumstances. The Family Court held that it would have been inappropriate for the Federal Magistrate to impose a suspended sentence because, at the time of the first instance hearing, the appellant mother demonstrated no willingness to comply with the contact orders.

On appeal to the Family Court, the mother indicated that she would comply with the orders, and the remaining 18 days of her 30-day sentence was suspended on condition that she comply with the

orders.

In *Abduramanoski and Abduramanoska*,[68] the Full Court summarised the principles applicable to sentencing under the court's contempt provisions in s 112AP of the FLA. While this decision related to proceedings for contempt in relation to orders other than those affecting children, it is suggested that the following principles enunciated by the Full Court have equal application to the imposition of a prison sentence under Div 13A Subdiv F. In principle, these are as follows:

- if a custodial sentence is to be imposed, transparency in the sentence imposed will be afforded in an appropriate case if general criminal law sentencing procedures are adopted, including imposing a sentence for each offence to be served either cumulatively or concurrently, but such procedure is not mandatory

- state and federal sentencing laws have no application

- in imposing a penalty, reference to relevant factors to be considered provides a useful framework, but ultimately the penalty should be structured having regard to the individual facts of the particular case, and

- the allegation must be proved beyond reasonable doubt.[69]

Relationship between contravention proceedings and criminal law

The fact that a party who commits a contempt or serious non-compliance of an order of the court thereby also commits a criminal offence does not affect the liability of that party to be dealt with both for contempt or non-compliance and for breach of the offence concerned.[70]

This gives rise to the question of whether a party who commits both contempt or serious non-compliance of an order of the court and a criminal offence (eg child abduction) should be dealt with for contempt

or non-compliance before or after the criminal prosecution.

While the Full Court dealt with this matter in detail in *Sahari*,[71] s 70NFH(2) provides that proceedings under Div 13A must be adjourned where the respondent is also the subject of a criminal prosecution.

In *K and J*,[72] the Full Court held that the fact that a person is found guilty of contempt by reason of disobeying an order of the court, is not to be equated to a conviction for a criminal offence, even where the conduct complained of constitutes both the offence and the contempt.

The Full Court said that the reason for this is that the purposes of criminal law are of necessity different from the purposes of the law of contempt, and, although the conduct in question may be identical, each branch of the law may regard its nature and gravity quite differently.

The difference between the criminal law and the law of contempt/non-compliance in family law was specifically discussed in *McClintock & Levier*.[73] In this case, the Full Court held that general deterrence in Div 13 cases gives rise to an appealable error. Indeed, the Full Court not only distinguished contravention proceedings and the criminal law, but also distinguished proceedings commenced under Pt XIIIB and those commenced under Div 13A. Cronin J said:

> ". . . whilst there are certain similarities of language between s 70NFC and s 112AG(5), the distinction is clear between the coercive nature of the orders in Div 13A and the punitive orders required in Part XIIIB . . . s 112AP(2) empowers a court to punish a person for contempt. There is no reference to punishment in Div 13A".[74]

While s 70NAF(3) imports the criminal law standard of proof for the making of certain orders, including imposing a period of imprisonment, the Full Court made it clear that such sanction must be imposed as a last resort and that the sentencing judge must provide reasons why a period of imprisonment is the only option.

Question

Given that considerations of deterrence and punishment can be found in s 70NAF generally, and in particular in s 70NAF(3) with its reference to the criminal law standard of proof, can an argument for punishment ever be advanced in cases involving the most serious contravention of parenting orders?

Principles relating to punishing for non-compliance persons found guilty of a criminal offence on the same facts

In *K and J*, the father was convicted of contempt for breach of a residence order and sentenced to nine month's imprisonment by Brown J. The father had previously been convicted under the Greek Penal Code for an offence of abduction on the date he was required to return the child to the mother. The Full Court of the Family Court dismissed the father's appeal against the contempt conviction and sentence, stating that it would be incongruous for the Greek conviction to be available to him in order to escape the consequences of his contempt, except in relation to the question of sentence. It was the view of the Full Court that, had the trial judge been aware that criminal penalties had been imposed in Greece, this should have been taken into account in determining the correct sentence. Nevertheless, in the circumstances, the sentence imposed by her Honour was appropriate.

Warning

Practitioners should ensure that all information relevant to any relevant criminal proceedings is before the court dealing with the contravention. The advantage of this for both parties is that the court is fully informed in relation to all circumstances flowing from the contravention and can take all relevant matters into account when dealing with the respondent.

Order that respondent pay compensation (s 70NFB(2)(f))

The court is empowered to order that a respondent pay compensation for lost expenses where the breach of the parenting order has resulted in some reasonable expenses referable to the breach.

Costs (s 70NFB)

The court *must* order all costs against the respondent unless it would not be in the best interests of the child to do so (s 70NFB(1)(a)), and it must consider imposing one of the sanctions available to the court (s 70NFB(1)(b)).

If the court does not order costs against the respondent then it *must* impose one of the sanctions available to it (s 70NFB(1)(c)).

The order may be expressed to take effect at a particular time (s 70NFB(6)), and the court may make any such ancillary orders (s 70NFB(7)) as are necessary to ensure compliance.

Footnotes

42 *McClintock & Levier* (2009) FLC ¶93-401.

43 Ibid, at pp 83,374 and 83,397.

44 Ibid, at p 83,395.

45 GJ Borrie and NV Lowe, *Law of Contempt*, 3rd ed, Butterworths, London, 1996, at p 629.

46 ALRC Report 37, *Contempt*, Australian Government Publishing Service, Canberra, 1987, at [519].

47 *Cummings and Cummings* (1976) FLC ¶90-100.

48 Ibid, at pp 75,461–75,462.

49 Ibid, at p 75,461.

50 *Sahari and Sahari* (1976) FLC ¶90-086.

51 Ibid, at p 75,406.

52 *McClintock & Levier* (2009) FLC ¶93-401.

53 As opposed to under Pt XIIIB.

54 At p 83,395 per Cronin J.

55 Ibid.

56 At p 83,374.

57 *Dobbs and Brayson* (2007) FLC ¶93-346.

58 Ibid.

59 Ibid.

60 *McClintock & Levier* (2009) FLC ¶93-401.

61 *M and M* (1978) FLC ¶90-495.

62 Ibid, at p 77,570.

63 *U and U* (1979) FLC ¶90-648.

64 Ibid, at p 78,421.

65 *G and G* (1981) FLC ¶91-042.

66 Ibid, at p 76,363.

67 *D and C* (Imprisonment for Breach of Contact Orders) (2004) FLC ¶93-193; [2004] FamCA 814.

68 *Abduramanoski and Abduramanoska* (2005) FLC ¶93-215; [2005] FamCA 88.

69 In this case reference was made to the criminal standard in accordance with s 141 of the *Evidence Act 1995* (Cth). The use of the criminal standard of proof in contempt cases was endorsed by the Full Court in *Mead and Mead* (2006) FLC ¶93-267 at p 80,536; [2006] FamCA 435.

70 See *Sahari and Sahari* (1976) FLC ¶90-086 at pp 75,407–75,408 and *Russell and Russell* (1983) FLC ¶91-356.

71 *Sahari and Sahari* (1976) FLC ¶90-086 at pp 75,407–75,408.

72 *K and J* (2004) FLC ¶93-177; [2004] FamCA 359.

73 Ibid.

74 Ibid, at p 83,395.

¶10-170 Enforcement of community service orders and bonds

Section 70NFF of the *Family Law Act 1975* (Cth) (FLA) provides that if the court is satisfied that a party has, without reasonable excuse, failed to comply with a community service order or a bond, it may impose a fine not exceeding 10 penalty units.

In addition, the court may revoke the community service order or bond, and deal with the person *in any manner that may have applied*

had the community service order or bond not been made (s 70NFF(2)–(3)).

In the event that the court decides to revisit the orders, the court must take into account the fact that the community service order was made, or the bond was entered into, as well as anything performed under the order or bond and any fine imposed or other order made in relation to the contravention (s 70NFF(4)).

In *Elspeth & Peter*,[75] the Full Court found it could not properly meet its statutory obligations under s 70NEC(5) to explain to the mother the consequences of her failure to enter into a bond, other than to say that there were no apparent consequences. In their view, the only effective penalty was an order for costs against the mother.

Can a person who is in contravention of a parenting order apply for a parenting order?

The general rule is that a person who is in breach of an order of the court will not necessarily be allowed to institute later proceedings in that court until the contempt/contravention has been purged.[76]

Section 69F gives the court a discretion to allow the applicant to proceed with an application notwithstanding the applicant's failure to comply with an order. In *Foo & Foo*,[77] the Full Court said it had discretion to allow a party to proceed with their answer and cross-application because the court must consider the welfare of the child (as it then was) as the paramount consideration in determining such cases and such welfare may not be advanced by the court insisting on strict adherence to the general rule. In *Foo*, the court found that it would not have had access to relevant information about the children of the marriage, if it precluded the husband from proceeding with his cross-application.

Warning

Practitioners should ensure that clients are not in contempt before issuing proceedings.

Footnotes

75 *Elspeth & Peter* (2007) FLC ¶93-341.

76 See, for example, *Hadkinson* v *Hadkinson* [1952] P 285 at pp 288–289 and C Miller, *Contempt of Court*, 2nd ed, Clarendon Press, Oxford, 1990, pp 454–455.

77 *Foo & Foo* (1994) FLC ¶92-482.

SUMMARY OF PT VII DIV 13A

¶10-180 Division 13A — Enforcement of orders affecting children

Summary

Division 13A can be summarised as follows:

- the court may do any or all of the following:
  - require a party who contravenes an order affecting children to participate in an appropriate post-separation parenting program designed to help in the resolution of conflict about parenting
  - make a further parenting order that compensates a party for time that a child did not spend with the party, or for time that a child did not live with the person, a result of the contravention, and
  - adjourn the proceedings to enable an application to be

made for a further parenting order

- the court must take other action in respect of a party who contravenes an order affecting children if the court is satisfied:
  - where the contravention is an initial contravention — that the party has behaved in a way that showed a serious disregard for his or her parenting obligations, or
  - where the contravention is a second or subsequent contravention — that it is not appropriate for the party to be dealt with by requiring his or her attendance at a post-separation parenting program.

¶10-190 Key elements of Pt VII Div 13A

Standard of proof

The standard of proof for all non-compliance proceedings is the balance of probabilities save where a serious sanction is contemplated. In such cases the court must be satisfied beyond reasonable doubt (s 70NAF).

General power to vary existing orders

Section 70NBA of the *Family Law Act 1975* (Cth) allows the court to vary an existing order, including a variation that takes into account a parenting plan. This power exists even if a contravention is unproven, or if it is proven but a reasonable excuse exists.

Obligation to consider certain things

Throughout Div 13A the provisions call upon the court to consider certain things in the course of dealing with a contravention. It is suggested that the most significant issue that the court ought to consider is the impact of any proposed disposition on the best interests of the children who are the subject of the contravened order.

In addition, the court ought to be asked to consider the provisions contained in s 117 in the event that any order for costs is going to be made.

Finally, the court ought to be asked to consider the various sentencing principles discussed in this chapter in the event that a sentence of imprisonment is likely to be imposed, as well as the impact of any such sentence on the best interests of the children the subject of the contravened order. In addition, a court ought to be asked to provide reasons as to why a period of imprisonment is the only option.

FAMILY LAW RULES

¶10-200 Introduction

Chapter 21 of the Family Law Rules 2004 (Cth) (FLR) makes provision for the enforcement of parenting orders, and contravention.

It sets out how a party may seek:

- an order to enforce a parenting order
- an order that a party be punished for contravening an order, bond or sentence, or for contempt of court
- an order to locate and recover children, or
- warrants of arrest.

The explanatory statement to the FLR is instructive in that it sets out the philosophy behind the FLR, and is aimed at encouraging parties to consider whether the result they want is enforcement or punishment.

The FLR encourages the use of the Application in a Case instead of an Application — Contempt (r 21.01 and 21.02), where the applicant seeks to enforce an order and put the matter back on track.

Where the applicant does not seek to have the respondent sanctioned but seeks a solution to a one-off problem, an Application in a Case should also be used so that the order is varied to resolve the problem.

That approach cannot be used as a process to obtain a quick trial for what is essentially an application to vary an order due to a change in circumstances.

Warning

Before filing an application, a party should consider the result that the party wants to achieve. The summary to the FLR cautions against the use of contempt proceedings where the alleged behaviour is not sufficiently serious. Legal practitioners should bear in mind that Ch 1 of the FLR, relating to the court's general powers, applies in all cases and can override all other provisions in the FLR including Ch 21.

¶10-210 How to apply for an order

Rule 21.02(1) of the Family Law Rules 2004 (Cth) provides that a party seeking to apply for an order under Pt 21.1 must file an application as set out in the following table.

No.	Kind of application	Part/Rule	Form/application	Affidavit
1.	Enforcement of parenting order	r 21.01(a)	Application in a Case	Affidavit per r 21.02(2)
2.	Contravention of an order affecting children	r 21.01(b)	Application — Contravention	Affidavit per r 21.02(2) and (3) (respondent may file affidavit — r 21.06)
3.	Contravention	r 21.01(b)	Application —	Affidavit per r

	of an order not affecting children		Contravention	21.02(2) (respondent may file affidavit — r 21.06)
4.	Punishment for contempt of court	r 21.01(d)	Application — Contempt	Affidavit per r 21.02(2) (respondent may file affidavit — r 21.06)
5.	Location order or Commonwealth information order or recovery order	r 21.11	Application in a Case	Affidavit per note 2 to r 21.12 — see r 5.02
6.	Application for directions for execution of recovery order	r 21.15	Written request per r 21.15(2) — complying with r 24.01(1) and setting out procedural orders sought	Affidavit setting out facts and reasons for order (r 21.15(2)(c))
7.	Failure to comply with a bond entered into in accordance with the Act	r 21.01	Application — Contravention	Affidavit per r 21.02(2) (respondent may file affidavit — r 21.06)

Note

As noted above, a party may use an Application in a Case if:

- the party does not want the other party to a parenting order to be punished for a failure to comply but wants to be compensated for missing time with the child as a result of the contravention plus costs, or
- before the time due to be spent with the child, the other party refuses to comply with the handover arrangements.

Rule 21.02(2) provides that a person filing an application mentioned in the above table must file with it an affidavit that sets out the facts necessary to enable the court to make the orders sought in the application.

In addition, an application mentioned in point 1 of the above table must have attached to it a copy of any order, bond, agreement or undertaking that the court is asked to enforce or that is alleged to have been contravened.

Rule 21.02(3) provides that if the application is for an order mentioned in point 2 of the table, the affidavit must also provide:

- details as to whether or not a court has previously found that the respondent contravened the primary order without reasonable excuse, and
- details of any findings in relation to previous contraventions made by the court including the date and place of the finding, the court that made such finding and the terms of such finding in sufficient detail to show that the finding related to a previous contravention by the respondent of the primary order.

The requirement for affidavits as set out in r 21.02(2) and (3) is to assist the court to determine the stage of enforcement that ought to apply, and to elicit the evidence needed in that respect.

¶10-220 Location and recovery orders — specific provisions

Part 21.3 of the Family Law Rules 2004 (Cth) applies to the making of a location order and a recovery order.

A person may apply for an order by filing:

- an Application in a Case, and
- an affidavit.

Under r 21.13, the court must fix a return date within 14 days of the application being filed, if practicable.

At the time a recovery order is executed, the person authorised by the recovery order to recover the child must serve the recovery order on the person from whom the child is recovered. It is not necessary to serve the original order, and a copy of such order would suffice (r 21.14).

A person authorised to execute the recovery order may seek procedural orders in relation to the recovery order under r 21.15. Such application is made by:

- a written request to the court which details the procedural orders sought, and
- an affidavit setting out the facts relied on and reasons for the orders sought.

CHILDREN AND RELATIONSHIP FACTORS

Editorial information

Written by Dr Renata Alexander

¶11-000 Introduction

This chapter looks at discrete issues that may arise in children's matters at all levels of problem solving and dispute resolution — advice given by lawyers and other professionals, negotiations between lawyers, mediation and round table dispute management and litigation — either by reaching consent orders or after contested proceedings and judicial determination.

Some of the issues are referred to in the legislation itself in Pt VII of the *Family Law Act 1975* (Cth) (FLA), some are raised in legislation and supported by case law, some only arise in case law, and other issues are solely generated through social sciences and mental health

sciences and remain areas of debate and controversy. This chapter also includes the latest changes to the FLA including changes to cross-examination and to arrest powers in family violence cases.

In this chapter, the following issues are considered: child abuse, family violence, gambling, drug use, mental illness, special needs of children and various theories as to parenting, bonding and attachment, overnight stays and parenting arrangements. The list of issues is not exhaustive but represents matters that often arise in child-related proceedings.

It is important to consider all these matters in each and every case concerning children, and in respect of discrete issues such as drug use or gambling it is necessary to ask a few pertinent questions so as to either include or exclude the matter in the preparation of the case. When initiating child-related proceedings, it is mandatory to notify the court of any risk factors such as mental health, substance abuse, family violence, child abuse or some other serious parental incapacity. See ¶11-155 below.

This chapter must be read in conjunction with other chapters in Part B on “Children” in this guide.

TAKING INSTRUCTIONS

¶11-010 Introduction

Often parenting and relationship issues exist but are not volunteered by clients nor by their support professionals and workers. It is essential for legal practitioners to first ask the questions to elicit whether these issues are relevant in *this* particular family, to *this* particular relationship and with *these* particular children. It is advisable for practitioners to have a list of questions that are not too intrusive but are sufficiently probing to generate specific responses and instructions and can be explained to the client as necessary to *their* situation which may or may not be relevant in further action.

¶11-020 Obtaining children’s details

When obtaining details of any children, it is commonplace to ask for full names, dates of birth, places of birth and details of parents — biological and social, if appropriate, and any other person involved in the care of the child. Details are also usually obtained as to whether a child attends child care, kindergarten or school, and as to progress made. It is a good idea to view school reports, any NAPLAN results and school attendance records if possible and to ask if the child is an advanced learner (eg Select Entry Accelerated Learning (SEAL) program in Victoria), receives any remedial help at school or is part of an intervention program (eg Prevention Intervention Enhancement (PIE) program in some states). What is less common is asking clients the following useful and specific details regarding physical, emotional and mental health.

Checklist

- ☐ Is your child on any medication or treatment plan? Have they been in the past?
- ☐ Has your child seen a doctor lately and for what?
- ☐ Does your child see any medical practitioners regularly?
- ☐ Does your child have any specific medical needs such as asthma, allergies or epilepsy?
- ☐ Has your child ever seen a psychologist or counsellor or psychiatrist?
- ☐ Has your child ever been hospitalised?
- ☐ Has your child ever been diagnosed with behavioural problems, learning or reading difficulties, cognitive problems, or attention or concentration difficulties?
- ☐ Does your child see an allied health professional, eg speech pathologist?

Often parents are asked if a child has any special needs without operationalising or breaking down that question. Many parents react to that question as reflecting poorly on their parenting capacity and are likely to answer defensively with a conclusive “no”. It is therefore necessary to ask more specific and structured questions such as those listed above which do not pathologise any issue into a formal diagnosis or “problem” but usefully provide flags that there may be one or more relevant factors to consider when negotiating or litigating about issues in that particular children’s matter.

¶11-030 Questioning adult clients

It is equally important to ask the adult client about their physical, emotional and mental health. Questions similar to those put about children can be reframed.

Checklist

- ☐ Are you or have you been on any medication and, if so, what are the details of the name, dosage, and prescribing doctor? Are you on any treatment plan? Do you see any allied health professionals, eg psychologist or counsellor?
- ☐ Have you ever been hospitalised? For what?
- ☐ Do you use any drugs (smoking, drinking alcohol, prescription drugs, marijuana, “hard” drugs)? Have you used any of those drugs in the past?
- ☐ Will your former partner and/or extended family and/or children allege that you use illicit substances like marijuana or ecstasy or that you go out drinking or take anti-depressants or other prescription drugs?

☐ Have you been in trouble with the police or do you have any traffic offences related to drugs and/or alcohol?

☐ Have you ever been in trouble at your place of employment regarding drugs or alcohol or does your employment involve drug testing?

Again, the same questions should be rephrased and asked about the other side and any other involved parties, new partners, adult children or relatives.

In the context of health and wellbeing, questions should also be posed about family or domestic violence. Family violence between adults is a gender specific phenomenon. The vast majority of perpetrators/offenders are men; the vast majority of victims/survivors are women. Questions need to reflect that understanding and need to be direct though not confrontational. Legal practitioners should be sensitive and non-judgemental.

¶11-040 Questioning about violence/abuse

If obtaining instructions from a client, for example, the practitioner may ask if there has been any physical violence or emotional abuse; however, this categorises the behaviour and is likely to be met with a blanket negative or non-responsive answer. It is better to ask shorter and simpler questions recognising that family violence can manifest in varied ways. The client may still be in an abusive relationship. If so, the practitioner needs to discuss all the options and ensure that the client and any children are safe before any action is commenced.

By way of a preliminary step, the practitioner should also check if the client has a good understanding of spoken and written English and whether they have any idea of what action they wish to pursue.

Checklist for female clients

- ☐ Has your current or former partner ever hit you? Called you derogatory names? Yelled at you at length? Deprived you of money for essentials or made you sign for any loans or debts?
- ☐ Has he ever locked you out of the house? Thrown things at you or near you?
- ☐ Have any drugs or alcohol or weapons been involved?
- ☐ Has he ever injured any pets intentionally?
- ☐ Has he ever forced you to have sex?
- ☐ Have the children witnessed any of this behaviour, heard it or seen the aftermath?
- ☐ Have the children seen you or spoken to you or your partner after such incidents? What was their reaction?
- ☐ Have the police ever been involved? The neighbours? Your friends or family?
- ☐ Have the children been present when the police or emergency services such as an ambulance attended at your home?
- ☐ Have you ever had any medical treatment or counselling related to family violence?
- ☐ Have you ever applied for or obtained a family violence intervention order or other form of restraining order?
- ☐ Have there been any other court proceedings such as in the Children’s Court or the Magistrates’ Court?

If approaching a male client, the practitioner can pose similar questions about whether he has been a victim. While men are far less likely to be victims of family violence, they are even less likely to admit it. Again, you need to ask direct questions and not be judgemental.

The practitioner needs to make enquiries about the relationship. It may be a former relationship or may still be on-going.

Checklist for male clients

- ☐ Will your current or former partner allege family violence?
- ☐ Will she claim that you hit her or yelled at her regularly, or called her abusive names?
- ☐ Have you ever kicked or locked your partner out of the house?
- ☐ Have either of you come home in a drunken state or smashed up furniture or yelled at the children or at each other in front of the children?
- ☐ Who made decisions about spending money, or about which social or family activities you attended?
- ☐ Have the children witnessed any fights? What was their reaction?
- ☐ Have police attended at your home for any family violence or neighbour incidents?
- ☐ Have the children been present when the police or an ambulance attended at your home?
- ☐ Do you have support?

Clearly all these questions are time-consuming, but the information gleaned can inform negotiations, mediation and the preparation of court documents, and obviate the need for further client interviews and instruction taking, which will be time saving and cost effective in the long-term. After obtaining instructions, the practitioner needs to also check that the client understands the legal process and what will happen next.

¶11-050 Gambling

There are different types and degrees of gambling evoking different reactions. The *Macquarie Dictionary* definition of gambling suggests that it involves playing games or placing bets for stakes involving taking financial risks and often losing or squandering money or assets in the process.

The relevance of gambling to a children's matter clearly depends on the type of gambling, frequency, time and money spent, and whether it affects the welfare of any children. It may be relevant to the parenting capacity and the care of children from the perspective of the primary caregiver, and it may be relevant to the amount of child support paid and the quality and quantity of time spent with a child from the perspective of the parent with whom the child does not live.

One can directly ask a client whether they gamble or whether gambling will be raised as an issue on either side in a parenting dispute. Evidence may be gleaned from credit or debit card statements. Gambling is not a consideration specifically listed in s 60CC of the *Family Law Act 1975* as to how a court determines what is in a child's best interests when making a parenting order under s 64B.

However, it may be relevant under:

- s 4AB, as a form of coercive or controlling behaviour within the definition of family violence

- s 60CC(3)(ca), as to the extent to which each of the parents have fulfilled, or failed to fulfil, the parent's obligations to maintain the child

- s 60CC(3)(f), as to the capacity of a parent to provide for the needs of a child

- s 60CC(3)(g), as to the maturity, . . . lifestyle . . . of either of the child's parents

- s 60CC(3)(i), as to a parent's attitude to the child and to the responsibilities of parenthood, and

- s 60CC(3)(m), as to "any other fact or circumstance that the court thinks is relevant".

Conduct such as gambling is relevant if it affects the welfare of a child or contributed to the break-up of the relationship. Gambling clearly reflects poorly on a parent's behaviour and affects a family's household resources. Reported cases generally focus on financial aspects such as capacity to pay child support or spousal maintenance or in respect of add backs, waste, destruction or dissipation of property or assets under Pt VIII or Pt VIIIAB of the FLA. Few cases refer to gambling as a risk factor in determining where children live or with whom they spend time.[1]

Footnotes

1 For example, in *Zafiropoulos and the Secretary of the Department of Human Services State Central Authority* (2006) FLC ¶93-264, one of the mother's arguments not to send two children back to Greece where their father lived was the allegation of psychological harm or grave risk posed by the father through his alleged gambling which had left the mother and children without their own accommodation and sometimes without adequate food. In *Adami & Adami* [2015] FamCAFC 102, the mother sought supervised time by the young child with the father because

the child would otherwise be at risk due to the father's alleged involvement with bikie groups, drug use, gambling and threats of self-harm and/or harm to the child. This point was not relevant to the decision of the Full Court which was about procedural points regarding a stay and consolidation of appeals.

DRUG USE

¶11-060 Introduction

The section in the *Diagnostic and Statistical Manual of Mental Disorders* on[2] substance-related and addictive disorders outlines 10 separate classes of drugs: alcohol; caffeine; cannabis; hallucinogens; inhalants; opioids; sedatives, hypnotics and anxiolytics; stimulants (eg amphetamines); tobacco and other substances. Drug use is relevant if it affects the welfare of the child and may be relevant to the parenting capacity and attitude towards parenting of the drug user. In considering the best interests of a child where substance use or abuse is alleged, courts look at the effect on a parent's emotional and psychological functioning, the drain on family and household resources, the benefit to the child of a relationship with a parent who has used or is still using drugs versus the risk to the welfare of the child, the risk of recidivism and child protection issues such as neglect, homelessness and exposure of children to the use of substances and to criminal activities to support drug habits.[3]

Footnotes

2 See DSM-5, (5th edition, 2013). See ¶11-130 below.

3 For example, see *Horan and Beckett* [2010] FamCAFC 200; *Akston and Boyle* (2010) FLC ¶93-436; *Dundas and Blake* [2013] FamCAFC 133; *Macey & Liddell and Anor*

[2018] FamCa 1027.

¶11-070 Alcohol

Alcohol is a legal drug. A UK study reported in *The Lancet* in 2010 ranked 20 legal and illegal drugs on various measures of harm to the user and to others.[4] Alcohol had the highest overall harm score (followed by heroin, crack cocaine, methamphetamine, cocaine and tobacco).

If a party admits to drinking alcohol to excess or if it is alleged by or against the other parent, it is necessary to obtain full details. This includes the amount of alcohol, type of alcohol, venue and frequency of drinking. It also includes records of criminal offences, especially traffic offences, and any medical records or employment records (if relevant). It can also explain children's school absences or failure to progress academically and socially. Subpoenas may be required. Medical evidence on alcohol abuse or alcohol dependence may also be required, and tests, such as liver function tests, can be requested. There are also sophisticated blood tests available. Alcohol contains ethanol. CDT (carbohydrate-deficient transferrin) is a laboratory test used to detect heavy ethanol consumption and can be useful to demonstrate chronic abuse. Elevated levels may suggest recent alcohol abuse but may also indicate other medical conditions. Again expert advice is needed.

A parenting order under s 64B of the FLA may be made subject to certain restrictions or conditions about alcohol. A non-resident parent may be restrained from drinking alcohol for 24 hours before or during any time spent with a child, or from taking children to premises licensed for the sale or consumption of alcohol, or may be required to pass a breathalyser test before spending time with or on returning children or to install an alcohol monitoring device to undertake a breath test before driving the children.[5] A parent may have to complete an approved drug and alcohol counselling course and

provide proof of completion to the other side's solicitor and/or the independent children's lawyer. For example, in *Dundas and Blake* [2013] FamCAFC 133, the trial judge granted primary care of a child to a mother whom the family report described as having a "lifelong vulnerability" to alcohol and needing "lifelong vigilance towards alcohol consumption". The trial judge ordered that the mother had to keep attending counselling and her psychologist. The father appealed given the mother's past alcohol abuse and hospitalisation. The appeal failed on this and other grounds. Again, in *Simmons & Anor and Kingley* (2014) FLC ¶93-581, the trial judge changed primary care of a seven-year-old child from the maternal extended family to a father with a history of binge drinking and multiple drink-driving offences. The court imposed several onerous conditions including that the father see a doctor who specialised in treating people with alcohol disorders; see a specialist to develop a "lifelong prevention relapse plan"; undergo random monthly blood tests for the next 12 months and notify the other side of any criminal or driving charges involving alcohol. The child's maternal family appealed. The appeal was dismissed. In *Walters & Fleetwood* [2015] FamCAFC 235, the mother appealed against final parenting orders whereby the trial judge ordered that the child live with the father, that the father have sole parental responsibility and that the mother have no time with the child for two months and then weekend and holiday time with conditions that she obtain treatment for her personality disorder and attend an alcohol abstinence course. The mother was found to have a "severe and extremely problematic history of alcohol abuse" and was a "significant risk factor for the young child". This finding was not disturbed and for various reasons, the appeal was dismissed. See ¶11-100 and ¶11-110 for further discussion.

Abuse of alcohol can also be a reason for no time, limited time or for supervision of time spent with the alcohol-dependent parent.[6]

Footnotes

4 DJ Nutt, LA King and LD Phillips, "Drug harms in the UK: A multicriteria decision analysis", *The Lancet*, vol 376, 2010, pp 1558–65; available online at ias.org.uk

5 See *Sebastian & Sebastian (No 3)* [2012] FamCA 707. See also *Walton & Walton and Anor* [2017] FamCAFC 107 where the Full Court extended time for an appeal to be filed but noted in passing that the trial judge had ordered the mother to live with the children at her mother's home for the next six months and to install a home alcohol monitoring device as one means of protecting the children, given the mother's past issues with abuse of alcohol.

6 For example, *O'Reilly and O'Reilly* (1977) FLC ¶90-300. See also *Oscar and Traynor* [2008] FamCAFC 158 where at first instance the children were found to be exposed to an "unacceptable risk" emanating from the father's likely abuse of alcohol and so the father was only granted limited time with the children and *Aldridge and Green* [2015] FCCA 318 where young children were supervised in their time with their father to ensure he was not alcohol-affected nor consuming alcohol. In *Mercier & Deagan* (2015) FLC ¶93-674, the Full Court dismissed the appeal of a mother against the trial judge changing the status quo and granting full time care of a five-year-old child to the father with limited time to the mother. Both parents had a history of alcohol abuse but the court was satisfied that the father had overcome his issues and could provide adequately for the child. See also *L* v *T* [1999] FamCA 1699 in ¶11-110 below.

¶11-080 Smoking

Smoking tobacco in front of or near a child can be injurious to a child's health (not to mention the smoker's health), particularly if the child suffers from asthma or some other respiratory illness.

As with alcohol, parenting orders can be made under s 64B(2)(i) of the FLA as to "any other aspect of the care, welfare or development of the

child or any other aspect of parental responsibility for a child". An order can restrain a parent from smoking in front of or near a child within a home, inside a motor vehicle or other confined space as long as there is evidence to establish that the order is justified in terms of the child's interests.[7]

Although difficult to police, the smell of smoke usually lingers on a child's hair or clothes. Often parties agree not to smoke in front of children and there need not be a formal order. Obviously there are problems ensuring compliance. The Full Court noted that it is difficult to see how injunctions about smoking cigarettes "could ever be the subject of effective enforcement".[8] It is even more difficult to enforce if someone else in the child's household or the child himself/herself smokes. Hopefully common sense prevails.

Footnotes

7 *M* v *M* (2000) FLC ¶93-006 at p 87,160 per Coleman J. This is a case primarily about family violence and no contact being allowed between an abusive father and two young children. See also *L* v *T* (1999) FLC ¶92-875 in ¶11-110 below.

8 *Radcliff & Mathieson* [2014] FamCAFC 200 at [47]. In this case, the mother also sought a very specific injunction at an interim hearing about there being a 10-minute lapse between the father smoking and then lifting or otherwise interacting with the child to avoid the stench of smoking causing the child to feel unwell. The Full Court noted in passing that this too was difficult to enforce but that the injunction made by the trial judge was sufficient. This ground of the appeal failed.

¶11-090 Prescription drugs

It is advisable to ask a client about their own and, to their knowledge, the other side's use of prescription drugs — if any. Prescription drugs may contain amphetamines, benzodiazepines, methadone, methamphetamines, morphine and opiates.

As with alcohol and smoking, there is no prohibition in the FLA regarding prescription drugs, and it is not a consideration stipulated in s 60CC. However, the use or abuse of prescription drugs or compliance or failure to comply with a treatment plan may be relevant if it affects the welfare of the child and can reflect upon the fitness, ability, capacity and/or attitude of the parents.

The practitioner needs to obtain full details of drugs taken in the present and in the past — name of drug, dosage, purpose, frequency, who provides the prescriptions and where prescriptions are filled. If possible, ask to see the actual bottle or packet of pills and take down details. You also need to ascertain if drugs were taken prior to, or during the relationship, by either party, as this may need to be raised or responded to. You can check which prescriptions are filled and how often. You should also check if medication is taken in accordance with any treatment plan and whether that plan is being complied with.

In order to understand the use of prescription drugs, it is a good idea to consult a pharmacist, a medical practitioner or a medical or pharmaceutical dictionary.[9] However, a little knowledge is dangerous and, ideally, with authority or by subpoena, it is best to consult the prescribing doctor. For example, a client prescribed an anti-convulsant drug may not be suffering from seizures or epilepsy but may have been prescribed this particular drug — after trial and error — as a mood stabiliser.

It is possible as part of a matter dealt with by a parenting order under s 64B to have a court order for a party to undergo random or date-specific supervised blood or urine drug screens or to undergo hair follicle testing. Results would be furnished to both sides and the independent children's lawyer, if one is appointed. Arrangements for such screens can be made via local general medical practitioners and laboratory services.

Drug screens or tests are of varying reliability. Some prescription

drugs have different half-lives. Some drugs can still be detected weeks after usage has ceased. For more on drug testing, see further below.

Prescription drugs may be taken for ongoing or chronic medical (including mental health) conditions, as treatment for a specific ailment or as part of a drug withdrawal regimen. Sometimes prescription drugs are used by illicit drug users as substitutes or to help increase the effect of the illegal drug or to "come down" from such drugs. In all cases of positive screens, medical evidence is needed.

Footnotes

9 The *Monthly Index of Medical Specialties* (MIMS) book or website is useful. See: www.mims.com.au. See also the Alcohol and Drug Foundation website: adf.org.au

¶11-100 Illicit drugs

The use of illicit drugs is frowned upon by the courts in children's matters as it clearly relates to parenting capacity and parental responsibility and impacts upon the best interests of children. If a drug-using parent "cannot be free and alert from substance abuse, they cannot properly care for young children who would rely upon them to have their needs met".[10] In such a case, undertakings to refrain from using marijuana or other substances prior to spending time with children will not be enough. Supervised time[11] or no time at all[12] or limited time conditional upon regular drug screens and/or drug counselling may be the only options to protect the children from risk of harm. The list of illegal drugs (and various street names) is growing. Each too has different detection times in urine samples:

- amyl nitrite or amyl nitrate
- cocaine

- crystal-methamphetamines such as ice, speed or meth
- GHB (gamma-hydroxybutyrate) or GBL (gamma-butyrolactone)
- hallucinogens such as cannabinoids, LSD (D-lysergic acid diethylamide), phencyclidine and magic mushrooms
- heroin
- ketamine or “special k”
- marijuana (THC), cannabinoids and kronic (synthetic marijuana), and
- methylenedioxymethamphetamine-related substances such as speed, ecstasy, MDEA, MDMA, MDA or PMA.

There are also synthetic drugs such as synthetic cannabinoids and cathinones or stimulants. These are legal and designed to replicate the effects of established illicit drugs but some are more potent and dangerous than traditional cannabis or methamphetamines and are difficult to detect.

All states and territories have alcohol and drug information services (ADIS) accessible by telephone. The National Drug and Alcohol Research Centre (NDARC) and the Australian Drug Foundation websites are also useful.[13]

The distinction between “soft” drugs like marijuana and “hard” drugs like heroin and ice is diminishing as there is growing evidence that *even* marijuana can give rise to mental illness like depression, drug-induced psychosis and schizophrenia. All illicit drugs are dangerous and, if raised in child-related court proceedings, this issue must be addressed as it may be relevant to parenting capacity, exposing the children to harm and the impact on a family’s functioning and resources. In *Horan and Beckett* [2010] FamCAFC 200 at [72], the Full Court recited this passage from the family report.

> “When you have a dependency often when you are coming down and people can genuinely crave marijuana . . . it is not as

> innocent as we thought 30 years ago . . . people can often experience irritability . . . and frustration, short temperedness . . . all these things can have an impact on the capacity to parent, particularly young children . . . And the other concern is that if you have a dependency you are spending a lot of money on drugs and other aspects of looking after the family, paying the rent, buying groceries, attending to medical needs, are being compromised . . .”

Again in *Barrett & Barrett and Anor* [2017] FamCAFC 4 at [30], the Full Court repeated the trial judge’s conclusion that:

> “I accept the mother’s evidence in terms of the father’s drug consumption during their marriage. A parent who consumes cannabis and has the responsibility of looking after children, whether or not the children are asleep when the cannabis is consumed, is placing children at risk given the parent’s diminished ability to respond to medical or other emergencies, such as a fire, that could arise with their children . . . What the father fails to realise is that there are children of a very young age who engage in smoking cannabis because of the role modelling of their parents”.

The common methods of addressing illegal drug use are through conditions or restraints, drug screens or different tests, by ensuring that the drug-using parent is competently supervised, requiring drug counselling or treatment and/or involving the relevant state child welfare/protection authority.[14]

Footnotes

10 *T and N* (2003) FLC ¶93-172 at p 78,761 per Moore J. See also *Bissell and Joss* [2007] FamCA 531, *Akston and Boyle* (2010) FLC ¶93-436 and *Baglio and Baglio* [2013] FamCA 105 as to the relevance of drug use.

11 *T and N* (2003) FLC ¶93-172.

12 *W and G (No 2)* (2005) FLC ¶93-248 at p 80,069 per

Carmody J.

13 See ndarc.med.unsw.edu.au and adf.org.au

14 For example, in *Akston and Boyle* (2010) FLC ¶93-436 the court detailed the "harrowing" abuse and neglect experienced by a child where both parents had abused alcohol and drugs and the relevant state authority had intervened.

¶11-110 Drug testing and other conditions and restraints

An order requiring a party to attend drug and alcohol counselling or not to gamble or smoke or drink alcohol when spending time with a child or to undergo supervised drug testing cannot be a stand-alone order. It must be linked to a parenting order.

In *L v T*,[15] the Full Court said:

> "In our view . . . a parent cannot be required to partake in a course of conduct or cease an activity merely because it would be in a child's interest that the parent does so. It may clearly be demonstrated that it is in a child's interest that a parent remain healthy and to that end give up smoking. Some would say it is essential that all adults undergo regular exercise, eat healthy foods and refrain from consuming alcohol. It would not be, in our view, a proper exercise of the 'welfare' power for a Court to place limits on a parent's conduct unless it could be demonstrated that those limits are necessary for the welfare of the child. Even then, careful consideration would need to be given to the right of the parent to conduct their life as they see fit".

In that case, the Full Court held that there is power to order a party to attend upon a medical expert and undergo treatment as a condition of a parenting order, but there is no such power to make a stand-alone or free standing order. The Full Court distinguished *L v T* in the case

of *Jacks & Samson* (2008) FLC ¶93-387 where the parents appealed against parenting orders in proceedings between the parents and the children's grandparents. An order was made for the mother to undertake psychotherapy treatment in circumstances where she had indicated a willingness to do so. The parents asserted that the trial judge erred in the exercise of his discretion and erred in principle. It was found that while the order was not supported in the circumstances of the case, under the former s 61 (now s 64B(2)(i)) of the FLA, it was distinguishable from the case of *L v T* and such an order could be made under s 67ZC (the welfare power).

The power to make a party attend for the purpose of counselling and drug screens, or to injunct them from certain activities, can be found in:

- s 64B(2) — matters dealt with by a parenting order
- s 65D(1) — court may make parenting order it thinks proper
- s 67ZC — orders relating to welfare of children
- s 68B — injunctions, and
- s 114 — injunctions.

There needs to be a basis for drug testing to be sought. For example in *Mann & Anor and Vargas & Anor* [2010] FamCAFC 50, the Full Court overturned the Federal Magistrate's (as they then were) interim order that the mother submit to two urine drug tests per fortnight pending a further hearing. The family report had recommended that the father submit to such drug tests but there was "no evidentiary foundation" for such orders in respect of the mother.

Footnotes

15 *L* v *T* [1999] FamCA 1699 at [57]

¶11-120 Reliability of drug testing

Testing of urine is the most common form of drug testing. It is easier to collect and easier to analyse than blood samples. However, reliability varies for a number of reasons:

1. Different testing has different windows for detection. Urine and blood samples only provide a window of days whereas hair samples can show past usage for months.

2. Some drugs like heroin have a very short half-life and are usually only detectable for 12–24 hours after use. Other drugs like cannabinoids can be detected for weeks after ceasing use in the case of chronic users. Prescription drugs, too, vary in how long they remain detectable in urine after use.

3. Drug testing cannot reveal how a drug was taken, how long ago, for what purpose, what frequency and in what quantity or dosage.

4. Specimens are vulnerable to adulteration or tampering or dilution. If the taking of the sample is supervised, then substituting or adulterating the specimen is avoided. However, drug use may be masked by dilution either by drinking excessive water or by taking diuretics such as herbal teas. The test may also depend on the client's general state of hydration.

5. In urine tests (but not usually in blood tests), there are "cut-offs". These are values below which a test is deemed to be "negative". A negative result does not necessarily mean that the client did not take a drug. It could mean that there was a very low level of drug present which was insufficient to be reliably identified.

Urine creatinine levels change according to whether urine is more diluted or more concentrated. A laboratory test will measure and report the creatinine level of the specimen tested. When urine is more dilute, there is a lower concentration of drugs. If the creatinine level is very low, this suggests dilution and may cause false negative results.

Most normal urine samples have a creatinine level between 20 and

350 mg/dl (milligrams per decilitre). A urine specimen with a creatinine level below 20 mg/dl is considered “dilute” and so the test result is unreliable. A positive test result still shows the use of drugs, though not the accurate concentration, and a negative test result does not necessarily mean that no drugs were used — only that no drugs were detected in that particular diluted sample.

Expert advice on how to read and interpret drug screen results is essential.[16]

Other forms of testing for alcohol and drugs involve blood and hair testing. These tests are generally more expensive. They are used in some workplaces and in some other jurisdictions and conducted by approved laboratories. Again expert advice is recommended.

Footnotes

16 See D Edney and D Deam, “Drug testing in family law”, *Law Institute Journal*, vol 80(4), 2006, pp 48–53 for a useful discussion. See also “Dealing with drugs: toxicology and testing” by Dr Dimitri Gerostamoulos presented at the 17th National Family Law Conference in Melbourne in October 2016 (Family Law Section, Law Council of Australia). Other papers were also presented on dealing with drugs in family law cases.

¶11-130 Mental health

In parenting disputes, one or both parents (or a child of the relationship) may have mental health issues. These may be admitted by the client, alleged by the other side or family members, or even suspected by a vigilant lawyer or support worker. Full enquiries must be made with relevant mental health and allied professionals and services. Subpoenas may be required.

According to the national mental health strategy,[17] one in five

Australians will experience a mental illness at some time in their lives. Mental illnesses can be separated into two main categories: psychotic and non-psychotic. Psychotic illnesses include schizophrenia and bipolar mood disorder (formerly called manic depressive illness). Non-psychotic illnesses include anxiety disorders, some forms of depression and personality disorders. Treatments vary and include psychotherapy, counselling, behaviour modification, medication and hospitalisation.

It is essential to obtain expert reports and assessments, not just as to diagnosis, prognosis and treatment, but also as to how the particular illness affects parenting capacity, care-giving capacity, day-to-day functioning, communication and interaction with adults and children. Such a report may be obtained from existing treating mental health professionals. If no such professional is involved, an order may be sought from court, although the cases differ as to the court's power to do so and whether consent is necessary.

In *L v T*,[18] the Full Court held that there is power under s 65D(1), s 67ZC, s 68B or s 114 of the FLA to order a party to attend upon a psychiatrist and undergo treatment as a condition of a parenting order. In *Jacks and Samson* (2008) FLC ¶93-387 the court held there was such a power under the welfare power in s 67ZC.

By contrast, in *Hunt* v *Hunt*,[19] a single judge in the Family Court of Western Australia, in a spousal maintenance case, distinguished *L v T* and held there was no express power to have a wife attend upon a specialist doctor (not a psychiatrist) for assessment and a report. Nonetheless, the judge made the order sought by the husband as an interlocutory order.

In *Every and McNaught* [2007] FamCA 626, the Family Court held there was no jurisdiction to order a psychiatric assessment of the father (he refused), while in *Prendergast and Parsons (No 7)* [2007] FamCA 538 the court ordered a psychiatric assessment even though there was no consent.

Information on mental illnesses and psychiatric medications can be obtained from various state and territory mental illness fellowships, psychotropic drug advisory services, government departments,

welfare services, the national mental health strategy and the Australian Institute of Health and Welfare.[20]

The most useful text is the DSM-5 published by the American Psychiatric Association.[21] It contains the classifications, diagnostic criteria, textual descriptions for forensic purposes, and research and clinical knowledge about mental disorders. The authors of the earlier DSM-IV warned against strict definitions and categorisations.

> "A common misconception is that a classification of mental disorders classifies people, when actually what are being classified are disorders that people have. For this reason, the text of DSV-IV . . . avoids the use of such expressions as 'schizophrenic' or 'an alcoholic' and instead uses the more accurate, but admittedly more cumbersome, 'an individual with Schizophrenia' or 'an individual with Alcohol Dependence'".[22]

Again, these are merely useful resources and references and are not exhaustive nor a substitute for expert advice and evidence. For example, in *Walters & Fleetwood* [2015] FamCAFC 235 at [133], the Full Court accepted an expert's diagnosis of the mother as suffering a syndrome even though it was not recognised in DSM-IV. "We are not persuaded that a syndrome which is recognised in Europe, the United Kingdom and has been for a decade or more ought to be disregarded merely because the American Psychiatric Society does not include it in their diagnostic manual". When relying on experts, practitioners should also be mindful of the High Court decision in *Honeysett* v *The Queen* [2014] HCA 29 which looked at specialised expert knowledge.

Footnotes

17 See www.mentalhealth.gov.au.

18 *L* v *T* [1999] FamCA 1699.

19 *Hunt* v *Hunt* (2001) FLC ¶93-064. The specialist doctor was a rheumatologist, asked to assess the wife's medical condition as part of her application for spousal

maintenance.

20 See www.mentalhealth.gov.au and www.aihw.gov.au.

21 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed) (American Psychiatric Association, Washington DC, 2000). The fifth edition was published in 2013.

22 DSM-IV (2000) at xxxi.

¶11-140 Special needs of children

Children may have special needs which are obviously relevant to the types and terms of parenting orders made and to consideration of the best interests of the children involved under s 60CC of the FLA.

Children may have a cognitive, psychological or psychiatric disability. They may have impairments or challenges such as:

- hearing, visual or other physical disability
- behavioural problems like attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD) or an eating disorder like anorexia nervosa or bulimia
- learning or language difficulties like dyslexia
- neurological or developmental disorders like global developmental delay, autism spectrum disorder or Asperger's disorder, and
- gender identity disorder or gender dysphoria (see Chapter 6).

The extent of such special needs varies from child to child and must be addressed in any parenting orders made. It is imperative to obtain

expert evidence as well as obtain specific information from the child's parents, carers, teachers, specialist intervention programs and education plans as well as any health professionals.

In the case of *ES and DS*,[23] there was expert evidence from the United States-based specialist doctor of a 10-year-old boy with autism. The expert stated that overnight stays were a challenge for children with autism and needed to be carefully planned and implemented so as not to cause distress and disorientation. The trial judge granted overnight stays with the father. The Full Court did not interfere with the trial judge's exercise of discretion.[24]

It is equally important not to stereotype children with special needs, and not to ignore or devalue their needs and views (pursuant to s 60CC(3)(a)) just because of their disability or impairment.

In *VW and J*,[25] the Full Court allowed an appeal noting at [26] that it had not been open to the trial judge to lessen the weight attached to the 12-year-old autistic child's expressed wishes on account of his autism spectrum disorder (ASD) "in the absence of expert opinion concerning the impact of that condition on the child's capacity to formulate his own wishes or to resist pressure from his father".

Again in *Attorney-General's Department & McGaffey* [2015] FamCA 722, the court considered the wishes of a high functioning autistic child as one factor in determining a Hague Convention abduction case. In *Perton and Hungerford* [2018] FamCA 583, the question of the five-year-old autistic child spending time with the father was adjourned for two years to enable the father to educate himself about autism and for the mother to engage with various professionals.

Footnotes

23 *ES and DS* [2006] FamCA 1271.

24 See also *Amador and Amador* [2009] FamCAFC 196 discussed at ¶11-180 in respect of family violence but which also involved comparing specialist care and education available in Australia and Serbia for a four-year-

old autistic child. Again in *Pataki & Valdez* [2015] FamCA 1159, the father tried to argue that the medical and educational facilities for the autistic child were better in Australia than in Mexico (where the mother sought to relocate) but there was insufficient evidence for the court to make any comparisons.

25 *VW and J* [2004] FamCA 784.

FAMILY VIOLENCE AND CHILD ABUSE

¶11-150 Introduction

The *Family Law Act 1975* has numerous references to family violence and child abuse. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) came into effect 7 June 2012 (see ¶11-185 and ¶11-300). It repealed/changed some provisions and introduced some new provisions. In 2018, three more amending Acts made further relevant changes (see ¶11-186). For easy reference, relevant sections are listed:

- s 4(1) — definition of “abuse” (in relation to a child)
- s 4AB — definition of “family violence”
- s 4AB(3) and (4) — definition of child being “exposed” to family violence
- s 10D — confidentiality and disclosures of communications in family counselling
- s 43(1) — principles to be applied by courts in exercising their jurisdiction, especially s 43(1)(ca)
- s 60B — objects and principles underlying Pt VII, especially s

60B(1)(b)

- s 60CC(2) and (3) — how a court determines what is in a child's best interests for s 60CA and s 65AA with primary and additional considerations, especially s 60CC(2)(b) and s 60CC(3)(j) and (k)

- s 60CC(2A) — greater weight to be given to s 60CC(2)(b) than s 60CC(2)(a)

- s 60CF — informing court of relevant family violence orders

- s 60CG — court to consider risk of family violence in considering what order to make

- s 60CH — a party must inform the court if aware that a child is under the care of a child welfare law

- s 60CI — a party to proceedings must inform the court if aware that a child has been the subject of a notification, report, investigation, inquiry or assessment by a state or territory child welfare authority relating to abuse or an allegation or suspicion of abuse

- s 60D — obligations of advisers including legal practitioners

- s 60I(9) and s 60J — family dispute resolution not attended because of child abuse or family violence

- s 61DA(2) — presumption of equal shared parental responsibility is rebuttable if:

  "there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:

  (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or

  (b) family violence"

- s 65DAA — if a parenting order provides for equal shared parental responsibility, then the court must consider the child spending equal time or substantial and significant time with each parent with regard to the best interests of the child and s 60CC considerations

- s 65Y, s 65YA, s 65Z and s 65ZAA — defence of believing "conduct is necessary to prevent family violence" to offences for taking children out of Australia or retaining children outside Australia when parenting orders are made or when parenting proceedings are pending

- s 67Z and s 67ZBA — allegations of family violence or child abuse and notifications

- s 67ZBB — court to take prompt action in relation to allegations of child abuse or family violence

- s 67ZA — mandatory reporting for certain court personnel, family consultants and independent children's lawyers

- s 68B — injunctions for personal protection of a child or parent or person with a parenting order

- s 68N – s 68T — deal with consistency and conflict between family violence orders and parenting orders

- s 69ZN — contains five principles that a court must give effect to in conducting child-related proceedings, including "Principle 3" (s 69ZN(5)):

  "The third principle is that the proceedings are to be conducted in a way that will safeguard:

  (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and

  (b) the parties to the proceedings against family violence"

- s 69ZQ(1)(aa) — general duties: in giving effect to the principles in s 69ZN, the court must ask each party to proceedings if a child or a party has been exposed to child abuse or family violence or is at risk of being subjected to family violence

- s 69ZW — evidence relating to child abuse or family violence from prescribed state or territory agencies

- s 92A — intervention in child abuse cases

- s 102A — restrictions on examination of children in relation to child abuse

- s 102NA and s 102NB — cross-examination of parties where there are allegations of family violence, and

- s 114 — injunctions for personal protection of a party to a marriage.

¶11-155 Rules and notices

Practitioners should be aware of filing requirements. Pursuant to r 13.04A of the *Federal Circuit Court Rules 2001* (and the equivalent r 10.15A of the *Family Law Rules 2004*), if an application is made to a court for consent parenting orders, the parties must advise the court of any allegations of child abuse or neglect or family violence or other risk factors (such as mental health or drug or alcohol abuse). The parties must also explain to the court how the proposed parenting orders attempt to deal with such allegations.

Pursuant to s 67Z(2) and s 67ZBA(2), if a party to proceedings alleges any family violence or child abuse or risk of abuse or violence in proceedings for parenting orders, then under r 2.04D, a Notice of Child Abuse, Family Violence or Risk of Family Violence must be filed together with an affidavit setting out the allegations. This triggers a protocol with the relevant state or territory child protection authority. If a Notice is filed under s 67ZBA then under s 67ZBB the court is required to take prompt action. It was an unsuccessful ground of

appeal in *Chapa* [2013] FamCAFC 52 that the Federal Magistrate (as they then were) had not complied with this provision.

Furthermore, in the Federal Circuit Court pursuant to r 22A of the *Federal Circuit Court Rules 2001*, **every** applicant and respondent seeking parenting orders must file a Notice of Risk form with the Initiating Application and any Response. This is a tick-a-box form advising the court of any risk factors. If issues of risk are flagged, details must be given in the form itself as well as in any supporting affidavit. Again this notice is forwarded to the relevant child protection authority for its response.

¶11-160 Family violence — introduction

Family violence is prevalent in Australian society. Family violence is not restricted to any particular profession or vocation, cultural or ethnic group, age group, geographic area or socio-economic class. It is pervasive and widespread.

According to an Access Economics study published in 2004,[26] a total of 1.7 million Australians had experienced domestic violence at some time in their lives. The study found that 87% of the victims/survivors were women and 98% of the perpetrators were men, and domestic violence cost Australian society $8.1 billion.

In 2008/09, the cost of family violence to the Australian economy rose to $13.6 billion and $22 billion by 2015/16. This cost will rise even further by 2021/22.[27]

Although domestic violence has no boundaries and is widespread, we know that domestic violence is a gender-specific phenomenon. According to the Australian Bureau of Statistics (ABS) in 1996, almost one in four women (23%) experienced domestic violence in a married or de facto relationship.[28]

In 2005, the ABS reported that one in three Australian women will be a victim of physical violence and almost one in five will be a victim of sexual violence. According to the 2012 ABS survey, an estimated 17% of all women aged 18 years and over and 5.3% of all men aged 18

years and over had experienced physical and/or sexual abuse by a partner since the age of 15 years.[29]

The 2016 ABS study reported that women were nearly three times more likely to have experienced partner violence (physical and/or sexual violence) than men, with approximately 17% of women and 6.1% of men having experienced partner violence since the age of 15 years. As for emotional abuse, 23% of women and 16% of men reported experiencing emotional abuse by a current and/or former partner since the age of 15 years.[30]

A comparative international survey found that 34% of Australian women experienced at least one form of violence from a current or former partner.[31]

At the extreme end of the family violence spectrum, there is homicide. Intimate partner homicides account for 23% of all homicides in Australia with the vast majority (77%) being male perpetrators killing their current or former female partners. One to two women are killed each week in Australia.[32]

Domestic violence against men is far less common but does occur as the above figures reflect and should not be trivialised. Arguably men are more reluctant to admit or report violence by their female partners.

A definition of family violence was not introduced into the FLA until 1996. It has undergone some changes. Section 4AB of the FLA defines “family violence” as:

> “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the ***family member***), or causes the family member to be fearful”.

Various examples of behaviour that may constitute family violence are listed in s 4AB(2) and include an assault, repeated derogatory taunts, intentionally damaging or destroying property, intentionally causing death or injury to an animal, or unreasonably denying the family member the financial autonomy that he or she would otherwise have had. These examples do not constitute family violence on their own. There still needs to be behaviour that falls within the statutory definition of family violence, that is, coercive or controlling behaviour

or behaviour that causes a family member to be fearful. For example, see *Lyons and Adder* [2014] FamCAFC 6; *French and Fetala* [2014] FamCAFC 57 and *Saska and Radavich* [2016] FamCAFC 179.

A child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence (s 4AB(3)). Examples of situations that may constitute a child being exposed to family violence are contained in s 4AB(4) and include the child overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family, or comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family.

This is a broad definition of family violence and includes all forms of abusive conduct — physical, sexual, emotional, psychological, verbal and even financial and social abuse, as well as property damage and injury to pets. It relates to conduct between adults and between adults and children.

Warning

It is essential that legal practitioners obtain instructions about family violence and child abuse in all children's matters. Appropriate questions for legal practitioners to ask are suggested at ¶11-010–¶11-040. Also, s 60D imposes obligations on lawyers (and other advisers) about informing and advising parties as to the importance of protecting children from harm when considering their best interests. The law does not provide all the answers, so practitioners need to adopt a multi-disciplinary approach to assist clients in terms of legal remedies,[33] support services and other resources. Lawyers should also keep abreast of relevant social science literature.[34]

Footnotes

26 Access Economics, *The Cost of Domestic Violence to the*

Australian Economy: Parts 1 and 2 (Office of the Status of Women, Canberra, 2004).

27 See The National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (Attorney-General's Department, Canberra, 2009) and KPMG, *The Cost of Violence Against Women and their Children in Australia: Final Report* (Dept of Social Services, Canberra, 2016).

28 Australian Bureau of Statistics, *Women's Safety Australia* (ABS, 1996).

29 See Australian Bureau of Statistics, *Personal Safety Survey 2005* (ABS, 2006) and Australian Bureau of Statistics, *Personal Safety Survey Australia* (ABS, 2012).

30 Australian Bureau of Statistics, *Personal Safety, Australia, 2016* (ABS, 2017). See also A Harland, D Cooper, Z Rathus and R Alexander, *Family Law Principles* (Lawbook Co, 2nd ed, 2015), Chapter 6 and R Alexander, *Family Violence in Australia: the legal response* (Federation Press, 2018) Chapters 1 and 2 for these and other data. See also Australia's National Research Organisation for Women Safety website (anrows.org.au).

31 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (Australian Institute of Criminology, 2005). Similar large numbers were reported by the World Health Organisation in *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and non-Partner Sexual Violence* (2013).

32 See National Homicide Monitoring Plan (NHMP) figures kept by the Australian Institute of Criminology and see ANROWS (Australian Research Organisation for Women's Safety).

33 See *Lawyers Practice Manual* in some states for a review of state civil and criminal legal remedies and also Alexander, *Family Violence in Australia*, note 30, Chapters 2 and 5.

34 For example, see Harland, Cooper et al, note 30, Chapters 6, 10 and 11 and Alexander, *Family Violence in Australia*, note 30, Chapter 3. See also *Murphy and Murphy* [2007] FamCA 795, *Maluka and Maluka* [2009] FamCA 647 and *Maluka and Maluka* [2011] FamCAFC 72. These cases are discussed below.

¶11-170 Family violence — effect upon children

Family violence between adults or household members exposing children as indirect or secondary victims can have a long-lasting deleterious impact and effect on parents and children alike. It affects the parenting capacity and attitudes of both parents as pointed out by the English Court of Appeal in *Re L (Contact: Domestic Violence), V, M and H*:[35]

> "The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long-term), on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes

> have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting — failure to protect the child's carer and failure to protect the children emotionally".

Historically, the Family Court has separated family violence between parents from child abuse. Effects upon children of inter-spousal or adult family violence were overlooked or quarantined for almost 20 years with the Family Court treating family violence as a form of marital misconduct and not relevant to the welfare of children.

This attitude changed through a number of reported cases in the mid-1990s,[36] and then the amendments to the FLA by the *Family Law Reform Act 1995* which came into effect in 1996. Some decisions then recognised the impact of family violence on children and parenting capacity, while other decisions ignored family violence. For example, in *Blanch* v *Blanch and Crawford*,[37] the Full Court held that domestic violence is an important factor in children's cases under the former s 68F(2) (now s 60CC FLA considerations), and ordered a rehearing of a parenting matter as the trial judge had given insufficient weight to the domestic violence against the wife and the relevance of such domestic violence to the overall welfare of the children.

In *A and A*,[38] the wife alleged serious domestic violence and assaults by the husband during the marriage and since separation. The trial judge gave the husband supervised contact leading up to unsupervised contact to three young children. On appeal, the Full Court found that there would be unacceptable risk to the children if unsupervised contact took place. The Full Court ordered that the husband only have supervised daytime contact and stated that it did not envisage any likely change in that contact arrangement in the predictable future.

Again in *M and M*,[39] the trial judge recognised the far-reaching effects of inter-spousal violence on children and family dynamics:

> "The father's abusive behaviour presents a multifaceted danger

> for the children. There is a risk of violence to them personally and injury. There is a risk that violence poses when it involves living with fear, insecurity and vigilance. There is the danger of ongoing fear that the father will emotionally or physically abuse the mother they love. There is the danger that E will learn from the father's abusive behaviour that abuse is part of life for females and becomes even more accepting of such behaviour. There is a danger that both children will come to believe from the father's abuse of the mother, that women are lesser beings.
>
> But the greatest danger is that B, particularly, will learn from his father's behaviour that physical and emotional abuse are acceptable ways of dealing with other persons and thus come to share his father's disability. Such a disability would mar his dealings and relationships with others, including those he loves, bring him into conflict with the police, the Courts and the community, and result in him being penalised and even imprisoned".

In *T and S*,[40] the Full Court held that the trial judge had not sufficiently considered how children are affected by the consequences of violence upon the victimised parent's (in that case, the mother's) parenting capacity. Again in *D and D*,[41] the trial judge recognised the impact of domestic violence perpetrated by the husband on the wife, some of which was witnessed and experienced by the two older girls (then aged 12 and 14).

Since the 1995 amendments and prior to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* reforms to the FLA, the court generally adopted the view expressed in *M and M* above and recognised that domestic violence between parents and household members can be injurious and deleterious to the welfare of children, as summed up by the trial judge in *T and N*:[42]

> "It also hardly needs to be said that violent and abusive conduct by one parent against the other is highly detrimental to the wellbeing of children, whether they are witness to it or not. If they do witness it, anyone can see that such conduct can only be a traumatic experience for them. There is an abundance of

> research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such experiences have for their personality formation. They are terrified and simultaneously come to accept it as an expected part of life; they may learn that violence is acceptable behaviour and an integral part of intimate relationships; or that violence and fear can be used to exert control over family members; they may suffer significant emotional trauma from fear, anxiety, confusion, anger, helplessness and disruption in their lives; they may have higher levels of aggression than children who do not have that exposure; and they may suffer from higher anxiety, more behaviour problems and lower self-esteem than children not exposed to violence. . . . One could go on to the impact upon their ability to form attachments, and so on".[43]

However, decisions between 1995 and 2006 were "inconsistent and sent conflicting messages" and overall could be described as "in favour of abusive partners in terms of outcomes in parenting orders".[44]

Footnotes

35 *Re L (Contact: Domestic Violence), V, M and H* [2001] Fam 260 at pp 272–273, per Butler-Sloss P.

36 Such as *Merryman and Merryman* (1994) FLC ¶92-497; *Jaeger and Jaeger* (1994) FLC ¶92-492; *JG and BG* (1994) FLC ¶92-515; *Patsalou and Patsalou* (1995) FLC ¶92-580.

37 *Blanch* v *Blanch and Crawford* (1999) FLC ¶92-837. This case was cited with approval by the Full Court in *Bormann and Bormann* (unreported), Appeal No NA47 and NA54 of 2002 — judgment 8/4/2003.

38 *A and A* (1998) FLC ¶92-800.

39 *M and M* (2000) FLC ¶93-006 at p 87,159 per Mullane J.

40 *T and S* (2001) FLC ¶93-086.

41 *D and D* [2005] FamCA 356.

42 *T and N* (2003) FLC ¶93-172 at pp 78,760–78,761 per Moore J.

43 See also *McCawley and Stewart* (2006) FLC ¶93-250, where the Federal Magistrate found that there was no direct abuse of the child but there was an unacceptable risk to the child of being exposed to scenes of violence between the mother and her new partner. On appeal, a single judge upheld this finding.

44 R Alexander, "Moving forward or back to the future? An analysis of case law in family violence under the *Family Law Act 1975* (Cth)", *UNSW Law Journal Forum*, vol 16(2), 2010, pp 63–76 at 68. See also R Kaspiew, "Violence in contested children's cases: An empirical exploration", *Australian Journal of Family Law*, vol 19, 2005, pp 112–143.

¶11-180 The 2006 amendments

Object, primary consideration and equal shared parental responsibility

The relevance of family violence (and child abuse) was elevated further in the amendments pursuant to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Protecting children from family violence is now both an object of the *Family Law Act 1975* (s 60B(1)(b)) and one of two primary considerations in determining

what is in a child's best interests (s 60CC(2)(b)). It is also a ground for rebutting the presumption of equal shared parental responsibility under s 61DA(2).

Case law since 2006 is still influenced by pre-2006 decisions, and reviews of the 2006 amendments led to several reports and evaluations as well as further amendments in 2011 (see below). Courts still struggle with the "twin pillars"[45] of promoting a child having a meaningful relationship with each parent as well as protecting the child from being subjected or exposed to physical or psychological harm (but see s 60CC(2A) and ¶11-185).

In some cases, the courts have rebutted the presumption of equal shared parental responsibility or have restricted or refused time between children and the abusive parent.

For example, in *Nawaqaliva and Marshall*,[46] the trial judge looked at the objects and principles in s 60B and the primary considerations in s 60CC, including the relevance of family violence. For a number of reasons, including the husband's past violence during cohabitation and the husband's unpredictable and erratic behaviour since separation, the trial judge refused to grant equal shared parental responsibility, determining it was not in the best interests of the children (then aged five and seven). His Honour awarded sole parental responsibility to the wife and ordered that the children spend time with their father on a regular basis.

In *H and R*,[47] a father appealed against an order that he have no face-to-face time with his children aged six and ten. During the relationship, the father had been extremely violent to the mother and had threatened to kill her. After separation, there were nine occasions of supervised time, and then the mother and children disappeared for two years. The father then sought to recommence supervised time with the children. The trial judge found that the mother remained petrified of the father and this affected her parenting capacity. The Full Court dismissed the appeal having found that the trial judge had not erred in the exercise of his discretion to refuse that the children spend any time with the father. The mother also retained sole parental responsibility.

In *Goode and Goode* (2006) FLC ¶93-286, the Full Court considered the approach to be taken in interim hearings and in this case held that the trial judge was correct in rebutting the presumption of shared parental responsibility on an interim basis until the allegations were tested at the final hearing.

Other relevant cases include *Colson and Olds* [2007] FamCA 668; *Murphy and Murphy* [2007] FamCA 795; *Carlton and Carlton* [2008] FMCAfam 440; *Shaw and Shaw* [2008] FMCAfam 1024; *Sabin and Francis* [2008] FMCAfam 1411; *Oakley and Cooper* [2009] FamCAFC 133; *Cabelka and Waite* [2009] FMCAfam 525; *Amador and Amador* [2009] FamCAFC 196 (see below); *Maluka and Maluka* [2009] FamCA 647; *Many and Quebec* [2010] FamCA 444 and *Salah and Salah* (2016) FLC ¶93-713 (regarding interim hearings).

The case of *Murphy* is particularly useful as Carmody J reviews the case law before and after the 2006 amendments, and also reviews the social science literature on family violence and child abuse both here and in the United Kingdom.

Importantly, evaluation of the 2006 reforms by the AIFS suggests that families where family violence occurred or where there were safety concerns were **no less likely** to have shared care time arrangements than those families where family violence had not occurred or where there were no safety concerns.

Reasonableness

The notion of “reasonableness” was introduced into a number of provisions in the 2006 amendments but is not defined in the FLA. It remains unclear whether the court will apply an objective or subjective test or whether the court devises a specific test for such circumstances:

- the requirement of “reasonable” was removed from the definition of family violence in s 4AB(1) in the 2011 changes in respect of the behaviour complained of (see below at ¶11-300) but it remains in some of the examples of behaviour listed in s 4AB(2) that may constitute family violence.

- “reasonable” grounds to believe there has been or may be child

abuse or family violence so as not to attend family dispute resolution (s 60I(9) and s 60J). This is usually supported by an affidavit setting out why otherwise compulsory family dispute resolution is inappropriate.

- "reasonable" grounds to believe that a person has engaged in child abuse or family violence to rebut the presumption of equal shared parental responsibility (s 61DA).

  This again is a question of evidence.

Amador and Amador [2009] FamCAFC 196

This is an important Full Court decision as to how courts deal with allegations of family violence (and arguably child abuse) in children's cases.

The mother sought to relocate from New South Wales to Serbia with her four-year-old autistic son. She alleged physical and sexual violence by the father. The allegations were mostly denied. The Federal Magistrate permitted her to relocate. One of the grounds of appeal was that the Federal Magistrate had accepted the uncorroborated evidence of the mother. The Full Court dismissed the appeal on various grounds including the ground as to lack of corroboration. The Full Court stated at [79]:

> "To the extent that it is submitted that the mother's allegations of 'horrific domestic violence' could only be accepted if objectively corroborated, we do not find that any such requirement exists. Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. We have not been referred to any authority in support of such a proposition".

In a 2010 paper, the then Deputy Chief Justice of the Family Court examined *Amador* and listed some key factors which are useful for practitioners in presenting cases involving allegations of violence and

abuse:[48]

- In order for evidence of assault to be accepted by a court, it is not necessary to show that there has been a complaint to relevant authorities or that there has been a medical examination (although this information may assist the court).

- The Full Court is concerned that trial judges may feel constrained by law in being able to make a positive determination in relation to allegations of violence even where there is satisfactory evidence to the requisite standard that the violence has occurred. This may constitute appealable error.

- The High Court decision in *M and M* (1988) FLC ¶91-979 does not require a trial judge to make positive findings, *inter partes*, about assault and other serious domestic violence (see below).

- A finding of "unacceptable risk" to a child may occur even when no allegation of sexual, physical or psychological abuse of the child is established as fact.

- The more serious the allegation the greater degree of certainty required in relation to making a finding (consistent with *Briginshaw* v *Briginshaw* (1938) 60 CLR 336 (see below)).

- Trial judges will, in most cases where allegations of serious criminal offences are made, choose to apply all provisions of the *Evidence Act 1995* (Cth) to the determination of the issue (as contemplated in Div 12A of Pt VII of FLA)

- A finding by a trial judge in a children's case under the FLA that a party has assaulted another party or person can have significant impact on the court's determinations as to the best interests of any children

- The best interests of a child require the court to determine relevant allegations of violence *where that can be done*

- The consequences of placing a child under the supervision and/or

care of a person who has been violent may be far-reaching and very detrimental to the child's welfare

- The more serious the allegation of violence the more important it is to the child to investigate and determine the allegation

- There is a distinction as to how positive findings of fact should be made in parenting cases where there are allegations of child abuse (where the test to be applied is "unacceptable risk") and the case where allegations are made of domestic violence and/or assault by one party upon another. Where such domestic violence and/or assault is alleged, the court must make findings where the evidence enables this to be done.

In the 2016 case of *Salah and Salah* [2016] FamCAFC 100 at [43], the Full Court was critical of the trial judge suggesting that the court required corroboration or objective support for the mother's allegations of family violence. "To so suggest is an error. Family violence often takes place in private in circumstances where no corroboration is available". This is important to remember.

Footnotes

45 *Mazorski and Albright* (2008) 37 FamLR 518 and *McCoy and Wessex* (2007) 38 FamLR 513.

46 *Nawaqaliva and Marshall* (2006) FLC ¶93-296.

47 *H and R* [2006] FamCA 878.

48 See The Hon J Faulks, " 'Condemn the fault and not the actor?' Family violence: How the Family Court of Australia can deal with the fault and the perpetrators", *UNSW Law Journal Forum*, vol 16(2), 2010, pp 8–18 at 13–14.

¶11-185 The 2011 amendments

Amendments to the *Family Law Act 1975* by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* commenced operation on 7 June 2012. The Act made some important reforms. As detailed above, the definition of "family violence" was inserted by s 4AB to include violent or threatening behaviour that coerces or controls a person or causes a person to be fearful. Various examples of family violence are listed, including physical, emotional, social and economic abuse, as well as damage to property and injury to animals.

The definition of "abuse" in relation to a child in s 4(1) has been expanded to include physical and sexual assault as well as neglect and "serious psychological harm" caused by being subjected or exposed to family violence. Examples of being exposed to family violence are listed.

Another change is s 60B(4) so that the Convention on the Rights of the Child is included as an additional object underlying the FLA.

The amendments did not change the presumption of equal shared parental responsibility nor the legislative pathway that mandates consideration of equal shared care. It did, however, insert s 60CC(2A) which provides that in applying the two primary considerations stated in s 60CC(2), the right of the child to be protected from harm is to be given greater weight over the right of the child to have a meaningful relationship with each parent. As discussed below, in an examination of case law, however, this appears to have had little impact on decision-making.

The amendments also repealed the "friendly parent" provision in s 60CC(3)(c) and substituted a new additional consideration that the court must consider in determining what is in a child's best interests. The court must look at the extent to which each parent has, or has not, participated in decisions about the child, spent time with the child and contributed to maintaining the child.

Also, the additional consideration in s 60CC(3)(k) was replaced so that a court may make inferences and take into account any state family

violence order (eg intervention orders in Victoria) and any relevant circumstances, evidence and findings from the state proceedings.

Another important change was the repeal of s 117AB as to costs where false statements are made. Costs can always be awarded in such circumstances under s 117.

There were also changes to strengthen obligations of legal practitioners, family consultants, family counsellors and family dispute resolution practitioners to advise parties and the court about risks and the safety of children.

According to the Explanatory Memorandum, the Act responded to various reports and evaluations following the 2006 reforms. Those reports are listed below in ¶11-280. Certainly, the 2011 definitions of family violence and child abuse in parenting cases are very broad. Unfortunately, notwithstanding the wealth of research and evaluations, the responses contained in this amended Act are limited and the presumption of equal shared parental responsibility and the premise of shared parenting (mistakenly interpreted to mean equal shared care) underlying the 2006 reforms were not challenged.

A much larger and more recent analysis by Alexander of over 200 cases (see note 69 below) similarly found that there was no consistency and there were different approaches to the definition of family violence, the use of classifications or typologies, the legislative pathway and the relevance of family violence and child abuse to the decisions made. Consistent with other research, time spent with an abusive parent was generally only restricted or denied in cases of extreme violence. There were also significant differences in judicial attitudes as to how family violence affected children, parental capacity and role modelling.

¶11-186 The 2018 amendments

There were three amending Acts passed in 2018 that have impact on cases involving family violence. These were the *Family Law Amendment (Family Violence and Other Measures) Act 2018*; the *Civil Law and Justice Legislation Amendment Act 2018* and the *Family Law*

Amendment (Family Violence and Cross-examination of Parties) Act 2018.

The first Act introduced new s 45A which claims to strengthen a court's power to protect victims of family violence by bolstering the power to dismiss matters summarily if there is no chance of prosecution or defence. In addition, under new s 69ZL, a court may give short-form reasons for decisions in interim parenting orders.

The second Act in new s 122A and s 122AA sets out new powers for police (state and federal) when making arrests under the *Family Law Act 1975* and new powers to enter and search premises for making arrests. This is important when police are exercising arrest powers under s 68C and s 114AA for alleged breach of a restraining order.

The third Act introduces important provisions in new s 102NA and s 102NB. Where a party intends to cross-examine another party and there is an allegation of family violence between those two parties and any of the following are satisfied:

- either party has been convicted of or is charged with an offence involving violence or threat of violence to the other party
- a family violence order (other than an interim order) applies to both parties
- an injunction for personal protection under s 68B FLA or s 114 FLA is directed against the other party, or
- the court makes an order that cross-examination is prohibited.

In such a case, cross-examination must be conducted by a legal practitioner. If direct cross-examination by a party does take place, then the court "must ensure that during the cross-examination there are appropriate protections for the party who is the alleged victim of the family violence".

CHILD ABUSE

¶11-190 Introduction

Research has traditionally quarantined child abuse from family breakdown and family violence.

> "Recognition of the relationship between child abuse, parental separation and divorce has been slow. Although the problems of child abuse were noted in the earliest of parental separation and divorce research, they were dismissed as incidental to the real problem: that of the parental separation and the divorce . . . Even those who have more recently explored the role of family violence in separation and divorce have tended to ignore child abuse, preferring to concentrate on one form of family violence: domestic violence . . . Furthermore, as many of the parents who brought the problem to professionals were mothers alleging that the child's father was a perpetrator of the abuse, the problems became suffused with the gender issues always prominent in parental separation and divorce, to the detriment of both the child victims and the development of a research-based body of professional knowledge".[49]

It is now recognised that child abuse and domestic violence are closely linked and are common causes of parental separation. However, the mere fact of separation does not mean that the abuse and/or violence automatically cease, and often family law proceedings ensue where a parent seeks to protect a child from the other parent or another household or family member. The period following separation is a danger period for many children, and in cases involving allegations of abuse or violence where children are direct or primary victims, the courts are more protective and interventionist.

Footnotes

49 T Brown and R Alexander, *Child Abuse and Family Law* (Allen and Unwin, 2007), p 2. See this text for a discussion of the human service issues and legal principles.

¶11-200 Definition of “child abuse”

There was no definition of child abuse in the FLA until 1991. The definition remained the same until the 2011 amendments and the current definition is contained in s 4(1) and provides:

> “***abuse***, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child; or
>
> (b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
>
> (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
>
> (d) serious neglect of the child”.

This is a comprehensive definition. It includes different forms of child abuse such as sexual, physical and psychological abuse as well as serious neglect (although the term “serious” is not defined). It also includes abuse through exposure to family violence as defined in s 4AB(3) and (4). The broad definition will not only cover cases where the child is the direct victim, but also cases where a child is embroiled in the distress or fear or anxiety felt by their caregiver towards the absent parent.[50]

In *Rhodes and Lewington*, the trial judge was satisfied that there was an unacceptable risk of psychological harm or emotional harm to the children if they spent any time with their father. His Honour was also satisfied that “the mother genuinely believes that such a risk exists and that should contact be ordered, this belief will have a significant and detrimental impact on the mother’s capacity to effectively parent the children. Thus, any form of contact would be inimical to the

children's best interests".[51]

The court in *K and B* recognised the detrimental effects of all forms of child abuse:

> "Sexual abuse is insidious. Its effects are far-reaching. Violence in the home can be equally insidious. Psychological or emotional abuse can have equally deleterious effects. Our society accepts a plurality of conduct and a plurality of attitude. It does its best to ensure the existence of certain minimal standards, and consistent with the maintenance of a relationship between parent and child, to ensure that parents do meet those minimum standards".[52]

Relevant cases after the 2006 amendments include *Napier and Hepburn* (2006) FLC ¶93-303; *Colson and Olds* [2007] FamCA 668; *Murphy and Murphy* [2007] FamCA 795; *Johnson and Page* (2007) FLC ¶93-344; *Amador and Amador* [2009] FamCAFC 196 (see ¶11-180) and *Slater and Light* [2011] FamCAFC 4. Case law after the 2011 amendments continues as before including *Oscar and Delware*; *Oscar and Ansten* [2013] FamCAFC 165; *Lyons and Adder* [2014] FamCAFC 6, *Tyler and Sullivan* [2014] FamCA 178 and *Lowry and Clemens* [2015] FamCA 557.

The inclusion of exposing children to family violence as a form of child abuse in paragraph (c) of the definition in s 4(1) is important. In the *Personal Safety Survey 2005* (ABS, 2006), victims of family violence reported that children were present in 49% of cases of family violence by a current partner. 27% reported that their children directly witnessed the violence. In the *Personal Safety Survey Australia* (ABS, 2012), 54% of the women who had experienced violence by a current partner had children in their care at the time of the violence. 31% stated that their children had directly witnessed the violence and 22% had heard it. These high figures are similarly reflected in other statistics from police who attend family violence incidents.

Sections 4AB(3) and (4) define exposure to family violence and give useful examples such as witnessing, overhearing, comforting or providing assistance, cleaning up or being present when emergency services attend. For early post-2011 first instance cases, see *Keaton and Mahoney* [2012] FamCA 658 and *Shergold and Clark* [2012]

FamCA 1072. In their review of 60 judgments after the 2011 reforms, Easteal and Grey found that exposure was minimised by the courts and unsupervised time was still ordered even where there were allegations that children had witnessed or been subjected to violence directly.[53]

For a recent case, see *Pannett v Crain (no 2)* [2018] FamCAFC 141 where the Full Court upheld a decision that a seven-year-old child who had been exposed to family violence spend no time with their father.

Footnotes

50 In such cases in the past, courts have refused time with the other parent or only ordered limited or supervised time. See *Cooper* v *Cooper* (1977) FLC ¶90-234; *Litchfield and Litchfield* (1987) FLC ¶91-840; *Russell and Close* 1992 (unreported, Appeal No SA45 of 2002 — judgment 25/6/1993); *Sedgley and Sedgley* (1995) FLC ¶92-623; *Irvine and Irvine* (1995) FLC ¶92-624; *Re Andrew* (1996) FLC ¶92-692; *McCawley and Stewart* (2006) FLC ¶93-250 and *Carpenter and Carpenter* [2014] FamCAFC 100.

51 *Rhodes and Lewington* [2017] FCWA 75 at [243] per Walters J.

52 *K and B* (1994) FLC ¶92-478 at p 80,973 per Kay J.

53 P Easteal and D Grey, “Risk of harm to Children from Exposure to Family Violence: Looking at How it is Understood and considered by the Judiciary”, *Australian Journal of Family Law*, vol 27, 2013, pp 59–77.

¶11-210 Child sexual abuse — myths

The most common form of child abuse presented to court is child

sexual abuse. Statistics[54] and social science research support the common belief that in the context of the family, the majority of perpetrators are adult male relatives (father, stepfather, grandfather, uncle, sibling) and the majority of victims are girls.[55]

Note

Myths to be challenged

There are, however, many **myths** surrounding child sexual abuse that need to be challenged, such as:

- an abusive parent (usually the father) will only abuse one child at a time; other children are “safe”
- the residential parent (usually the mother) often colludes by knowing the abuse is taking place during cohabitation but does nothing
- child abuse is consensual — children of all ages and especially teenagers do not object to the abuse and see it as a sign of parental love and affection
- paedophiles who abuse non-related children never “cross-over” and abuse their own children
- children are more likely to be abused by strangers than by their relatives
- mothers, stepmothers and female relatives do not commit child sexual abuse; it is exclusively an offence committed by male relatives
- children make up stories, and
- mothers make up allegations to obtain advantages in family law proceedings and coach their children to do likewise.

Footnotes

54 For statistics, see Australian Institute of Family Studies, National Child Protection Clearinghouse as well as the Australian Institute of Health and Welfare (www.aihw.gov.au) and state and territory child protection authorities.

55 See Brown and Alexander, note 49, Chapter 4.

¶11-220 Child abuse — test

As listed at ¶11-150, child abuse features in numerous provisions in the *Family Law Act 1975* and protecting children from abuse is relevant to the type and terms of a parenting order and to the determination of what is in the best interests of a child.

In *B and B*[56] and *M and M*,[57] the High Court unanimously determined and articulated the test to be applied in considering whether or not to grant custody or access (now "living with" and "spending time and communicating with") under the FLA in cases involving allegations of child sexual abuse.

A court exercising jurisdiction under the FLA will not make parenting orders granting custody or access to a parent "if that custody or access would expose the child to an unacceptable risk of sexual abuse".[58]

The High Court also made it clear that the court hearing the case need not make a positive finding as to whether the alleged sexual abuse alleged took place or not unless it is satisfied on the civil standard of proof with due regard to the factors in the earlier High Court decision of *Briginshaw v Briginshaw*.[59] Those factors include the seriousness of the allegation made and the gravity of consequences flowing from a

particular finding.

Subsequent cases have reinforced that the standard of proof to make a positive finding of sexual abuse, as opposed to a finding of unacceptable risk, “must be towards the strictest end of the civil spectrum as set out in *Briginshaw* and s 140 of the *Evidence Act 1995* (Cth)”.[60]

In federal civil matters like proceedings in the Family Court and the Federal Circuit Court, this is in part reflected in s 140 of the *Evidence Act 1995* (Cth), which reads:

> “(1) In a civil proceeding the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence; and
>
> (b) the nature of the subject-matter of the proceeding; and
>
> (c) the gravity of the matters alleged”.

One of the essential features in child abuse cases is risk assessment. Although a case involving a father convicted of child pornography offences rather than child abuse, Murphy J in *Harridge and Harridge* [2010] FamCA 445 refers to the High Court test, case law and secondary sources and lists a number of questions that may assist in assessing risk:

1. What harmful outcome is potentially present in this situation?
2. What is the probability of this outcome coming about?
3. What risks are probable in this situation in the short, medium and long term?
4. What are the factors that could increase or decrease the risk that

is probable?

5. What measures are available whose deployment could mitigate the risks that are probable?

Footnotes

56 *B and B* (1988) FLC ¶91-978.

57 *M and M* (1988) FLC ¶91-979.

58 *M and M* (1988) FLC ¶91-979, at p 77,081 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ.

59 *Briginshaw* v *Briginshaw* (1938) 60 CLR 336.

60 *WK and SR* (1997) FLC ¶92-787 at p 84,694 per Baker, Kay and Morgan JJ. See also *K and B* (1994) FLC ¶92-478; *N and S and the Separate Representative* (1996) FLC ¶92-655; *S and S* (2001) FMCAfam 185; *Re W and W: Abuse allegations; expert evidence* (2001) FLC ¶93-085; *Re W (Sex abuse: standard of proof)* (2004) FLC ¶93-192.

¶11-230 Child abuse — outcomes

The “unacceptable risk” test has been applied to children’s cases and parenting orders as to where a child lives, with whom a child spends time, and on what conditions, and also to specific issues. It has also been broadened to apply to other forms of abuse[61] and remains the applicable test in all cases involving allegations of child abuse (see discussion of *Amador and Amador* [2009] FamCAFC 196 at ¶11-180 above). The test is not affected by the 2011 amendments.

In interim hearings, the court also has powers where child abuse is

alleged, pending a full hearing, to make various interim parenting orders with various terms and restrictions. The court can also ask the relevant state or territory child welfare agency to intervene in the proceedings (s 91B of the *Family Law Act 1975*) and/or give leave to other persons to intervene where it is alleged that child abuse has occurred or may occur (s 92 and s 92A).

There are established protocols and procedures in each state and territory between the federal family law courts and the responsible child protection or welfare agencies (s 69ZW).

In final hearings, a finding of unacceptable risk may result in time with an abusive parent being supervised or limited,[62] suspended[63] or totally refused or denied.[64] There are cases on all of these.

A finding of unacceptable risk may also mean that a status quo of primary care is overturned or modified.[65]

The reality is that, notwithstanding all the provisions and protocols for the protection of children, courts are reluctant to totally exclude an abusive parent from a child's life.

> "Australian law is unashamedly pro-contact. Consequently, this court will bend over backwards to establish or preserve a worthwhile relationship with the poorest of parents provided adequate protective measures can be put in place to prevent any relevant risks . . . Thus, contact will rarely be wholly negative . . . The essential issue is what is best for the child not what is justice to an 'innocent parent'. The child's overall welfare is the dominant concern . . . Even in the context of abuse or violence it can provide the opportunity for reconciling differences, repairing and restoring faith in a damaged relationship".[66]

Cases involving child abuse allegations comprise over 50% of the family law courts' workload in contested children's matters. Specific case management processes and lists (ie, Magellan and Columbus programs in the Family Court of Australia and the Family Court of Western Australia respectively) have been established to manage and determine cases involving serious allegations of direct physical and/or sexual child abuse. Cases involving domestic violence between

parents, but not directed at children, are not included. Legal practitioners need to be aware of the relevant fast-tracking case management processes available in their respective state or territory. Legal practitioners must also be aware of the requirements under the FLA to notify the court of any family violence or child abuse allegations and the relevance of any child protection agency reports and files (see ¶11-155 and ¶11-185 above).

Footnotes

61 For example, *B and B* (1993) FLC ¶92-357.

62 *M and M* (1987) FLC ¶91-830; *B and B* (1988) FLC ¶91-948; *Re C and J* (1996) FLC ¶92-697; *Re W (Sex abuse: standard of proof)* (2004) FLC ¶93-192; *Re B (Alleged apprehension of bias)* (2004) FLC ¶93-185; *Fitzpatrick and Fitzpatrick* (2005) FLC ¶93-227; *W and W (Abuse allegations: unacceptable risk)* (2005) FLC ¶93-235; *Madigan and Madigan and Ors* [2018] FamCA 1062. See *Joelson and Joelson* [2014] FamCA 788 as to choice of supervisor.

63 *K and B* (1994) FLC ¶92-478; *S and P* (1990) FLC ¶92-159.

64 *B and B* (1986) FLC ¶91-758; *B and B* (1993) FLC ¶92-357; *M and H* (1996) FLC ¶92-695; *A and A* (1998) ¶FLC 92-800; *Oscar and Delware; Oscar and Ansten* [2013] FamCAFC 165; *Rhodes and Lewington* [2017] FCWA 75; *Macey & Liddell and Anor* [2018] FamCA 1027 (interim).

65 *Re David* (1997) FLC ¶92-776; *Re W and W* (Abuse allegations; expert evidence) (2001) FLC ¶93-085; *McCawley and Stewart* (2006) FLC ¶93-250; *H and R* [2006] FamCA 878; *Slater and Light* [2011] FamCAFC 1.

66 *W and G (No 2)* (2005) FLC ¶93-248 at pp 80,067–80,068 per Carmody J.

¶11-250 Family Violence Best Practice Principles

In 2009, the Family Court published the *Family Violence Best Practice Principles* setting out useful information for litigants, lawyers and judicial officers. The latest revised version for use in the Family Court and the Federal Circuit Court of Australia was published in December 2016. These are principles, not guidelines, acting as a "checklist of matters that judges, court staff, legal professionals and litigants may wish to refer at each stage of the case management process in disputes involving children",[67] particularly those involving allegations of family violence and/or child abuse. It is clear that the Principles are not prescriptive and a failure to take them into account does not necessarily give rise to appealable error.[68]

The Full Court referred to the Principles as a useful tool in *Oakley and Cooper* [2009] FamCAFC 133 and *Cameron and Walker* [2010] FamCAFC 168. In the case of *Maluka and Maluka* [2009] FamCA 647, the trial judge handed out copies of the Principles to all parties during the course of a long trial involving allegations of serious domestic violence. In relation to post-2011 reforms, see *Thomas and Watson* [2013] FamCAFC 8 and *Caldera and Mateo* [2014] FCCA 1686 at [338].

The Principles refer to how family violence is defined, different types of family violence, cultural contexts, the statutory framework, a checklist of legislative requirements, family reports and other expert reports, interim hearings, final hearings, consent orders and outcomes for children.

Although there is some debate about the categories or typologies of family violence which the Principles appear to support,[69] the Principles are useful at all stages of litigation and are recommended as a reference for all family law practitioners.

Footnotes

Footnotes

67 Foreword — Revised *Family Violence Best Practice Principles* (4th ed, December 2016).

68 Faulks, note 48, p 14 and *Cameron and Walker* (2010) FLC ¶93-445 at [126].

69 For example, see R Alexander, "Family violence in parenting cases in Australia under The Family Law Act 1975 (Cth): The journey so far — where are we now and are we there yet?", *International Journal of Law, Policy and the Family*, vol 29, 2015, pp 313–340 at 324–328.

¶11-260 Parental alienation syndrome

Parental alienation syndrome is a former fashionable legal strategy:

> "The combination of rising divorce rates and rising child abuse notification rates affected the professionals working in family law by the early 1980s. Increasing numbers of allegations of child abuse in the context of residence and contact disputes were presented to family and divorce courts . . . Soon family law professionals began to ask why there was such a marked increase in child abuse allegations in residence and contact disputes in family law proceedings".[70]

In response to this question, Richard Gardner (a US psychiatrist with no background in child abuse) propounded the "parental alienation syndrome" (PAS) in the mid-1980s. According to Gardner, manipulative mothers made up false allegations of sexual abuse of children against fathers in order to exclude those fathers from their children's lives forever. Gardner later expanded PAS to a general theory of one parent alienating a child from the other parent for a variety of reasons.

This form of parental brainwashing became accepted in child

protection and family law in various jurisdictions including Australia. In *Re K*,[71] the Full Court cited "cases where the child is apparently alienated from either one or both parents" as one ground or reason for the appointment of a separate representative. This remains one of the checklist of reasons used by the court in appointing an independent children's lawyer under s 68L of the *Family Law Act 1975*.

Parental alienation syndrome became a "fashionable legal strategy"[72] in the Family Court of Australia in cases where children were resisting spending time with a parent whether or not abuse was alleged.[73] *Johnson v Johnson*[74] was a case setting out the obligations of a trial judge when hearing children's cases involving unrepresented litigants. The Full Court also looked at parental alienation syndrome and determined that it was relevant to the best interests of a child:

> "In a case where there has been obvious contact difficulties between the parties, the possibility that the child has either been brainwashed or indoctrinated by one of the parents, must be a relevant consideration . . . Parental Alienation Syndrome is a very real psychological phenomenon."

Footnotes

70 Brown and Alexander, note 49, p 11.

71 *Re K* (1994) FLC ¶92-461.

72 JR Johnston, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, Paper presented at the 11th Biennial National Family Law Conference, Queensland, September 2004 at p 3.

73 For example, *M* v *H* (1996) FLC ¶92-695.

74 *Johnson* v *Johnson* (1997) FLC ¶92-764 at p 84,415.

¶11-270 Current thinking

The theory of parental alienation syndrome (PAS) was relevant as a factor in determining best interests in parenting orders under former s 68F(2) (replaced in the 2006 reforms) and the "friendly parent" provision in former s 60CC(3)(c) (repealed in the 2011 reforms). However, the debate has changed perspective. The DSM-IV and DSM-5 both refer to "parent-child relational problems". Several empirical studies have critiqued and rejected PAS, and the concept has been reformulated and re-articulated. Clinicians now refer to the "alienated child" or the "aligned child" and the "aligned parent" and/or the "rejected parent". They also use terms like loyalty, enmeshment, estrangement, coaching, brainwashing or "splitting" whereby a child adopts a view of one parent and rejects the other parent as a way of coping with ongoing hostility and conflict on a long-term basis.[75]

The Family Court has followed suit. In *R v R (Children's wishes)*[76] the Full Court referred to the article and critique of a Californian law professor Carol Bruch[77] and commented that the appropriate methods for dealing with alienated children "have not yet been discovered" (p 89,034) but it was clearly not in an alienated child's best interests to be deprived of time with her father in circumstances that appear to have been engineered by the mother.

The "friendly parent" provision was repealed in the 2011 amendments and PAS is arguably no longer relevant. However, Tucker[78] describes the clinical features of PAS that can be useful if kept in perspective. The "alienated child" is characterised by the following:

- child preoccupied with deprecation and criticism of the rejected parent which is unjustified and/or exaggerated
- child's denigration of the parent has the quality of a litany, a rehearsed quality
- child justifies the alienation or rejection with memories of minor/trivial altercations, and, when asked, the child cannot give compelling reasons

- hatred of the rejected parent is most intense when the aligned parent and child are in the presence of the rejected parent
- hatred often extends to members of the rejected parent's family, with even less justification
- child shows no ambivalence — the rejected parent is all bad and the other parent is all good
- child shows no regard for the rejected parent's feelings, and no guilt
- child fears the loss of love of the aligned parent, and
- child feels abandoned by the other parent.

Tucker describes how each of the parents contributes. The "aligned parent":

- is openly negative about the rejected parent
- conveys their fear and distrust of the rejected parent
- believes that the rejected parent has no place or value in the child's life
- reinforces the child's negative behaviour towards the rejected parent, and
- may have personal mental health issues.

The "rejected parent":

- withdraws when the inter-parental conflict becomes intense
- stops attempts to contact the child
- rejects the child when rejected by them
- may have a difficult and rigid parenting style, and

- may not be able to empathise with the child.

These features are useful but not formulaic. Each case is different and there are variables such as the child's age, stage of emotional and cognitive development, ability to reality test, and own feelings of anxiety and low self-esteem.[79] There are also variables in the personalities and traits of the parents involved.

Research and experience show that in high conflict separations, both parents can try to brainwash a child, and in some cases the child is alienated from or rejects one parent and is aligned with the other. Parental alienation syndrome is no longer presented as the primary or exclusive reason for a child refusing to spend time or communicate with one parent. Social science now differentiates between the "alienated child" as described above (who persistently refuses or rejects time with a parent because of unreasonable or unjustifiable views) and the child who also rejects time with a parent after separation but for a variety of developmentally-expected and acceptable reasons.[80]

Now the Family Court and Federal Circuit Court appear to recognise that there is a range of justified and reasonable reasons why children feel estranged from or rejected by a parent which do not necessarily involve PAS or pathologising the child's position. In some cases, however, there may be an alienated or resistant child, and that requires expert investigation.[81]

Footnotes

75 See *Udall and Oaks (No 2)* [2015] FamCA 1101 at [45].

76 *R* v *R* (Children's wishes) (2002) FLC ¶93-108.

77 CS Bruch, "Parental alienation syndrome and parental alienation: Getting it wrong in child custody cases", *Family Law Quarterly*, vol 35(3), 2001, pp 527–552.

78 A Tucker, *Parental Alienation and Rejection: Effects on*

Children, Paper presented at Independent Children's Lawyer Training Program, Law Council of Australia, Melbourne, November 2006.

79 Ibid, p 6.

80 Johnston, note 72, p 6.

81 In *McGregor & McGregor* [2012] FamCAFC 69, the Full Court was critical of the trial judge for relying on material about PAS without notice to the parties. Some of the literature and research is discussed. In a more recent Full Court appeal, one ground of appeal argued by the mother was that one of the experts in the trial had been on a media program apparently supporting PAS and the notion that there are a lot of false allegations of child physical and sexual abuse in the Family Court. The trial judge had ordered that the two children live with the father and that the mother have supervised time for one year and then unsupervised thereafter because, inter alia, the mother had a fixed idea that the father had sexually abused the children. The trial judge found that the evidence did not establish an unacceptable risk with the father and made orders in favour of the father. The Full Court dismissed this ground of appeal (and the appeal overall) not because it raised PAS but because it was new evidence and there was no way of verifying the media report. See *Malave and Radcliffe* [2015] FCCA 201 and *Helbig & Rowe and Ors* [2016] FamCAFC 117.

RESEARCH, DEBATES AND THE FUTURE

¶11-280 Research and reviews

Post-2006 reforms

Soon after the 2006 amendments, the Standing Committee on Law and Justice of the Legislative Council of the New South Wales Parliament[82] warned that numerous provisions of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* may expose women and children to family violence and may subordinate the best interests of children to the interests of parents. This was prescient. In the following five years there were several evaluations of the statutory provisions and case law as well as social science research to inform family dispute resolution practitioners, lawyers and decision-makers.

For example, Chisholm and McIntosh discuss the impact of the shared parental responsibility amendments in situations of high conflict.[83]

The article tackles the question of how to deal with affording children the best care arrangements within a framework of difficult and conflicted family circumstances. It also provides a useful review of the literature on the psychology of shared care for young children. This research is consistent with other research overseas.[84]

The Australian Institute of Family Studies conducted an extensive longitudinal study of the 2006 reforms.[85]

Although there were positives arising from the reforms, many shared care arrangements were found to be inappropriate in light of past family violence and ongoing safety concerns and had a negative effect on both the primary caregivers' (mostly mothers) and children's emotional and physical wellbeing.

Similarly, research by Cashmore et al[86] confirms that children's wellbeing is optimised where parents are able to cooperate about parenting arrangements, where parents have a say in those arrangements, where there is relatively little conflict between parents and where parents believe that each parent is paying his/her fair share of the costs of raising the children.

Another study by Bagshaw et al examines experiences and views of parents and children.[87] This study concludes that a majority of respondents (men and women) have not achieved safe and suitable

parenting arrangements for themselves and their children after separation where there is a history or ongoing existence of family violence. The problem remains that the family law socio-legal service system does not place adult and child safety post-separation above all other principles.

There have also been reviews looking at the FLA and its family violence provisions. First there was the "Chisholm report".[88] The report makes a number of recommendations about simplifying the legislative pathway and repealing certain sections such as the "friendly parent" provision and the costs provision as discussed above. Some of the recommendations were followed in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (see ¶11-300).

Then in its report, the Family Law Council refers to the practice of vague non-particularised written allegations of violence and makes various recommendations about law reform and professional education.[89]

In 2010, the NSW Law Reform Commission (NSWLRC) and Australian Law Reform Commission (ALRC) published a comprehensive consultation paper and then a report confirming many of the concerns raised in earlier legal and social science analyses.[90]

Post-2011 reforms

There have been some useful analyses of judicial attitudes and case law since the 2011 reforms came into effect. One analysis suggests that judges are more aware of different types of family violence under the definitions but can overly focus attention on the use of typologies. Also there is still confusion about s 60CC(2A) such that "there has not necessarily been a reduction in orders requiring a child to spend equal time or substantial time with a parent who is alleged to have behaved violently".[91]

A much larger and more recent analysis of over 200 cases similarly found that there was no consistency and there were different approaches to the definition of family violence, the use of classifications or typologies, the legislative pathway and the relevance

of family violence and child abuse to the decisions made. Consistent with other research, time spent with an abusive parent was generally only restricted or denied in cases of extreme violence. There were also significant differences in judicial attitudes as to how family violence affected children, parental capacity and role modelling.[92]

In 2016, the Family Law Council published a detailed report on the intersection between state child protection systems and the federal family law system.[93]

In 2017, in a project with ANROWS, the Australian Institute of Family Studies published a report with data.[94]

The research reports on the experiences and impacts of inter-parental conflict and domestic violence on parenting and parent–child relationships. Key messages include that one in four mothers and one in six fathers reported physical abuse before separating, two-thirds of mothers and half of fathers reported experience of at least one form of emotional abuse by their former partners, and emotional abuse continued for long periods of time after separation for many people. Inter-parental conflict and family violence have serious impacts on parents, and children and mothers who experienced family violence are more likely to suffer psychological distress, and to have less confidence as mothers and to face financial hardship. These findings confirm much of what is described above.

Also in 2017, a federal House of Representatives report stated that “more than half the parenting cases that proceed to court involve allegations of family violence. A recent study in 2015 found that in more than 83% of matters involving allegations of family violence or child abuse, parental responsibility is shared between parents for the care of the child. For judicially-determined arrangements, 40% of parents share ongoing parental responsibility despite allegations of family violence or child abuse”.[95]

Australian Law Reform Commission

In 2017, the Australian Law Reform Commission commenced a comprehensive review of the family law system. It had far-reaching terms of reference. An Issues Paper and Discussion Paper were

released in 2018.[96] The final report of almost 600 pages was tabled in federal parliament in April 2019. There is a shorter summary report available which sets out the 60 recommendations made.[97] In children's matters, these include:

- "closing the jurisdictional gap" by creating state and territory family courts to exercise jurisdiction under the FLA as well as state and territory child protection and family violence jurisdiction (so that federal family law courts will eventually be abolished);

- repeal of s 60B objects and principles;

- simplifying the best interests factors in s 60CC to what arrangements best promote the safety of the child and the child's carers; the views of the child; the developmental, psychological and emotional needs of the child; the benefit to the child of maintaining relationships with each parent and other significant people; the capacity of each of the child's proposed carers to provide for the child's needs and "anything else that is relevant to the particular circumstances of the child"; and

- replacing the presumption of equal shared parental responsibility in s 61DA with a presumption of "joint decision making about major long-term issues".

Footnotes

82 Standing Committee on Law and Justice, *Impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 Cth)* (NSW Parlt, 2007). See www.parliament.nsw.gov.au.

83 R Chisholm and J McIntosh, "Cautionary notes on the shared care of children in conflicted parental separations", *Journal of Family Studies*, vol 14, 2008, pp 37–52. The article is a revised and expanded version by the same authors of "Shared care and children's best interests in conflicted separation: A cautionary tale from current

research", *Australian Family Lawyer*, vol 20(1), 2008, pp 3–16.

84 For example, J Johnston, "Children's adjustment in sole custody compared to joint custody families and principles for custody decision making", *Family and Conciliation Courts Review*, vol 33, 1995, p 415.

85 See R Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (AIFS, December 2009) and also L Qu and R Weston, *Parenting Dynamics after Separation: A follow up Study of Parents Who Separated after the 2006 Family Law Reforms* (AIFS, December 2010).

86 See J Cashmore, P Parkinson and J Single, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms*, Social Policy Research Centre, University of New South Wales, May 2010.

87 D Bagshaw, T Brown et al, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006*, Monash University, University of South Australia and James Cook University, 2010.

88 R Chisholm, *Family Courts Review* (Attorney-General's Department, Canberra, 2009).

89 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, 2009.

90 NSWLRC and ALRC, *Family Violence: Improving Legal Frameworks* (Consultation Paper), 2010 and *Family Violence: A National Legal Response* (Report), 2010.

91 S Strickland and K Murray, “A judicial perspective on the Australian Family Violence Reforms 12 months On”, *Australian Journal of Family Law*, vol 28, 2014, pp 47–82 at 58. See also Harland, Cooper et al, note 30, Chapter 10.

92 See Alexander, note 69.

93 Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, 2016). See www.ag.gov.au/FamiliesAndMarriages

94 R Kaspiew, B Horsfall et al, *Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs* (ANROWS, Sydney, 2017). See anrows.org.au/node/1392

95 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System toSupport and Protect Those Affected by Family Violence* (Commonwealth Parlt, Canberra, 2017) p 183.

96 Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper (March 2018) and Discussion Paper (October 2018). See www.alrc.gov.au/publications

97 *Family Law for the Future – An Inquiry into the Family Law System*, Summary Report, ALRC Report 135 (March 2019) and Final Report, ALRC Report 135 (March 2019). See www.alrc.gov.au

¶11-290 Ongoing debates

There is a growing and changing body of empirical and clinical research and knowledge in Australia and abroad about various issues in children's matters, such as:

- parenting and parenthood
- bonding and attachment theories
- relevance of gender and sexual preference
- children's and adults' adjustments post-separation
- parenting arrangements after family breakdown
- parenting arrangements where there is past or ongoing high conflict or family violence
- effect on children of exposure to conflict or family violence
- effectiveness of men's behavioural change programs
- differentiating and classifying different types of family violence, and
- use of research and social science material.

Research is also challenging conventional views about shared parenting, frequency of time, overnight time, developmental needs of children, how to talk to and listen to children, and the putative benefits of supervised time in contact centres. Much of the research is referred to in the above section. There is also other useful material. For example, there is research which focuses on overnight time for young children. The traditional view is that frequent, but not overnight time, between an absent parent and a young child (under three or four years) is encouraged so as not to disrupt the attachment between the primary caregiver (usually the mother) and the young child. This view is now being questioned based on other theories of child development that young children form multiple attachments which should be maintained to include overnight time with each parent separately even in early infancy.[98]

There is also debate about the appropriate age when overnight stays should commence with the non-resident parent.[99]

Of course, this may not be appropriate where there is a history of family violence or child abuse.[100]

Similarly, the effects on children of all ages of exposure to family violence should not be underestimated.[101]

There is other research too on Commonwealth-funded children's contact centres. These are often used short-term where competent supervisors are not available. Although such centres may benefit many parents and children, some children do not benefit. Research by Sheehan et al[102] suggests that for children who are forced to go to the other parent, especially in cases of family violence or child abuse, the experience can be negative and unhelpful.

Jurisprudence is still developing and practitioners need to keep up-to-date with case law as well as developments in social, psychological and medical sciences. It is important for practitioners to remember that, if relying on any such research or material, it is adduced as part of evidence. Similarly, to ensure procedural fairness, judicial officers cannot rely on such material as matters of common knowledge under s 144 of the *Evidence Act 1995* (Cth) without giving parties the opportunity to challenge or comment.[103]

Footnotes

98 For example, see T Altobelli, *Children's Attachment — Its Impact on Family Law Practice*, Paper presented at Independent Children's Lawyer Training Program, Law Council of Australia, Melbourne, November 2006 and J McIntosh and R Chisholm, "Cautionary notes on the shared care of children in conflicted parental separation", *Journal of Family Studies*, vol 14(1), 2008, pp 37–52.

99 For example, see R Sexton, "Parenting Arrangements for the 0–4 Year Age Group", *Australian Family Lawyer*, vol 22, 2012, pp 30–39. The different sides of the debate are

explored in J McIntosh et al, *Post-Separation Parenting Arrangements and Developmental Outcomes for Infants and Children — Collected Reports*, 2010, Family Transitions, Melbourne compared with R Warshak, "Social Science and Parenting Plans for Young Children: A Consensus Report", *Psychology, Public Policy and Law*, vol 20(1), 2014, pp 46–67.

100 See various papers through the former Australian Domestic and Family Violence Clearinghouse (www.adfvc.unsw.edu.au), Australia's National Research Organization for Women's Safety www.anrows.org.au and the Australian Institute of Family Studies (www.aifs.gov.au).

101 For case law, see Alexander, note 44, pp 63–76 and for research literature see K Richards, "Children's exposure to domestic violence in Australia", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, June 2011 and M Campo, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses* (AIFS, Melbourne, 2015). See also Harland, Cooper et al, note 30, Chapter 10.

102 G Sheehan, B Carson, B Fehlberg, R Hunter, A Tomison, R Ip and J Dewar, *Children's Contact Services: Expectations and Experiences: Final Report* (Attorney-General's Department, Canberra, 2005).

103 See *Lamereaux & Noirot* (2008) FLC ¶93-364; *Dylan & Dylan* [2008] FamCAFC 109; *Carlton & Carlton* [2008] FMCAfam 440; *McCall & Clark* (2009) FLC ¶93-405; *Allen & Green* [2010] FamCAFC 14; *Salvati & Donato* [2010] FamCAFC 263; *Baranski and Baranski & Anor* [2012] FamCAFC 18; *McGregor & McGregor* [2012] FamCAFC 69 and *Hillier & Wootton* [2013] FamCAFC

11.

SURROGACY

Editorial information

Written by Anne-Marie Rice and Jane Johnson and edited by Louise O'Reilly[1]

¶12-010 Overview

The law surrounding surrogacy primarily relates to the transfer of parentage rights from the surrogate mother (and her partner, if any) to the intended parents in circumstances where Australian law, at least immediately following the birth of a child, recognises the parentage of only the birth (surrogate) mother regardless of whether or not she is the biological mother of the child.

This means that the birth certificate of a child born of a surrogacy arrangement will, unless amended, contain the details of the birth (surrogate) mother and the intended father (if he provided the genetic material). That certificate must be amended, pursuant to an order of the relevant court before it can bear the details of the intended parents. Without such amendment some of the practicalities of day-to-day parenting can be challenging for the intended parents. It is worth noting that the details of the surrogate will always appear in some form on the certificate.

There is no Commonwealth law governing surrogacy (although immigration law may be relevant) and the state laws in this regard are complex and lack uniformity.

Although commercial surrogacy remains illegal in most parts of Australia, with the exception of the Northern Territory (where no surrogacy legislation is in place), in recent years all of the States and the ACT have enacted laws governing altruistic surrogacy and the transfer of parentage under that regime. Parents of children born via International Commercial Surrogacy (ICS) do not have that benefit and due to the varying approaches of the Family Court, securing a parentage order under the *Family Law Act 1975* (FLA) is not necessarily assured. Australians are known to be among the largest users of ICS arrangements.

Despite being a highly emotive subject, the legislative framework surrounding commercial and altruistic surrogacy has failed to keep pace with rapidly changing social notions of family and parent. Meeting the interests of children born of surrogacy arrangements, in both a day-to-day and long-term sense, can be challenging.

¶12-020 Legislation

The relevant pieces of legislation governing surrogacy throughout Australia are:

New South Wales	***Surrogacy Act 2010***
Victoria	***Assisted Reproductive Treatment Act 2008*** in conjunction with ***Status of Children Act 1974***
Queensland	***Surrogacy Act 2010***
South Australia	***Family Relationships Act 1975*** in conjunction with ***Births, Deaths and Marriages Registration Act 1996***
Western Australia	***Surrogacy Act 2008***
Tasmania	***Surrogacy Act 2012***
Australian Capital Territory	***Parentage Act 2004***

Also refer to:

Commonwealth	***Prohibition of Human Cloning for Reproduction Act 2002****s 21*	**Ban on commercial trade in eggs, sperm, embryos, maximum 15 years imprisonment**
	s 24	Act is not intended to exclude the operation of any law of a State
Australian Capital Territory	***Births, Deaths and Marriages Registration Act 1997***	Altering birth register
	Human Cloning and Embryo Research Act 2004*, s 19*	Ban on commercial trade in eggs, sperm, embryos, maximum 15 years imprisonment

Queensland	***Births, Deaths and Marriages Registration Act 2003***	Altering birth register
	Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003*, s 17*	Ban on commercial trade in eggs, sperm, embryos, maximum 15 years imprisonment
	Status of Children Act 1978	Parenting presumptions
New South Wales	***Assisted Reproductive Technology Act 2007***	Regulation of IVF clinics
	Births, Deaths and Marriages Registration Act 1995	Altering birth register
	Human Cloning for Reproduction and Other Prohibited Practices Act 2003*, s 16*	Ban on commercial trade in eggs, sperm, embryos, maximum 15 years imprisonment
	Status of Children Act 1996	Parenting presumptions
Victoria	***Births, Deaths and Marriages Registration Act 1999***	Altering birth register
	Prohibition of Human Cloning for Reproduction Act 2008*, s 17*	Ban on commercial trade in eggs, sperm, embryos, maximum 15 years imprisonment
South Australia	***Prohibition of Human***	Ban on commercial

	***Cloning for Reproduction Act 2003**, s 16*	trade in eggs, sperm, embryos, maximum 15 years imprisonment
Western Australia	***Artificial Conception Act 1985***	Parenting presumptions
	Births, Deaths and Marriages Registration Act 1998	Altering birth register
	***Human Reproductive Technology Act 1991**, s 53Q*	Ban on commercial trade in eggs, sperm, embryos, maximum 10 years imprisonment
Northern Territory	***Births, Deaths and Marriages Registration Act 1997***	Altering birth register
	Status of Children Act 1996	Parenting presumptions

In all cases, the legislation ensures that intended parents and surrogates are properly screened, have the benefit of legal advice and that the child will have the ability to know their genetic heritage. However, again in all cases, the relinquishment of parentage by the surrogate (and her partner, if relevant) is voluntary which means that if the surrogate changes her mind, there will be no transfer of parentage to the intended parent/s. Also, there is no capacity to enforce a surrogacy arrangement to compel an intended parent to take the child should they change their mind.

The laws of the various States have divergent requirements and restrictions on who can undertake surrogacy. The fundamental differences relate to who can be a party to a surrogacy arrangement and the relevant age requirements. Some States are more discriminatory than others.

There exists very limited case law as guidance in relation to surrogacy in the state courts.

The relevant Acts can be summarised as follows:

New South Wales	***Surrogacy Act 2010***	
	• Commercial surrogacy, advertising for surrogate prohibited.	• s 10
	• Intended parents can be married, de facto (including same sex) or single.	• s 5(6)

	• Surrogate and intended parents must be at least 25 years (can be lowered to 18 for intended parents in exceptional circumstances).	• s 27–29
	• Intended parents must be NSW resident, surrogate need not be.	• s 32
	• Surrogate/birth mother (and partner) is parent until parentage order is made.	• s 39
Victoria	***Assisted Reproductive Treatment Act 2008***	
	• Commercial surrogacy and advertising for surrogate or to be surrogate prohibited.	• s 45
	• Intended mother must be infertile, unable to carry pregnancy/give birth or at medical risk from pregnancy.	• s 40
	• Intended parents can be married, de facto (including same sex) or single.	• s 40
	• Surrogate must be at least 25 years and intended parents at least 18 years.	
	•s 40(1)(b)	
	• Fertility treatment must occur in Victoria — intended parents must be Victorian residents, surrogate need not be.	• s 36

	• Surrogate/birth mother (and partner) is presumed to be parent until parentage order is made.	• s 19 *Status of Children Act 1974* (Vic)
Queensland	***Surrogacy Act 2010***	
	• Commercial surrogacy and advertising for/as surrogate prohibited.	• s 56
	• Intended parents can be married, de facto (including same sex) or single	• s 22(2)(f) and (g)
	• Surrogate and partner and intending parents must be 25 years (except in exceptional circumstances).	
	• Fertility doctor and surrogate can be outside jurisdiction — intending parents must be resident in Queensland.	• s 22(g)
	• Surrogate (and partner) is parent until parentage order is made.	•s 17
South Australia	***Family Relationships Act 1975***	
	• Commercial surrogacy and advertising for/as surrogate prohibited.	• s 10H
	• Surrogacy available only to married or de facto couples in relationship for three years — ie not available to singles.	• s 10HA

	• Surrogate (and partner) and intended parent/s must be at least 18 years.	• s 10HA
	• Intended parents, but not surrogate, must be residents of SA.	• s 10F
	• Surrogate (and partner) is parent until parentage order is made.	• s 7, 8, 10C and 10EA
Western Australia	***Surrogacy Act 2008***	
	• Surrogacy arrangement must be approved by WA Reproductive Technology Council.	• s 16
	• Commercial surrogacy prohibited and advertising to be a surrogate is an offence.	• s 8 and 10
	• Intended parents can be married, heterosexual couple or single woman (single men and homosexual couples excluded).	• s 17–19
	• Intended mother must be infertile, unable to carry pregnancy/give birth or medical risk to mother or child from pregnancy.	• s 19
	• Surrogate generally required to have previously given birth to live child.	• s 17
	• Surrogate or surrogate's partner must be over 25,	• s 17–19

	intended parents must be over 18 years.	
	• Intended parents must be resident in WA but surrogate need not.	• s 19
	• Surrogate (and partner) is parent until parentage order is made.	• s 5–7
Tasmania	***Surrogacy Act 2012***	
	• Intended parents can be married, de facto (including same sex) or single.	• s 5
	• Intended parents and surrogate must be ordinarily resident in Tasmania.	• s 16(1)(g) and (j)
	• Surrogate must be 25 years and the intended parent/s at least 21 years	• s 16
	• Commercial surrogacy prohibited and advertising to be a surrogate is an offence.	• s 41
	• Surrogate (and partner) is parent until parentage order is made.	• s 26
Australian Capital Territory	***Parentage Act 2004***	
	• Altruistic surrogacy (formalised by way of a substitute parent agreement) available to married or de facto couples only.	• s 24

	• Commercial surrogacy prohibited and advertising to be a surrogate is an offence.	• s 43
	• Same sex parents able to be parents of a child providing one is the child's genetic parent.	• s 24
	• Surrogate and both intended parents must be 18 years.	• s 7, 8, 9, 11 and 26
	• Intended parents must be resident of ACT but surrogate need not.	•s 24
	• Surrogate (and partner) is parent until parentage order is made.	• s 26

¶12-030 Types of surrogacy arrangements and requirements

The specific requirements in each state can be summarised as follows:[2]

New South Wales	***Surrogacy Act 2010***	**Section**
	Types of Surrogacy Arrangements	
	• Pre-conception surrogacy arrangement — where woman agrees to become (or to try to become) pregnant and transfer parentage.	• s 5
	• Post-conception surrogacy arrangement — where a woman agrees that parentage of a child be transferred to another person/s.	• s 5

	• Commercial surrogacy arrangement — where a consensual transfer of parentage occurs for the provision of a fee, reward or other material benefit/advantage.	• s 9(1)
	• Altruistic surrogacy arrangement — where only costs of surrogacy are reimbursed.	• s 9(2)
	Compensation available	
	• Obligation to pay/reimburse mothers' surrogacy costs is enforceable only in cases of pre-conception surrogacy arrangements.	• s 6(2) and 7
	Mandatory pre-conditions to making a parentage order	
	• Best interests of the child are paramount.	• s 22
	• Surrogacy arrangement may only be altruistic.	• s 23
	• The surrogacy arrangement must be a pre-conception surrogacy arrangement.	• s 24
	• Intended parent must be single or part of a (married or de facto) couple.	• s 25
	• The child must be under 18 and the court must take into account any views of a sufficiently mature child.	• s 26
	• Birth mother and intended parent/s must be at least 18 at time of agreement.	• s 27 and 28
	• Intended parents under 25 must	• s 29

	demonstrate sufficient maturity to understand social and psychological implications of parentage order.	
	Discretionary pre-conditions to making parentage order	
	• Birth mother to be at least 25 at time of agreement.	• s 27
	• Medical or social need for surrogacy.	• s 30
	• The birth parent and each intended parent consents.	• s 31
	• The applicants live in NSW.	• s 32
	• The child lives with the applicant parents.	• s 33
	• A written surrogacy arrangement exists.	• s 34
	• Each of the parties has obtained counselling and legal advice.	• s 35 and 36
	• Information for Central Register provided.	• s 37
	• Birth of the child has been registered.	• s 38
Victoria	***Assisted Reproductive Treatment Act 2008***	
	Types of surrogacy arrangements	
	• Assisted Reproductive Treatment (ART) — registered ART provider may carry out procedure per surrogacy arrangement once approved by the *Patient Review*	• s 39

Panel.	
Compensation available	
• Aside from prescribed costs incurred as a direct consequence of surrogacy arrangement, surrogate can receive no material benefit or advantage.	• s 44
Pre-conditions to surrogacy arrangement	
• All parties have received counselling.	• s 43
• *Patient Review Panel* must be satisfied a doctor is of the view that the intended parent is unlikely to become pregnant or carry a child to term or that pregnancy creates a life risk for the mother or child.	• s 40
• *Patient Review Panel* must be satisfied that surrogate is at least 25, has previously given birth and is not the biological mother.	• s 40
Mandatory pre-conditions to making parentage order under the *Status of Children Act 1974* (Vic)	
• Order is in child's best interests.	• s 20–23
• Commissioning (intended) parents live with child in Victoria at time of application.	
• ART procedure was pre-approved.	
• Surrogate (and partner, if relevant)	

	consents.	
	• If not ART provider, surrogate must be at least 25 years old and all parties must have received counselling and information about legal implications (s 22 *Status of Children Act 1974* (Vic)).	
Queensland	***Surrogacy Act 2010***	
	Types of surrogacy arrangements	
	• No arrangements specified.	
	• Agreement must be executed pre-conception and relate to an altruistic arrangement.	
	Compensation available	
	• No payments permitted other than birth mother's "surrogacy costs".	• s 57
	Pre-conditions for making surrogacy agreement	
	• Both "birth parents" (surrogate and her partner) and intending parents must obtain independent legal advice and counselling.	• s 30 and 31
	• Surrogacy agreement must be in writing.	• s 25
	Mandatory pre-conditions to making parentage order	
	• Child's birth must be registered by surrogate and partner, if relevant.	• s 25
	• Guidance report from counsellor must be obtained.	

	• Order is in child's best interests and for their wellbeing.	
	• Surrogacy agreement was consensual, relates to altruistic surrogacy and was entered into before the birth of the child.	
	Discretionary pre-conditions to making parentage order	
	(Note: can be dispensed with only in exceptional circumstances and if dispensation will be for the wellbeing, and in the best interests, of the child.)	
	• Child lived with intending parents for at least first 28 days.	• s 22
	• Child aged between 28 days and 6 months.	
	• Evidence of medical or social need for surrogacy.	
	• All parties legally advised and obtained counselling before entering into arrangement.	
	• Agreement is in writing and signed by parties.	
	• Guidance report supports making of order.	
	• Both parties consent to making order.	
South Australia	***Family Relationships Act 1975***	
	Types of surrogacy arrangements	

	• Commercial surrogacy arrangements — illegal to enter into, or induce someone to enter into a contract/receive “valuable consideration” for surrogacy.	• s 10H
	• Permitted arrangements — arrangement is permitted if the surrogate agrees to become/attempt to become pregnant and surrender custody and rights to child to two other persons (intending parents).	• s 10HA(2)
	Compensation available	
	• No consideration able to be payable except for expenses relating to:	• s 10HA
	– Pregnancy (including attempts to become pregnant)	
	– Birth or care of a child born as a result of the pregnancy	
	– Counselling or medical services	
	– Legal services	
	– Matters prescribed in *Regulations*.	
	Pre-conditions to making recognised surrogacy agreement	
	• Intended parents to be domiciled in Australia and must be married or in de facto relationship for more than three years.	
	• Intended mother must be infertile or at risk of passing on serious genetic	

	defect, disease or illness.	
	• Surrogate must be approved by recognised counselling service — reproductive technology clinics are bound by *Assisted Reproductive Treatment Act 1998* (SA) which requires recognised surrogacy agreement.	
	• Surrogate and intended parents must have obtained counselling certificate.	• s 10HA(3)
	• At least one of the intended parents must provide "human genetic material" unless there is a medical reason not to use that material.	• s 10HA(5)
	• Agreement must be in writing, signed by all parties and be accompanied by a medical certificate.	• s 10HA(6)
	Pre-conditions to making parentage order	
	• Child was born under Recognised Surrogacy Agreement.	• s 10HB
	• Intended parents live in South Australia.	
	• Fertility treatment occurred in South Australia.	
	• Birth mother "fully and freely" consents (unless is deceased or has lost capacity).	
	Other considerations for making of order	

	• If only one intended parent applies for order, other intended parent must consent.	• s 10HB
	• No consideration paid.	
	• Child lives with intended parents.	
	• Intended parents are “fit and proper parents” to assume care of child.	
Tasmania	***Surrogacy Act 2012***	
	Types of surrogacy arrangements	
	• Surrogacy arrangement — an arrangement for the birth mother to conceive and give birth to a child which is to be treated as the child of the intended parents. Cannot be entered into after conception.	• s 5
	• Commercial surrogacy arrangement — prohibited if it provides for a person to receive a payment, reward or other material benefit for giving up a child born as a result of the arrangement or making a parentage order.	• s 8
	Compensation available	
	• The intended parents must pay or reimburse the mother’s surrogacy costs.	• s 9
	Pre-conditions to making surrogacy agreement	
	• There is a medical or social need for the surrogacy.	• s 14

	• The arrangement is not a commercial surrogacy arrangement.	
	• The intended parents are over 21.	
	• The surrogate is over 25 and has given birth to a live child.	
	• All parties have signed a written agreement after having received counselling.	
	• All parties were resident in Tasmania.	
	Mandatory pre-conditions to making parentage order	
	A court must be satisfied that:	
	• The order is in best interests of the child.	• s 16(2)(k)
	• All parties have received counselling following the birth and prior to the application for parentage orders (in addition to counselling prior to signing the agreement).	
	• All relevant parties consent to making the parentage order.	• s 16(2)(j)
	• Court may make orders without consent of surrogate (and her partner) in case of death, lack of capacity or absence of communication and child is living with intended parents.	• s 16(4)
	• The arrangement is not a commercial surrogacy arrangement.	

	• A written, signed agreement exists.	• s 16(2)(e)
	• Intended parents are aged at least 21 years and surrogate at least 25 years.	• s 16(2)(b) and (c)
	• All parties resident in Tasmania at time of agreement and child is living with intended parent in Tasmania at time of hearing.	
	• Surrogate has given birth to a live child.	• s 16(2)(d)
	• There is a medical or social need for the surrogacy	• s 16(2)(h)
	• The other intended parent is notified if only one applies.	
	Other requirements	
	• Orders must be made about each child in the case of multiple births	• s 17
Australian Capital Territory	***Parentage Act 2004***	
	Types of surrogacy arrangements	
	• Substitute parent agreements — agreement for woman to become (or attempt to become) pregnant with a child taken to be the child of another party, or agreement with a woman who is pregnant with a child who will be taken to be the child of another party.	• s 24
	• Commercial substitute parent	• s 40

	agreements — an agreement under which a person agrees to make payment other than for expenses connected with the pregnancy/birth/care of a child born of a pregnancy.	
	Compensation available	
	• It is an offence to:	• s 41
	– intentionally enter into a commercial substitute parent agreement	
	– facilitate the pregnancy of another person who intends to be a party to a commercial substitute parent agreement.	
	• Obligation to meet mother's "surrogacy costs" — no requirement for expenses to be "reasonable".	• s 44
	• Payment of mother's surrogacy costs under substitute parent agreement not otherwise legally binding.	
	Pre-conditions to making surrogacy agreement	
	• No specific pre-conditions, but parentage orders can only be made where there is a non-commercial substitute parentage agreement.	
	Mandatory pre-conditions to making parentage order	
	• Child born of procedure carried out in ACT.	• s 26

	• Intended parents live in ACT.	
	• Neither surrogate nor her partner is biological parent and (except in case of death or incapacity — s 26(2)(a) both understand and consent to making of the order.	• s 26(1)(b)
	• At least one intended parent is genetic parent of child.	
	• Substitute parent agreement indicating intention to apply for parentage order is in place.	
	• Order is in best interests of the child.	
Western Australia	***Surrogacy Act 2008***	
	Types of surrogacy arrangements	
	• Agreement for woman to become (or attempt to become) pregnant with a child to be raised by the intended parents.	
	• Agreement must be entered into before birth mother becomes pregnant to be valid.	• s 3
	• Egg or sperm donor and their spouse are parties.	• s 17
	Compensation available	
	• Surrogacy cannot be for “reward” — ie commercial.	• s 8
	Pre-conditions to making surrogacy agreement	

	• Written agreement signed by all parties.	
	• All parties received counselling, legal advice and clinical assessment at least three months before agreement made.	• s 22
	• Agreement made pre-conception.	
	• Approved plan in place that is “reasonable”, promotes child’s welfare and balances rights and responsibilities of parties.	
	Pre-conditions to making parentage order	
	• Child’s best interests are paramount consideration.	• s 17
	• Agreement must be approved by Western Australian Reproductive Council.	• s 16
	• Parties have received legal advice and counselling.	• s 21
	• Child is in day-to-day care of intended parent.	

Warning

Practitioners should have careful regard to the applicable legislation before advising clients on their rights and obligations.

Footnotes

2 For further commentary on Western Australia see ¶12-070.

¶12-040 How to apply for a parentage order

The procedure for applying for a parentage order in each state[3] can be summarised as follows:

New South Wales	***Surrogacy Act 2010***	**Section**
	• An application can be made to the Supreme Court for orders transferring the parentage of a child to the intended parent under the relevant altruistic arrangement only after the child is born and the surrogate consents to waiving her parental rights.	s 14 and 16
	• The application must be made not less than 30 days and not more than six months after the child's birth.	
	• The child's birth certificate can then be amended.	
Victoria	***Assisted Reproductive Treatment Act 2008***	
	• Commissioning (intended) parents can apply to County Court (or, in theory, to the Supreme Court) for substitute parentage order.	
	• Application can be made no earlier than 28 days after birth of child and no later than six months after birth.	

	• Child's birth certificate can then be amended.	
Queensland	***Surrogacy Act 2010***	
	• Intended parents can apply to Supreme Court for parentage order.	
	• Consent of surrogate (and partner, if relevant) is required.	
	• Except with leave of the court, application can be made no earlier than 28 days after birth of child and no later than six months after birth.	• s 21
	• Child's birth certificate can then be amended	
South Australia	***Family Relationships Act 1975***	
	• Parties to recognised altruistic surrogacy agreement can apply to the Youth Court of South Australia for parentage order when child is between four weeks and six months of age.	
	• Surrogate must give "free and informed consent".	
	• If sole applicant, other intended parent must consent.	
	• Court must consider any submissions made by birth father.	
	• Some discretion for judge to cure irregularities in agreement.	• s 10HG(2)
	• Child's birth certificate can then be	

	amended.	
Tasmania	***Surrogacy Act 2012***	
	• Application for transfer of parentage can be made when the child is aged between 30 days and six months.	• s 15
	• Effect of order is that child ceases to be child of surrogate (and her partner, if any) and is child of the intended parents.	• s 26
Australian Capital Territory	***Parentage Act 2004***	
	• Application can be made to Supreme Court when child is aged between six weeks and six months.	•s 25
	• Court must consider whether:	• s 26
	– child lives with intended parents	
	– intended parents are both over 18	
	– other intended parent give “full and free” consent if application is made by only one intended parent	
	– any payments (other than reasonable expenses) or other compensation made	
	– all parties have received counselling.	
	• Effect of order is to give intended parents same status as if the child had been adopted.	• s 29

		• The child takes the surname of the intended parents (or name otherwise approved by the court).	• s 28
Western Australia	***Surrogacy Act 2008***		
		• Application for transfer of parentage can be made when the child is aged between 28 days and six months.	s 20

Footnotes

3 ibid.

¶12-050 Parentage in surrogacy arrangements

The once simple concept of “who is a parent” is becoming increasingly complex as advances in reproductive technology continue. There is no exhaustive definition of “parent” in the *Family Law Act 1975* (FLA) although parents are usually regarded as being those persons who, generally speaking, have parental responsibility for a child.

Parentage in a technical legal context is determined having regard to the presumptions in Div 12 Subdiv D of Pt VII FLA and, in cases of assisted reproduction, by paying particular regard to s 60H and 60HB.

In cases involving surrogacy, s 60HB provides for a presumption of parentage in favour of intended parents who have secured a transfer of parentage pursuant to the legislation of their home state. This would, on the face of it, appear to be a sanctioning by the Commonwealth of the state acts regulating altruistic surrogacy. Although the process and pre-requisites vary slightly from state to state, the state acts set out the mechanism for the transfer of parentage from the surrogate (and her partner) to the intended

parents.

Where those requirements have been met, the transfer of parentage to the intended parents is relatively straightforward.

The situation is more difficult where those state legislative requirements have not been met, such as in the case of commercial surrogacy.

There have been conflicting decisions of the Family Court about the intersection of Commonwealth and state laws in light of s 60H and 60HB.

Examples

***Mason & Mason* [2013] FamCA 424**

Justice Ryan formed the view that the insertion of s 60H (dealing with children born of artificial conception procedures) and 60HB (dealing with children born under surrogacy arrangements) in 2008 were intended to ensure that parentage of children born under surrogacy arrangements are determined by the relevant state laws.

***Groth & Banks* [2016] FamCA 420**

Justice Cronin held that Commonwealth laws prevail over state legislation on matters of parentage. Cronin J found the *Status of Children Act 1974* (Vic) irrelevant, as it relied on the sperm donor being "unknown" where, in this case, the man was known and had formed a bond with the child. His Honour noted that even if the state legislation was relevant, the man would still comply with the definition of "parent" under the FLA and concluded that despite any potential conflict between the state and Commonwealth legislation that the Commonwealth law would still prevail as per s 109 of the Constitution.

***Shaw & Lamb* (2018) FLC ¶93-826**

Justice Tree applied Bernieres and Anor & Dhopal and, because no parentage order was made pursuant to the provisions of the Surrogacy Act 2010 (Qld), the question of who was a parent was to be determined by reference to the Status of Children Act 1987 (Qld). On appeal, the Full Court noted that the trial judge "properly recognised" that he was bound by Bernieres & Dhopal [at 10].

A court exercising power under the FLA can, pursuant to s 69VA, make an order declaring parentage of a child. It is important to note that a declaration of parentage is not a "parenting order" which can be sought by a parent, grandparent, child or any person concerned with the care, welfare and development of a subject child and relates to issues such as who a child lives with, spends time with and

communicates with. A parentage order confers on a person all the powers, responsibilities, duties and authority which, by law, parents ordinarily have for children. A declaration for such rights can create legal certainty for a child by enabling issues such as the name of the child, the details on the birth certificate, the child's citizenship, the child's entitlement under wills/estates and child support to be addressed by the "parent" in a practical sense. There is often little practical difference between a parentage order and an order conveying parental responsibility on a party. Liability for payment of child support is one area in which a declaration of parentage is essential given that a non-parent cannot be held liable for the payment of child support.

For many parents of children born of surrogacy arrangements, a parentage order is essential to enable them to make important practical decisions in relation to their children. The approach taken by the Family Court to applications for parentage orders initially varied but has now crystallised in a way that makes securing such an order uncertain.

¶12-060 Parentage in informal or commercial surrogacy arrangements

Practitioners should be cautious about advising clients about the prospects of successfully securing a declaration for parentage in cases of commercial surrogacy.

Whether or not a parentage order will bring any practical benefit that cannot be remedied by an order for parental responsibility will depend on the circumstances of the case. The need for an order to be obtained under the *Family Law Act 1975* (FLA) to afford one or both of the intended parents of a child the rights to make legal decisions affecting that child adds a degree of costs and delay that is, arguably, inconsistent with the paramount principle contained in Pt VII.

From the examples highlighted below it is clear that there has been a divergence in decisions, even resulting in different outcomes within the same family. For example, in *Dennis and Anor & Pradchapet*

[2011] FamCA 123, Stevenson J found that the biological father was a parent of the child born to Ms Pradchapet. However, in *Dudley & Chedi* [2011] FamCA 502, Watts J declined to make a finding that the same man was the parent of twins born to a different surrogate, Ms Chedi.

Examples

***Ellison and Anor & Karnchanit* [2012] FamCA 602**

Justice Ryan considered an application by Mr Ellison and his wife, Ms Solano, for orders that they have shared parental responsibility for two children born in Thailand as a result of a commercial surrogacy arrangement. The applicants also sought orders that the children live with them and that a parentage declaration be made in favour of the biological father, Mr Ellison.

The facts can be summarised as follows:

- Ms Solano was rendered infertile following treatment for cancer.
- Mr Ellison and Ms Solano engaged the services of a Thai surrogacy clinic and paid Ms Karnchanit, a Thai citizen, $7,350 to be their surrogate mother.
- Mr Ellison's sperm was used to fertilise an egg provided by an unknown donor.
- Mr Ellison and Ms Karchanit entered into a surrogacy agreement and, in accordance with its terms, Ms Karchanit relinquished the children to Mr Ellison and Ms Solano immediately on their birth.
- Mr Ellison was named as the children's father on their Thai birth certificates.
- Ms Karchanit also entered into a parenting plan relinquishing her parental responsibility, and consented to the orders ultimately sought in the Family Court.
- The children were brought by the applicants from Thailand to Australia when they were eight weeks of age.

Her Honour held that by operation of the *Status of Children Act 1978* (Qld) only Ms Karnchanit was a legal parent of the children and that it was necessary for Mr Ellison to produce evidence of DNA tests to confirm that he was the biological father before a parentage declaration in his favour could be made. He was ultimately able to do so.

Ryan J noted that declaration of parentage would recognise that Mr Ellison was their biological father, would ensure the children were recognised as Australian citizens and would survive the children's minority.

Her Honour granted each applicant immunity by a certificate issued pursuant to s 128 of the *Evidence Act 1995* (Cth) to enable them to produce evidence (such as in relation to paternity) free from fear that the evidence would be used against them in other courts. In the absence of that certificate, inadequate evidence had been led by the parties for fear of criminal sanction.

Ryan J held that the presumption (that it is in the children's best interests for Mr Ellison and Ms Karnchanit to have equal shared parental responsibility) was rebutted because of the stance adopted by Ms Karnchanit (the birth mother) in seeking no involvement with the children. Her Honour confirmed the best interests remained the paramount consideration and was of the view that it was important for the children to be cared for by people with not only the intention to be involved in their day-to-day care but also the legal authority to make decisions in that regard.

Accordingly, her Honour was satisfied that it was in the children's best interests that:

- Mr Ellison be declared a parent of the children.
- Mr Ellison and Ms Solano have shared parental responsibility for the children.
- The children live with Mr Ellison and Ms Solano.

Her Honour had the benefit of submissions from the Australian Human Rights Commission, and the case sets out useful guidelines in relation to the high level of rigour to be imposed to ensure the court is satisfied that the birth mother has not been exploited in this process and that she give full and informed consent to the orders sought.

Ryan J set out what she considered to be "best practice" in such cases (at [132]–[139]):

1. An Independent Children's Lawyer is appointed to represent the child's interests.
2. Affidavit evidence of the applicant(s) comprising:
    - their personal circumstances, in particular the circumstances at the time the procedure took place
    - their circumstances leading up to the surrogacy agreement and of the procedure itself, and
    - the circumstances after the birth of the child and subsequent arrangements for the care of the child.
3. Affidavit evidence of the birth mother comprising:
    - her (their) personal circumstances, in particular the circumstances at the time the procedure took place
    - their circumstances leading up to the surrogacy agreement and of the procedure itself, and
    - the circumstances after the birth of the child and subsequent arrangements for the care of the child.
4. Independent evidence regarding the identification of the child including:
    - the surrogacy contract/agreement entered into between the persons seeking the parenting orders and the clinic and/or surrogate mother
    - a certified copy of the child's birth certificate, and, if not in English, a translation accompanied by an affidavit of the person making the translation verifying that it is a correct translation and setting out the translator's full

name, address and qualifications

- parentage testing in accordance with the Regulations to ascertain whether the child is the biological child of the person/s seeking the parenting orders, and

- evidence of Australian citizenship of the child if citizenship has been granted.

5. Independent evidence with respect to the surrogate birth mother. This may be obtained by a family consultant or an independent lawyer, including:
    - confirmation that the surrogacy arrangement was entered into before the child was conceived

    - confirmation that the surrogacy arrangement was made with the informed consent of the surrogate mother

    - evidence after the birth of the child of the surrogate mother's views about the orders sought and what relationship, if any, she proposes with the child, and

    - if the child has been granted a visa to enter Australia, evidence of participation by the surrogate mother in an interview with immigration officials prior to the grant of the visa, and the views expressed by her during this interview.

6. The preparation of a family report which addresses:
    - the nature of the child's relationship with the persons seeking parenting orders

    - the effect on the child of changing their circumstances

    - an assessment of the persons seeking the parenting orders capacity and commitment to the long-term welfare of the child

    - the persons seeking the parenting orders' capacity to promote the child's connection to their country of birth's culture including but not limited to their birth mother

    - advice in relation to issues which may arise concerning the child's identity and how those issues are best managed, and

    - the views of the birth mother, in particular her consent to the proposed parenting orders, and other matters with respect to the birth mother referred to above.

7. Other evidence including:
    - evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to surrogacy arrangements, and

    - evidence of the legal regime in the overseas jurisdiction in which the procedure took place with respect to the rights of the birth mother, and if applicable, of her husband or de facto partner.

***Dudley & Chedi* [2011] FamCA 502**

A different approach was taken by his Honour Watts J to that of her Honour Ryan J in *Ellison and Anor & Karnchanit*. His Honour refused to make a finding for a declaration of parentage in relatively similar factual circumstances. In this case:

- The two subject children were born of Thai surrogacy arrangements using the applicant father's sperm, donor eggs and an unrelated surrogate. A third child, conceived using identical genetic material, was born to a different surrogate on the same day as the subject children. By the time the matter came before Watts J, Stephenson J had made orders, including a declaration for parentage, parental responsibility and express orders as to with whom the third child was to live (*Dennis and Anor & Pradchapet* [2011] FamCA 123).
- There was no provision in the relevant state law that allowed recognition of any relationship between the children and the applicants.
- The applicable state law made the act of commercial surrogacy, and therefore the applicants' conduct, illegal.
- Had the surrogacy been altruistic, the state law that would have allowed recognition with respect to the applicant's parentage of the children.
- The parenting orders sought (for joint responsibility and for the children to live with the applicants) could be, and were, made without recognising the first applicant as the father of the children.
- The applicant could seek a remedy through adoption.

While the facts of *Ellison and Anor & Karnchanit* and *Dudley & Chedi* are similar, in *Ellison and Anor & Karnchanit*, Ryan J made reference to *G* v *H* (1994) 181 CLR 387 where the passage of a declaration of parentage was said to potentially "*be of the greatest significance to a child in establishing his or her lifetime identity*" (at [37]). Ryan J was of the view that she was unable to place greater weight on public policy considerations of avoiding a thwarting of state legislation which prohibited commercial surrogacy than on the children's best interests which, in her Honour's view, supported the making of the orders.

Ryan J had cause to revisit the issue of parentage declarations in the matter of *Mason & Mason and Anor* [2013] FamCA 424. In that case:

- Two children were born to a surrogate mother in India using a donor egg and the sperm of the first applicant.
- The children acquired Australian citizenship by descent (following

the provision of DNA test results to the relevant Australian authorities) and held Australian passports.

- The applicant, and his partner, sought parenting orders and a declaration of parentage in favour of the applicant.

- Orders were made for the applicants to have joint parental responsibility and for the children to live with them.

- Her Honour did not make a parentage declaration.

In refusing to make the declaration of parentage as sought, Ryan J considered the terms of the two separate, but related, provisions in s 60H (parentage of children born as a result of artificial conception) and 60HB (parentage of children born under surrogacy arrangements). Her Honour concluded that the existence of the two separate sections reflected Parliament's intention to ensure that the transfer of parentage for children born under surrogacy arrangements is made by the courts of the States and Territories.

In an approach that differs from that which she adopted in *Ellison and Anor & Karnchanit*, her Honour concluded (at [34]):

> *"Unless an order is made in favour of the applicant pursuant to the Surrogacy Act* [NSW], *the provisions of the* [Family Law] *Act do not permit this Court to make a declaration of parentage in his favour. Thus, on reflection, I am inclined to respectfully agree with Watts J in* Dudley and Anor & Chedi *. . . that ultimately state law will govern the determination of parentage . . . and that state law will be recognised by Federal Law*".

The issue of the court's capacity to make declarations of parentage was considered by Berman J in *Bernieres and Anor & Dhopal and Anor* [2015] FamCA 736. In that case:

- The child was born of an international commercial surrogacy agreement using the sperm of the second applicant and an anonymous egg donor.

- The child was bought to Australia in 2014 following the issuing of

an Australian passport and a Certificate of Citizenship by Descent — the second applicant having proved that he was the biological father of the child for those purposes.

- The parties sought both parenting orders and a declaration of parentage (including in favour of the first applicant who was not biologically related to the child).

As a result of the commercial surrogacy arrangement and the fact that no orders were made (or able to be applied for) pursuant to s 22 of the *Status of Children Act 1974* (Vic), Berman J concluded that the child was not one to whom s 60HB of the Act applied.

A declaration of parentage pursuant to s 69VA was also sought in favour of the first applicant. His Honour concluded that s 69VA is *"not a stand-alone power but requires parentage of a child to be in issue in proceedings in respect to another matter [and] . . . is limited by the fact that the court can only make a declaration if it finds that a person is a biological progenitor"* (at [78]). No such declaration was made as the first applicant was not the biological progenitor of the child.

His Honour was, however, prepared to make orders for parental responsibility in favour of the parties.

In an articulation of the shortcomings of bringing applications for parentage declarations pursuant to the FLA in situations such as these, his Honour noted (at [120]–[121]):

> *"Clearly the circumstances surrounding the birth of Q are not dealt with directly either by the relevant state legislation or by reference to s 60HB of the Act. It may well be an unsatisfactory position that children who are born pursuant to a commercial gestational overseas surrogacy arrangement are not acknowledged by either state or Commonwealth legislation. I am not satisfied however that the definition of a parent should be extrapolated because of a legislative vacuum"*.

Berman J took a softer approach in *Saliba & Romyen* [2015] FamCA 927. In that case:

- The children were born of an overseas surrogacy arrangement

using the first applicant's sperm and an anonymous donor's egg.

- The children were Australian citizens by decent.

- The parties sought orders for equal shared parental responsibility and that the children live with them.

His Honour referred to the best practice principles as determined by Ryan J in *Ellison & Anor & Karnchanit* and made the orders sought by the applicants. Berman J stated at [20]:

> *"It is hoped that the Full Court will provide some clarity to what is a very difficult and distressing hiatus in the provisions of the Act insofar as they relate to the particular issues thrown up by these sorts of applications"*.

The Full Court provided that guidance in the course of hearing the appeal of Berman J's decision in *Bernieres* (see *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180). In their grounds of appeal (so far as the issue of surrogacy is concerned), the first and second appellants asserted that the trial judge erred in failing to declare either of the appellants as parents pursuant to s 69VA of the Act and in failing to declare the appellants as parents pursuant to s 67ZC of the Act.

The Full Court (comprised of Bryant CJ, Strickland and Ryan JJ) dismissed the appeal and confirmed:

- Section 60HB "covers the field" in relation to children born of surrogacy arrangements. That section *"specifically addresses the position of children born under surrogacy arrangements . . . [and] the plain intention of s 60HB is to leave it to each of the States and Territories to regulate the status of children born under surrogacy arrangements"* (at [62]).

- As a matter of statutory construction, that specific provision takes precedent over any more general provisions in the Act (such as s 60H which applies to children born by means of "conventional artificial conception procedures").

- There is therefore no basis for relying on the power contained in s 67VA and that section does not, as Berman J noted, represent a standalone source of power for the making of a declaration of parentage.

- Section 67ZC cannot be relied upon to make a declaration of parentage as it is a general provision and, while it may appear to be applicable, it cannot prevail over the specific terms of s 60HB. That section, as noted, is intended to cover the field in relation to children born under surrogacy arrangements.

In dismissing the appeal, the Full Court agreed with Berman J (and Johns J in *Green-Wilson & Bishop* [2014] FamCA 1031) that it was not possible to fill the legislative vacuum by judicial interpretation. That, the Full Court noted, is a matter for the legislature and, following this decision, it is clear that, unless parties are able to apply for parentage orders pursuant to the relevant surrogacy legislation of their home state or territory, declarations of parentage for children born of commercial surrogacy arrangements cannot not be made pursuant to the FLA.

In *Shaw & Lamb* (2018) FLC ¶93-826 the Full Court discussed *Bernieres*. Their Honours noted that the trial judge "properly recognised" that he was bound by the decision [at 10].

Examples

Other cases in which the court has considered applications for parentage orders in light of international commercial surrogacy arrangements include:

***Findlay & Punyawong* [2011] FamCA 503**

Watts J described this case as "virtually identical" to *Dudley & Chedi*.

***Hubert & Juntasa* [2011] FamCA 504**

The case involved a surrogacy arrangement in Thailand. However, here, the applicants were from New South Wales and Watts J considered that at the time the arrangement was entered into the New South Wales prohibition on surrogacy arrangements did not have extraterritorial effect. Nevertheless, Watts J declined to make an assessment of the child's parentage *"because of the public policy concerns behind how current surrogacy laws have been framed in New South Wales and consistently with other places in Australia"* (at [18]).

***Wilkie & Mirkja* [2010] FamCA 667**

Cronin J found that Mr Wilkie contributed his sperm but considered that there was *"no evidence to establish"* (at [10]) that he was a parent. His Honour considered that there was *"little point in pursuing a definition of a parent"* (at [19]).

***Gough and Kaur* [2012] FamCA 79**

Macmillan J found that, although the applicant father was the genetic parent of a child born via a Thai surrogate, he was not a "parent" for FLA purposes. Her Honour adopted the view, consistent with the approach subsequently taken by Ryan J in *Mason*, that s 60H and 60HB are intended to "cover the field" as to who is a parent in surrogacy matters.

¶12-065 Registration of Foreign Surrogacy Orders

It is open to intended parents to register, pursuant to s 70G of the *Family Law Act 1975* (FLA) and reg 23 of the Family Law Regulations 1984, foreign surrogacy orders, including in relation to children born of commercial surrogacy arrangements providing such arrangements are legal in the jurisdiction where the surrogacy order is made. Valid foreign surrogacy orders relating to an unborn child are capable of registration under the FLA providing:

- the order meets the definition of an "overseas child order" pursuant to s 4
- the court is provided with a copy of the foreign order and certificate of currency
- there is reasonable grounds for believing either of the parties or the child are ordinarily resident in, present in or proceeding to, Australia
- the order was made in a "prescribed overseas jurisdiction" pursuant to Sch 1A of the Family Law Regulations, and
- the judge, in the exercise of their discretion, is satisfied to register the order.

Forrest J was satisfied on these grounds in *Re Halvard and Anor* [2016] Fam CA 1051 and *Re Grosvenor* [2017] FamCA 366. See also *Carlton and Bissett and Anor* [2013] FamCA 143 on the issue of

unborn children of surrogacy arrangements.

¶12-070 Parentage in Western Australia

The position in Western Australia is different, in light of the non-referral to the Commonwealth of the state's powers, and the existence of the *Family Court Act 1997* (WA) (the Family Court Act).

If a child is born to a surrogate overseas and the surrogate is not married to the intended parents, as is usually the case, then it is likely the proceedings will be decided under the Family Court Act.

The Family Court Act does not contain provisions which mirror s 60H and 60HB of the Family Law Act. Nor is there an equivalent to s 69VA in the Family Court Act. Parentage is therefore to be determined by reference to the *Artificial Conception Act 1985* (WA) (the Artificial Conception Act).

Parentage in informal surrogacy arrangements

Where a child is born of an informal surrogacy arrangement in Western Australia, the rules as to parentage are as set out in the Artificial Conception Act and the Family Court Act.

In relation to the maternity of a child, s 5 of the Artificial Conception Act provides that where a woman undergoes an artificial fertilisation procedure as a consequence of which she becomes pregnant and the ovum used for the purposes of the procedure was taken from some other woman, the pregnant woman is the mother of any child born as a result of the pregnancy.

In relation to paternity, s 6 of the Artificial Conception Act purports that where a married woman undergoes, with the consent of her husband, an artificial fertilisation procedure as a consequence of which she becomes pregnant, the husband is presumed to have caused the pregnancy and is the father of any child born as a result of the pregnancy.

The rule relating to parentage in same sex de facto relationships is outlined in s 6A. Where a woman who is in a de facto relationship with another woman undergoes, with the consent of her de facto partner,

an artificial fertilisation procedure as a consequence of which she becomes pregnant, the de facto partner of the pregnant woman is presumed to be a parent of the unborn child and is a parent of any child born as a result of the pregnancy.

In circumstances where a woman becomes pregnant as a consequence of an artificial fertilisation procedure and the ovum used for the purposes of the procedure was taken from some other woman, then for the purposes of the law of the state, the woman from whom the ovum was taken is not the mother of any child born as a result of the pregnancy (s 7(1), Artificial Conception Act). Where a woman becomes pregnant as a consequence of an artificial fertilisation procedure and a man (not being the woman's husband) produced sperm used for the purposes of the procedure, the man shall be presumed not to have caused the pregnancy and is not the father of any child born as a result of the pregnancy (s 7(2), Artificial Conception Act).

Summary

The effect of s 5–7 of the Artificial Conception Act is that:

- The woman who gave birth to the child is the mother of any child born of an informal surrogacy arrangement (s 5).
- If she is married or in a de facto relationship, her husband or de facto husband of the surrogate is the father of the child (s 6).
- If she is in a de facto relationship with another female, then her de facto partner is a parent of the child (s 6A).
- The provider of any genetic material, whether male or female, is not a parent of the child (s 7).

It is not uncommon for the contracting parents in an informal surrogacy arrangement to seek Family Court orders in relation to the children born of the arrangement.

Examples

***Blake & Anor* [2013] FCWA 1**

The Family Court of Western Australia gave the word "parent" an expanded meaning so as to incorporate the sperm donor in a commercial surrogacy agreement. The sperm donor's male de facto partner had applied to the Family Court of Western Australia to adopt the resulting twins. In order for his application to succeed, the court found that the sperm donor needed to come within the definition of "birth parent" in s 4(1) of the *Adoption Act 1994* (WA). At the time, this definition was as follows:

> "birth parent means, in relation to a child or adoptee—
>
> (a) the mother of the child or adoptee; and
>
> (b) the father or parent of the child or adoptee under section 6A of the *Artificial Conception Act 1985*".

As paragraph (a) clearly did not apply, the court had to determine whether the sperm donor answered the description "the father or parent of the child or adoptee under s 6A of the Artificial Conception Act".

The court recognised that the reference in the definition to s 6A of the Artificial Conception Act had no application, since that provision deals only with a female partner of a woman who gives birth to a child. The court also found that by operation of s 7 of the Artificial Conception Act that the sperm donor was not the "father".

The court concluded that the sperm donor did not come within the categories of "parent" as defined by the *Interpretation Act 1985* (WA) (Interpretation Act) but went on to say (at [31]):

> *"However, as already noted, that definition is not exhaustive. In the Court's view, there is scope to enlarge the definition and determine what other people might be considered a 'parent' or a 'father' within its ordinary meaning. Unless the Court so determines, a person in [the sperm donor's] position would not be considered a birth parent for the purpose of the [Adoption] Act".*

The court then turned to discuss the presumptions of parentage in the state act, which it said *"apply when considering who is a parent or birth parent of a child"* (at [33]). The court was prepared to hold that the sperm donor was a "parent" by reference to the provisions of s 4(1) of the Adoption Act, s 5 of the *Interpretation Act* and s 5(1) of the Family Court Act.

Following analysis of the interaction of the various state acts, the court concluded that the definition of parent in the Interpretation Act was inclusive and noted (at [51]):

> *"To suggest that Mr Marston is anything other than a parent or a father within its ordinary meaning is to turn a blind eye to the reality of 'family' in present day society. It is also turning a blind eye to the reality of the situation presently before the Court. The objective facts surrounding the birth and the manner in which*

> *various agencies have treated those circumstances coupled with the fact of the genetic father acting in that role since the birth of the twins points to the use of an expanded definition of parent. To adopt any other interpretation would serve no purpose in addressing any public policy issues if, indeed, any exist. It would serve no purpose in enhancing the future welfare and best interests of these children"*.

***W & C* [2009] FCWA 61**

The court was dealing with an application by a mother of a child born of an artificial fertilisation procedure, where it was intended the child would remain with the mother, but spend ongoing time with the sperm donor and his male partner.

In determining the status of the sperm donor, the court considered the provisions of both the Artificial Conception Act and the Interpretation Act and concluded (by reference to s 7 of the Artificial Conception Act) that the sperm donor was not a "parent" of the child.

***Farnell & Anor & Chanbua & Others* (2016) FLC ¶93-700**

Although this case is colloquially known as the "Baby Gammy" case, the Family Court of Western Australia was asked to determine the parenting arrangements which were in the best interests of Pipah (baby Gammy's twin sister). Gammy lived with the surrogate in Thailand. The circumstances which led to him remaining in the care of the surrogate were discussed in the judgment. Both the surrogate and the commissioning parents sought that Pipah live with them.

The court disagreed with the approach in *Blake*. Thackray CJ said (at [285]–[286]):

> *"I consider that the presumptions [in those sections] cannot have any application in the case of a child born as the result of an artificial fertilisation procedure. This is because the presumptions are rebuttable, and are trumped by the rules of paternity in the ACA, which are not rebuttable, and which apply to all 'written laws' of the State, including the* [Family Court Act].
>
> *As the ACA provides that a sperm donor, is 'conclusively presumed not to have caused the pregnancy' and is expressly declared by that Act not to be the father of the child, the male de facto partner of the applicant in Blake could not, at law, be the father of the twins. I therefore respectfully consider that it was not open to her Honour to find that there was 'scope to enlarge the definition and determine what other people might be considered . . . a "father" within its ordinary meaning'"*.

The court in *Farnell* went on to note that the court in *Blake* did not have the benefit of submissions from a contradictor and had taken a pragmatic approach, in circumstances where the Department of Child Protection (as it then was) had submitted that it was not in the interests of the children for there to be any further delay in consideration of the matter.

Another issue of interest in *Farnell* was the status of the female applicant. By virtue of s 6A of the Artificial Conception Act, she could not be a parent of the child, regardless of whether she had provided any genetic material for the pregnancy.

Notwithstanding this, the first affidavit filed by the applicants recorded that she had provided the gametes for the pregnancy. The applicants' initial evidence was that the embryos for the pregnancy had been produced at a fertility clinic in Perth and sent to Thailand for implanting into the surrogate. This evidence was untrue. In declining to refer the matter to the Department of Public Prosecutions for investigation for prosecution, Thackray CJ noted (at [537]–[545]):

- He could not understand the basis upon which the untrue evidence had been given, taking into account the provisions of the Artificial Conception Act (and the similar provisions contained in s 60H of the *Family Law Act 1975*) as the female applicant could not be a parent of the children born of the arrangement.
- A formal referral was unnecessary because at the time of the trial the Attorney-General of Western Australia had intervened in the proceedings and was aware of the circumstances of the evidence.
- Little could be gained from a prosecution.

The surrogate was ultimately unsuccessful in her application for Pipah to live with her, although the court might have granted her application if the case was heard earlier. Orders were made so she was kept aware of the commissioning parents' contact details, so there could be contact between the two families as agreed.

¶12-080 Commercial surrogacy and public policy

In all Australian States, surrogacy agreements are unenforceable and relate only to altruistic arrangements. It is an offence for residents in Queensland, New South Wales and the ACT to enter into international commercial surrogacy arrangements. Despite the fact that the case law confirms that commercial surrogacy arrangements have been entered into by Australian parents, submissions made by the Chief Justices of both the Family Court of Australia and the Federal Circuit Court of Australia to the 2016 Parliamentary Inquiry into Surrogacy Matters[4] indicate that no one has yet been prosecuted under those laws.

The use of the formal process provided for in the various state acts is arguably both expensive and uncertain. There is anecdotal evidence to show there is a dearth of women willing to enter into altruistic arrangements under the state legislation, potentially because it is unlawful to advertise for such arrangements. In addition, the process of seeking approval is expensive.

As a result, in recent years an increasing number of people have found a solution to their reproductive challenges in commercial surrogacy arrangements utilising the services of, often, poor women in developing economies. There are major public policy issues associated with this development.

The public policy considerations were summarised by Thackray CJ in *Farnell* (at [254]–[266]) as follows:

- Commercial surrogacy is forbidden by law in every state of Australia.

- The provision of consideration (by offer or acceptance) for the supply of a human egg is prohibited and attracts a penalty of up to 15 years imprisonment (s 21 of the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth)).

- Although altruistic surrogacy is permitted in Australia, it is subject to conditions, and the rights of the birth mother (and her husband or partner) can only be extinguished by order of the court.

Against this is the position under the citizenship laws (discussed at ¶12-100) that the term "parent" is required to be applied in its ordinary usage, meaning that a person who is precluded from parentage pursuant to the provisions of the Family Court Act or the *Family Law Act 1975* can still be a parent for the purposes of the citizenship laws.

In *Farnell*, it was noted that while the public policy considerations against commercial surrogacy arrangements may be strong, the circumstances in which those public policy considerations might be applied to an individual child are necessarily limited by the requirement in both state and federal law that a child's best interests are of paramount consideration in determining what orders should be made.

The court in *Farnell* referred to the UK decision of Hedley J (in *In re X & Y (Foreign Surrogacy)* (2008) EWHC 3030) where it was noted (at [265]):

> *"I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will*

bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. Bracewell J's decision in Re AW . . . is but a vivid illustration of the problem. If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing . . . In relation to adoption this has been substantially addressed by rules surrounding the bringing of the child into the country and by the provisions of the Adoption with a Foreign Element Regulations 2005. ***The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement***. *It is, of course, not for the court to suggest how (or even whether) action should be taken, I merely feel constrained to point out the problem"*.

Footnotes

4 Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements, House of Representatives Standing Committee on Social Policy and Legal Affairs, April 2016 Canberra.

¶12-100 Citizenship by descent

A child born outside Australia as a result of a surrogacy arrangement is eligible for Australian citizenship by descent if, at the time of their birth, they had a parent who was an Australian citizen. Applications for Australian citizenship by descent are assessed according to the requirements set out in the *Australian Citizenship Act 2007* and the

policy guidelines set out in the Australian Citizenship Instructions.

> **Warning**
>
> Family lawyers need to be aware that they cannot give family law advice in relation to international surrogacy in isolation from a referral to an immigration lawyer for immigration advice. Immigration advice can only be given by migration agents. People who practice as unregistered migration agents in Australia are breaching the law and may be fined up to $6,600 or imprisoned for up to 10 years.

The immigration issues vary depending on:

- the jurisdiction in which the surrogacy arrangement was performed, and the laws regarding the issuing of a birth certificate in that jurisdiction
- the genetic material used to create the child, and
- the information given by the commissioning parents on the application for a birth certificate.

Immigration laws in the country in which the birth took place are also relevant. For example, India has introduced visa regulations which require medical visas to be applied for by people going to India for the purpose of surrogacy arrangements. A letter from the Australian Government is also required. The letter must state that Australia recognises surrogacy and that the child will be permitted entry into Australia as a biological child of the commissioning couple.

Parents of children born overseas must apply for either Australian citizenship by descent or a permanent visa for the child. It must be disclosed at the time of making the application whether the child was born via a surrogacy arrangement.

A child is eligible for citizenship by descent if at the time of birth they had a parent who was an Australian citizen. In surrogacy arrangements where the genetic material of one or both commissioning parents was used, this requirement is readily satisfied by a DNA test. Where there is no biological relationship with the child and one or both of the commissioning parents, further evidence must be provided to demonstrate that a parent–child relationship existed at the time of birth between the child and the commissioning parents.

The Immigration Department has listed the following non-exhaustive list of factors indicating a parent–child relationship:

- A formal surrogacy agreement was entered into before the child was conceived.
- The lawful transfer of parental rights occurred in the country in which the surrogacy took place, before or at the time of the child's birth.
- Evidence that the commissioning parent/s inclusion as a parent on the birth certificate was done with that parent's prior consent.
- Evidence that the commissioning parent/s was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care.
- Evidence that the child was acknowledged socially from or before birth as the Australian citizen's child.

The decision in *H* v *Minister for Immigration* [2010] FCAFC 119 involved the interpretation of s 16(2) of the *Australian Citizenship Act 2007* which provides for the granting of citizenship to a child if they are born outside Australia and has at least one parent who was an Australian citizen at the time of the birth.

The Federal Court determined that the word "parent" was to be given its ordinary meaning with such an assessment to be made by the

Administrative Appeals Tribunal (at [48]):

> *"Today, perhaps, one assumes that when a person speaks of a 'parent', the speaker is referring to a biological parent. If, however, it is plain from the context or from one's knowledge of the speaker that the reference is not to a genetic relation but to someone who, for the speaker, performs the role that society typically expects a parent to fulfill, then one accepts the reference to 'parent' as apposite. Thus, in ordinary usage, the word 'parent' may be used without modifier to signify a genetic or non-genetic connection with another: compare Black's Law Dictionary (8th ed, 2004). Whilst often a person's parents will in fact be biological parents, ordinary usage does not limit the meaning of parent in this way. Rather, the word 'parent' is used today to signify a social relationship to another person. Whether or not this has always been the case, this usage reflects a widespread contemporary awareness of families that include non-biological parent-child relationships"*.

On the basis of this decision, the Department of Immigration and Border Protection now makes an assessment of fact, rather than law, when determining if a child is entitled to Australian citizenship by descent. Normally, biological parentage is determined through DNA testing.

There is a tension between the interpretation of this provision and the operation of the Artificial Conception Act in Western Australia. This tension was noted by Thackray CJ in *Farnell* when he said (at [551]):

> *"The arrangement leading to the births of Pipah and Gammy would never have been put in place had it not been for the fact that a department of the Australian Government provided assurances that the children would receive citizenship and automatic entry to this country. Such assurances could not be provided if the citizenship laws were harmonised with all the other laws of this country. Effective law reform therefore does not have to involve the legalisation of commercial surrogacy to encourage would-be parents to buy locally-grown children. Equally, it could involve amendment of the citizenship laws to align them even*

more clearly with existing state laws. A fundamental policy decision is required".

If the child is not eligible for Australian citizen by descent, the intended parent will need to apply for a visa to allow the child to enter and remain in Australia. In international surrogacy cases where the intended parent is not a biological parent, an Adoption (subclass 102) visa is relevant for the child. The intended parent would then need to formally adopt the child. It is rare for a child born of an international surrogacy arrangement to meet such requirements.

Tip

Comprehensive fact sheets and forms in relation to citizenship by descent and visas can be found on the website for the Department of Immigration and Border Patrol: https://immi.homeaffairs.gov.au/citizenship/what-does-it-mean

Footnotes

1 Jane Johnson provided commentary on Western Australia.

Part C — Property

PROPERTY

Editorial information

Written by Jacqueline Campbell and Grant T Riethmuller J

¶13-000 Introduction

Parts VIII and VIIIAB of the *Family Law Act 1975* (FLA) provide for the division of the property of parties to a marriage and a de facto relationship respectively.

Part VIIIAB was inserted into the FLA to cover the breakdown of heterosexual and same sex de facto relationships in all states and territories (other than Western Australia where the state legislation still applies). In relation to de facto relationships that broke down prior to 1 March 2009 (1 July 2010 in South Australia), the relevant state and territory laws apply unless parties choose to opt in (see Chapter 22). Even in 2019, cases are still arising where lawyers need to refer to the previous state and territory legislation. This chapter does not cover

that legislation.

Note

Below is a summary of the operative property settlement sections in Pt VIII and VIIIAB referred to in this chapter. The various sections are similar. Some of the differences are discussed in Chapter 22.

Part VIII	Description	Part VIIIAB
s 75(2)	Other factors	s 90SF(3)
s 78	Declarations of interests in property	s 90SL
s 79	Alteration of property interests	s 90SM
s 79A	Setting aside property adjustment orders	s 90SN
s 81	Duty to end financial relations	s 90ST

As the FLA provides for a broad discretion, and each couple is different, it can be difficult to obtain clear guidance from considering only a small number of decisions.

Importantly, the legislation is intended to bring about an end to the financial relationship of the parties, and bring certainty for the parties in the future. As a result, s 81 and 90ST require the court to make orders that will, as far as practicable, end the financial relationship of the parties. This is referred to as the “clean break” principle. However, this concept should not be taken to extremes,[1] and does not prevent ongoing maintenance orders in appropriate cases,[2] or the exercise of the powers to adjourn proceedings if this is necessary to do justice.[3]

Footnotes

Footnotes

1 *Best & Best* (1993) FLC ¶92-418 at p 80,296.

2 *DJM* v *JLM* (1998) FLC ¶92-816 at p 85,275; [1998] FamCA 97.

3 *Family Law Act 1975* (Cth), s 79 and 90SM.

¶13-010 Time limits

Section 44(3) of the *Family Law Act 1975* provides a time limit of 12 months from the date of a divorce order becoming absolute for bringing property proceedings.

In relation to de facto relationships, s 44(5) provides a time limit of two years following the end of a de facto relationship.

The time limits may be extended if they would cause hardship to the party or a child (s 44(4) or (6)). The time limit can be extended by consent for previously married couples (s 44(3)), or for de facto couples (s 44(5)(b)).

¶13-015 Separation and death

It has generally been accepted that under the *Family Law Act 1975*, there is power for the court to make orders in relation to property and spousal maintenance even if the parties are not separated.

In *Stanford* v *Stanford* (2012) FLC ¶93-518, the High Court stated its views on whether an order for alteration of property interests can be made under s 79 if parties are not separated or are “involuntarily” separated. The High Court majority decided that a s 79 order can be made in these circumstances if it is just and equitable to do so. The same principle does not apply to de facto relationships as a “de facto financial cause” requires a “breakdown” of the de facto relationship. In *Redman & Redman* (2013) FLC ¶93-563, the Full Court made

reference to *Stanford* v *Stanford* (2012) FLC ¶93-518 in circumstances where the parties sought consent orders with the sole purpose being to transfer the family home in an intact marriage from the name of the husband to the names of both himself and his wife to avoid stamp duty. The Full Court considered whether it would be just and equitable to make consent orders in the circumstances and declined to do so.

Section 79(8) gives the court the power to continue proceedings if one party dies before property settlement proceedings are completed. Proceedings cannot, however, be commenced. If both parties die, the proceedings cannot continue (*Whitehouse & Whitehouse* (2009) FLC ¶93-415). Death is discussed further at ¶13-030.

Stanford v Stanford (2012) FLC ¶93-518

In *Stanford*, property orders were sought in an intact marriage where an elderly couple were separated by circumstances, not by intention. The parties lived apart after the wife had fallen so ill that she required full-time care. The husband continued to visit her and set aside money for her use. The wife, acting by a case guardian, applied for orders under s 79 to pay for better care for her. The husband was also represented by a case guardian. Both parties' case guardians were their children from their previous marriages. Although it was the second marriage for both of them, they had been married for about 40 years. The husband was aged 87 and the wife was aged 89. The husband had medical problems but was able to live in the former matrimonial home with assistance from his son. The home was in his sole name as it had been acquired by him after the break-up of his first marriage.

The matter was initially heard by a Magistrate of the Family Court of Western Australia, then twice by the Full Court of the Family Court and finally by the High Court of Australia.

The Magistrate determined the available assets of the parties and the contributions which each party had made, and ordered that the assets be divided on the basis of the parties' contributions as to 57.5% to the husband and 42.5% to the wife. This required the husband to pay to the wife the sum of $612,931 within 60 days, which he was unlikely to be able to do unless he sold the home.

The husband appealed to the Full Court of the Family Court. After the appeal was heard, but before judgment was delivered, the wife died. The proceedings were continued by her legal personal representative. The Full Court allowed the appeal ((2011) FLC ¶93-483) and concluded that the Magistrate had erred in a number of respects.

In its second judgment ((2012) FLC ¶93-495), the Full Court ordered that on the husband's death, the sum which had been fixed by the Magistrate as representing 42.5% of the marital property, be paid to the wife's legal personal representatives.

All members of the High Court upheld the appeal. The husband's appeal succeeded primarily on the basis that the Full Court had not followed the path required by s 79(8).

The majority rejected the husband's argument that a matrimonial cause did not exist. The majority also rejected the husband's argument that a s 79 order can only be made if the parties have separated.

¶13-020 Variation of property orders

The court's power to vary or set aside property orders is quite restricted. Sections 79A and 90SN of the *Family Law Act 1975* (FLA) provide for the varying or setting aside of property orders only where there is either:

- the consent of both parties, or
- the court is satisfied that:
    (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance

    (b) in the circumstances that have arisen since the order was made, it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for that order

(d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage or relationship, the child, or where the applicant has caring responsibility for the child, the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order, or

(e) a proceeds of crime order has been made covering property of the parties to the marriage or relationship or either of them, or a proceeds of crime order has been made against a party to the marriage or relationship.

The court has a discretion as whether to vary or set aside orders even if one of the above requirements is met. If the order is set aside, it can make an order in substitution if it considers it appropriate to do so. Generally, the s 79A application and any consequential s 79A application will be heard at the same time, but there are exceptions — such as where the s 79A application is able to be determined relatively quickly and cost effectively for the parties.

A party seeking to set aside consent orders may have another option besides s 79A(1). This is to seek a review of a decision made by a Judicial Registrar, Registrar or Deputy Registrar under Pt 2 (repealed) of the Family Law Rules 2004. For property orders made by consent in the Family Court, an application for a review of a decision must be filed within 28 days of a final property order being made (r 18.08). A party may apply for an extension of the time (r 1.14).

Rule 20.01 of the Federal Circuit Court Rules specifies the time in which an Application for Review of a Registrar’s orders must be made as being seven days from the date of the making of the orders by a Registrar.

Variation of property orders is discussed in more detail in Chapter 18.

Examples

***Pompidou & Pompidou* [2007] FamCA 879**

The orders were set aside on the ground of duress, in circumstances where the wife signed consent orders because she feared the husband would carry out his express threat to kill and an implied threat to arrange the biggest siege a regional Victorian city had ever seen.

***Jeeves & Jeeves* [2011] FamCAFC 94**

The Full Court dismissed the wife's appeal against the dismissal of her s 79A application in which she had alleged non-disclosure by the husband. The source documents were available to the wife's valuers and it was not established that the husband failed to disclose relevant material or misled the wife. The evidence did not establish conclusively whether or not the husband had disclosed the improved trading result, or that if there was non-disclosure that it was, or could reasonably have been, material to the wife's consent.

¶13-025 Declarations

Where there is a dispute as to the ownership of property, the court has the power to make declarations under s 78 of the *Family Law Act 1975* for married couples and s 90SL in relation to parties in a de facto relationship. This power is purely declaratory and cannot be used to alter parties' interests (s 79 or s 90SM must be used for such purposes).[4] As a result, it is appropriate to determine the issues requiring declarations before proceeding to consider alterations of property under s 79 and 90SM.[5] Declarations under s 78 and 90SL can bind third parties[6] provided they are parties to the proceedings.[7]

Sections 78 and 90SL are rarely invoked but in *Stanford* v *Stanford* (2012) FLC ¶93-518, the High Court majority said (at [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".

Following *Stanford*, more opportunity may be made of s 78 and 90SL.

Once the existing legal and equitable interests are identified, if the court finds that it is not just and equitable to make an order, the court may simply make declarations as to the parties' rights.

Example

***Pavone & Pavone* [2015] FamCA 100**

The trial judge did not agree with the parties and the intervener that it was just and equitable to alter the parties' property interests. There was no intermingling of proprietary interests and the parties' affairs were structured as if they were commercial partners, as much as they were domestic partners. The trial judge made s 78 declarations instead of s 79 orders.

Footnotes

4 *Hickey & Hickey* (2003) FLC ¶93-143 at p 78,386; [2003] FamCA 395.

5 *Pickard & Pickard* (1981) FLC ¶91-034.

6 For discussion as to the extent of the court's accrued jurisdiction, see *Warby* v *Warby* (2002) FLC ¶93-091; *Bishop & Bishop* (2003) FLC ¶93-144; *Lewis & Rayhill* (2006) FLC ¶93-278.

7 *Lanceley & Lanceley* (1994) FLC ¶92-491.

¶13-030 Effect of death of a party to property proceedings

The ordinary rule is that upon the death of a party to a marriage who is a party to a family law case, no further steps can be taken. The case automatically comes to an end. However, s 79(8) *Family Law Act 1975* (Cth) (FLA) allows a property case to be continued after the death of one party to a marriage by the substitution of the deceased's

legal personal representative. Section 90SM(8) was inserted for de facto couples from 1 March 2009. Section 79(8) only deals with the continuation of proceedings, not the commencement of them.

There is a two-step test, which was confirmed by the High Court in *Stanford & Stanford* (2012) FLC ¶93-518. The proceedings may be continued by or against the legal personal representative of the deceased party if the court is of the opinion:

1. that it would have made an order with respect to property if the deceased party had not died, and

2. that it is still appropriate to make an order with respect to property.

In *Stanford*, the High Court considered the application of s 79(2) of the FLA (the just and equitable requirement) in cases where s 79(8) was relied on to continue property settlement proceedings. The majority said (at 86,639):

> "In cases where s 79(8) applies, a court must consider whether, had the party not died, it would have been just and equitable to make an order and whether, the party having died, it is *still* just and equitable to make an order". (Original emphasis)

Where proceedings have not been issued and a party dies, the position is more difficult for de facto couples than it is for married couples.

Under the FLA, the courts have no jurisdiction to make property orders if the de facto relationship has not broken down. The question as to whether proceedings can be issued in the expectation of a relationship breakdown when one party is likely to shortly die, is unresolved. There are decisions of single judges which decide the question differently and the matter has not been considered by the Full Court of the Family Court. In both cases, appeals were filed, but both cases settled before the appeals were decided.

In *Hayes & Eddington (No 3)* [2014] FamCA 336, the trial judge held that as the court had no jurisdiction to make property settlement orders at the time proceedings were filed, the proceedings were totally

flawed and a nullity. By contrast, in *Banaszak & Executors of the Estate of Mr S Mandia and Anor (No 2)* [2015] FamCA 235, the trial judge held that although the court did not have jurisdiction when the proceedings were filed, the breakdown of the relationship after the proceedings were filed meant that the court had jurisdiction prior to the time it exercised its power to alter property interests.

¶13-035 Power of court to adjourn property proceedings

Sections 79(5) and 90SM(5) of the *Family Law Act 1975* enable a court to adjourn property proceedings in certain circumstances if so requested by either party. They enable the court to adjourn the proceedings if, in the exercise of its discretion, it finds there are appropriate reasons for doing so.

There are four preconditions to invoking the power to order an adjournment:

1. there is likely to be a change in circumstances

2. the likely change is a significant one

3. that having regard to the likely significant change, it is reasonable to adjourn the proceedings, and

4. that an order made if that significant change occurs is more likely to do justice and equity as between the parties than an immediate order.

See *Grace & Grace* (1998) FLC ¶92-792 and *Pratt & Pratt* [2012] FamCAFC 81.

Sections 79(5) and 90SM(5) do not limit the general powers of any court to grant adjournments.

A court may grant an adjournment under s 79(5) or s 90SM(5) where it is of the opinion:

- that there is likely to be a significant change in the financial circumstances of the parties to the marriage or the de facto

relationship or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings, and

- that an order that the court could make with respect to the property of the parties to the marriage, or the de facto relationship, or either of them, or the vested bankruptcy property of a bankrupt party to the marriage or de facto relationship, if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage or the de facto relationship than an order that the court could make immediately with respect to the property.

In forming an opinion as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the marriage or the de facto relationship, the court may have regard to any change in the financial circumstances of a party that may occur by reason that the party to the marriage or the de facto relationship:

- is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme, or

- may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property (s 79(7) or s 90SM(7)).

Examples

***Capelinski & Patton* [2010] FamCA 1243**

The deceased's legal personal representative unsuccessfully sought an adjournment under s 90SM(5) pending the resolution of two family provision proceedings (one current and one prospective) in the Supreme Court of Queensland. O'Reilly J rejected the argument that until the family provision proceedings had been determined, the Family Court could not know the size of the pool. Her Honour said that the contrary was true, and that until Ms Capelinski's proceedings had been determined by the Family Court, the Supreme Court of Queensland could not know the size of the deceased's estate to assess whether there was inadequate provision for the claimants.

***Bailey & Bailey* (1990) FLC ¶92-117**

The Full Court upheld a stay of s 79 proceedings while the common law claims of the

interveners in relation to the deceased's psychiatric practice were determined.

***Helms & Helms* [2016] FamCA 389**

The wife successfully applied for an adjournment of the proceedings under s 79(5) so that the uncertainty as to whether or not several franchises operated by a company which were due to expire within the next 12 months would be renewed. The valuer had assumed that they would not be renewed and therefore attributed no goodwill to the franchise businesses. The wife asserted that there was a realistic prospect of them being renewed.

¶13-037 Should the orders be made?

The proper approach to be taken by the court in making consent orders under s 79 of the *Family Law Act 1975* was considered by the High Court in *Harris* v *Caladine* (1991) FLC ¶92-217. The High Court's pronouncements are equally applicable to orders made under s 90SM. Justice Brennan said that when a consent order is sought in a s 79 application, it is not necessary to conduct an inquiry into each of the factors in s 79(4). He said (at [11]):

> "It does not follow that, when a consent order is sought in a s 79 application, it is necessary to conduct an inquiry into each of those factors. The Court may be satisfied that a provision is proper by reference not only to the material before the Court relating to the factors mentioned in s 79(4) but by reference to the advice available to the respective parties and the consent which they respectively give to the making of the order. In the majority of cases, once it appears that the parties are conscious of the factors mentioned in pars (a) to (f) and have taken them into account before consenting, the provisions 'with respect to financial matters' proposed for incorporation in the consent order will be seen to be 'proper'. The factor mentioned in par.(g) may require independent inquiry by the Court, but that question does not arise in this case. Nevertheless, when an application for a consent order in a s 79(1) matter is made there is a discretion to be exercised with reference to the propriety of the provisions with respect to financial matters. The making of a consent order in a s 79(1) matter is not automatic".

In the case of consent orders, the court can, therefore, more readily

find that the requirements of s 79 (or s 90SM) are met because the parties consent to the orders, but there needs to be relevant material before the court.

In summary, it appears that based on *Harris v Caladine* and the Family Court's consideration of that case:

- consent orders do not need to be investigated by the court as fully as orders not made by consent
- the investigation required is less when both parties are represented, and
- if the orders on their face appear not to comply with s 79, extra information and/or documentation may be required.

Example

***Redman & Redman* (2013) FLC ¶93-563**

The Full Court dismissed an appeal against a trial judge's refusal to make consent orders in circumstances where:

- there was initially no evidence of the parties' contributions
- the husband was likely to receive substantial but unidentified assets from his family
- the order appeared to be of no utility
- the wife was not a citizen, had only been in Australia for four years and there was no evidence she had received independent legal advice. The court did not know what her English language skills were
- the order, on its face, seemed to have a degree of finality, even though as a matter of law it might not
- there was not an apparent principled reason for interfering with the existing legal or equitable interests of the parties to the marriage, which was intact, and
- if the orders on their face appear not to be just and equitable, extra information and/or documentation may be required.

¶13-039 Form of property orders

The courts generally favour giving the parties a percentage interest

upon the sale of an asset rather than a fixed sum — eg *Waters and Waters* (1981) FLC ¶91-019 and *Smith and Smith* (1991) FLC ¶92-261.

The court will usually calculate the division of property it considers to be just and equitable in percentage terms. This may be converted to a lump sum figure if, say, one party is to transfer their interest in the former matrimonial home in return for a payment. Sometimes it is preferable for a party to receive a lump sum. In other circumstances, a percentage interest is more advantageous.

An order that a party be given a certain dollar amount, rather than a percentage, may result in an order which is not just and equitable because it fails to take into account the costs of sale.

In *Elgin & Elgin* [2015] FamCAFC 155, the wife argued that the trial judge was not obliged to consider the tax consequences of making a particular order unless asked to do so. Justices Thackray and Ryan observed [at 203] that in the absence of evidence, it was impossible for the trial judge to be satisfied that the proposed orders were just and equitable. Justice May [at 156] said:

> "Despite the well-articulated arguments on behalf of the wife, and the apparent failures of the husband to conduct his case, it cannot be regarded as just and equitable to uphold orders that do not take into account such a serious misstep as failing to allow for taxation consequences of a significant sum and ordering the husband to be responsible for the payment. Such an order cannot be said to be just and equitable . . ."

Where there is a recent valuation and one party is to buy out the other's interest in the property in a relatively short time, a lump sum may be able to be safely ordered.

In *Trask & Westlake* (2015) FLC ¶93-662, the Full Court of the Family Court explained the form of orders which should be made when real properties are to be sold. The orders made by the Full Court were more complex than the Family Law Courts usually make, using a mathematical formula to give a more precise percentage outcome. The Full Court said that orders should be drafted to reflect the

possibility that the parties' percentage entitlements to the overall pool may be different than the court's intentions if the sale price is different from the valuation relied upon by the court.

The Full Court was critical of orders which assumed that the percentage division after real properties had been sold would be the same as the percentage division of the pool to which the parties were found to be entitled based on the valuations relied upon in the judgment. There will often be a discrepancy for reasons such as a delay between the judgment date and the sale date, a volatile market or a contentious valuation.

The values of the real properties which were to be sold in *Trask* had been agreed between the parties as being valued at $2,319,000. At trial, however, the husband contended that they were actually worth $3,150,000. The trial judge found that the wife was entitled to a 60/40 division of the property in her favour. Under the orders, the wife was to receive 87.43% of the assumed sale prices at the agreed values. This resulted in an overall division of 60/40 in her favour if the two real properties were sold at their agreed valuations.

However, if the real properties sold for the figures the husband contended, the wife would receive $2,745,045 from the sales rather than $2,027,511 which the trial judge had calculated using the earlier agreed values. She would therefore receive, inconsistently with the trial judge's findings, 62.8% rather than 60% of the overall pool.

Using the husband's figures for illustrative purposes the disparity was, as the Full Court pointed out, $1,422,000 in favour of the wife, or 25.77%. This was potentially not a minor variation from the intended outcome.

The new orders made by the Full Court were:

> "(f) The wife be paid an amount $X calculated in accordance with the following formula —
>
> $X = [A plus $4,795,101) × 60%] − $2,241,154
>
> Where:
>
> • A is the balance remaining consequent upon compliance

with the sales and payments required by paragraphs 1 & 2(a) to (e) of these orders;

- $4,795,101 is the total value of the property and superannuation interests of the parties as found excluding the assumed value of the two properties the subject of sale; and

- $2,241,154 is the value of the property retained by the wife as found;

(g) The husband be paid the balance".

¶13-040 The court's discretion

Sections 79 and 90SM of the *Family Law Act 1975* (FLA) enable the court exercising jurisdiction under the FLA to alter interests in property as between the parties to a marriage or de facto relationship.

The court has a broad discretion under s 79 and 90SM to make property settlement orders. While the power is a broad one, it is not without restrictions. These are:

(a) An order must not be made unless it is just and equitable to alter the legal and equitable interests of the parties (s 79(2) in relation to married relationships and s 90SM(3) in relation to de facto relationships). See *Stanford* v *Stanford* (2012) FLC ¶93-518.

(b) The order must be "appropriate" (s 79(1) and 90SM(1)).

(c) The order must finalise the relationship between the parties as far as practicable (see s 81 in relation to married relationships and s 90ST in relation to de facto relationships).

(d) In determining the order, the court must recognise both direct financial and indirect non-financial contributions to "property" (see s 79(4)(a), (b) and (c)) in relation to legally married relationships and s 90SM(4)(a), (b) and (c) in relation to de facto relationships).

(e) In determining the order, the court must take account of other matters see (s 79(4)(d)–(g) or s 90SM(4)(d)–(g)):

– the effect of any proposed order upon the earning capacity of a party to the marriage or de facto relationship

– the s 75(2) or s 90SF(3) matters so far as they are relevant

– any other order affecting a party to the marriage or de facto relationship or a child of the marriage or de facto relationship

– any child support that a party to the marriage or de facto relationship has provided, is to provide or might be liable to provide in the future for a child of the marriage or de facto relationship.

Importantly, s 79(2) and 90SM(3) provide that the "court should not make an order under these sections unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Prior to *Stanford & Stanford* (2012) FLC ¶93-518, this was considered to be the fourth and final step of the s 79 process. Following *Stanford*, it appears to be a preliminary step or threshold issue although the majority in *Bevan & Bevan* (2013) FLC ¶93-545 said (at [86]) that it was unhelpful and misleading to describe the initial s 79(2) enquiry as a "threshold" issue. It is unclear whether it is still a final step. Arguably, the requirement that the order be "appropriate" under s 79(1) is the final step or cross-check.

The Full Court of the Family Court repeatedly stated prior to *Stanford* (although in the earlier years of the FLA a three-step approach was often taken — eg Gibbs CJ in *Mallet v Mallet* (1984) FLC 91-507) that judgments should follow a four-step process of reasoning.[8] In *Omacini*,[9] the Full Court said:

> "46. The four important steps to be taken in determining a property dispute are well defined (see for example *Ferraro & Ferraro* (1993) FLC ¶92-335 at 79,560) and they are:
>
> (a) To identify and value the net property of the parties (usually as at the date of trial);

(b) to consider the contributions of the parties within paragraphs (a)–(c) of s 79(4);

(c) to consider the s 75(2) factors; and

(d) to consider whether the order proposed is just and equitable".

This was referred to as the "four-step process".

Cases such as *Mallet* v *Mallet* (1984) FLC ¶91-507, *Ferraro & Ferraro* (1993) FLC ¶92-335 at p 79,560 and *McLay & McLay* (1996) FLC ¶92-667 deal with the first three steps.

Courts which stray from the wording of the FLA and, instead, look at the underlying philosophy or values of s 79 and 90SM have been criticised by the Full Court and the High Court. For example, in *Douglas & Douglas* (2006) FLC ¶93-300, the Full Court criticised the trial judge for importing into his decision such principles as intention and compensation. See also *Beck & Beck (No 2)* (1983) FLC ¶91-318. The High Court majority in *Stanford* criticised the Full Court for considering moral obligations.

The Full Court had previously said in *Norman & Norman* [2010] FamCAFC 66 (at [61]) in relation to following a structured approach:

> "A structured approach is, of course, desirable and also provides to litigants and practitioners alike predictability in the manner in which cases will be dealt with and judgments delivered. But, that is not the same thing as a legal requirement, the failure to comply with which will result in appealable error. The words of Gibbs CJ in *Mallet*, (given in another context) are apposite:
>
> > '. . . it is understandable that practitioners, desirous of finding rules, or even formulae, which may assist them in advising their clients as to the possible outcome of litigation, should treat the remarks of the court in . . . cases as expressing binding principles, and that judges, seeking certainty, or consistency, should sometimes do so. Decisions in particular cases of that kind can, however, do no more than provide a

> guide; they cannot put fetters on the discretionary power which the Parliament has left largely unfettered. It is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular case'" (at 608–9).

The extent to which a structured approach can be used post-*Stanford* is unclear. The High Court in *Stanford* warned (at [37]) that in determining applications under s 79, three fundamental propositions must not be obscured:

> "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.
>
> Second, 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* (1956) 98 CLR 228 at 231–232, 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* at 257:
>
> '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' . . .
>
> Third, whether making a property settlement order is 'just and equitable' is not to be answered by beginning from the assumption that one or other [sic] 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' (*R v Watson*, *Ex Parte Armstrong* (1976) 136 CLR 248 at 257). 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".[10]

The High Court concluded (at [41]) that adhering to the above three fundamental propositions:

> "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. . . . 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".

It is likely to be some time before the proper approach to s 79 following *Stanford* is settled.

Following *Stanford*, trial judges have taken different approaches. Some have considered s 79(2) as a final step as well as an early

step.[11] Others have expressed greater doubt as to whether a stepped approach exists at all.[12]

The nature of the consideration of whether it is just and equitable to make an order is discussed at ¶13-048.

The assessment of contributions is usually done in percentage terms, rather than giving a dollar value to each contribution or the contributions of each party. Likewise, the assessment of the weight to be given to s 75(2) factors is usually not done in any mathematical way, such as by adding together percentage or dollar amounts for each factor. Often the overall result is looked at in dollar terms only as a form of cross-check.

However, a different approach was taken in *Wallis & Manning* (2017) FLC 93-759, where the Full Court showed a preference for assessing the s 75(2) factors in dollar terms rather than percentage terms. After a 27-year marriage, the husband's contributions-based entitlements were 57.5% and the wife's were 42.5%, a discrepancy of about $300,000. The Full Court made a $150,000 adjustment in the wife's favour, which it noted was 7.5% — meaning the property was equally divided between the parties. The Full Court said at [169]):

> "In our view, s 79(4)(e) requires those matters to be taken into account in arriving at orders that are just and equitable as between the parties. In arriving at an appropriate assessment for those factors, a dollar value of it should be uppermost in our minds and, of course, the ultimate disparity in entitlements which it might produce. That dollar value is, in turn, dependent upon the value of the interests in property of the parties".

Footnotes

8 See also *Hickey & Hickey* (2003) FLC ¶93-143 at p 78,393; referring to *Lee Steere & Lee Steere* (1985) FLC ¶91-626; *Ferraro & Ferraro* (1993) FLC ¶92-335; *Davut & Raif* (1994) FLC ¶92-503; *Prpic & Prpic* (1995) FLC ¶92-574; *Clauson & Clauson* (1995) FLC ¶92-595; *Townsend* v *Townsend* (1995) FLC ¶92-569; *Biltoft & Biltoft* (1995) FLC ¶92-614;

McLay & McLay (1996) FLC ¶92-667; *JEL & DDF* (2001) FLC ¶93-075; *Phillips* v *Phillips* (2002) FLC ¶93-104. Whether the fourth step is a distinct step in the reasoning process, or a point of more general consideration of the actual impact of the outcome, is a matter of some debate: see *OSF & OJK* (2004) FLC ¶93-191. However, this matters little on a practical level.

9 *Omacini & Omacini* (2005) FLC ¶93-218 at p 79,619.

10 *Standford & Standford* [2012] HCA 52 at [37]–[38], [40].

11 For example *Alexiou & Alexiou* [2012] FamCA 1146, per Le Poer Trench J; *Newman & Newman* [2013] FamCA 376 per Watts J.

12 *Gaucho & Gaucho* [2013] FamCA 120 per Cronin J; *Watson & Ling* [2013] FamCA 57 per Murphy J.

¶13-043 Reliance on previous cases

In cases like *Fields & Smith* (2015) FLC 93-636, the Full Court seemed to confirm that earlier cases could not be relied on as a guide to decision-making. Bryant CJ and Ainslie-Wallace J said [at 117], in relation to the use by the trial judge of a table of comparative cases prepared by one of the counsel:

> "The problem with the table is that it gives no indication of the relevant facts in the particular cases . . . With all due respect to his Honour, the table can only form the glibbest of comparisons, and although it may be a seductive tool, it cannot illuminate the valuing and weighing of contributions in this particular case and carries with it the danger, if relied upon, of detracting from the individual requirement to make orders that are just and equitable

in an individual case".

Bryant CJ and Ainslie-Wallace J considered that the apparent reliance on the table by the trial judge may have led him into error and acted as a fetter to the exercise of his discretion. The third member of the bench, May J, also allowed the appeal. In her judgment, she did not refer to the offending table, but was critical of the trial judge for ignoring the wife's post-separation contributions.

The High Court in *Norbis v Norbis* (1986) FLC 91-712 at 75,174 referred to "arbitrary and capricious decision-making" per Mason and Deane JJ.

The reference to "arbitrary and capricious decision-making" in *Norbis* was echoed by the High Court majority in *Stanford & Stanford* (2012) FLC 93-518 which referred to the risk of "palm tree justice" and said that the court has a wide discretion, but that it must be exercised in accordance with legal principles laid down in the *Family Law Act 1975.*

In *Wallis & Manning* (2017) FLC 93-754, although not suggesting that *Fields & Smith* dictated that comparable cases could not be relied upon, Thackray, Ainslie-Wallace and Murphy JJ relied on *Norbis* and said [at 67 to 68]:

> "While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often, be used so as to inform, relevantly, the assessment of contributions within s 79 . . . .
>
> The word 'comparable' is used advisedly. The search is not for 'some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made'. Nor is it a search for the 'right' or 'correct' result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability — for 'what has been done in other (more or less) comparable cases' — with consistency as its aim".

The Full Court analysed a number of cases at length and compared factors such as the length of the relationship, and the nature, form and characteristics of the contributions made by the parties, including the timing of contributions.

In *Anson & Meek* [2017] FamCAFC 257; FLC ¶93-816, the Full Court was critical of the process undertaken by the trial judge in looking at comparable cases. After quoting from *Wallis & Manning* (2017) FLC ¶93-759, they went on to say (at [158] and [179]:

> "In our opinion, the fact that two different judges acting upon the same evidence may properly reach different conclusions greatly diminishes the value of comparable cases. This is especially so in this jurisdiction where there is almost an infinite variation in the rich factual detail that attend both parenting and property cases. The concern is amplified when the Court is proffered just a selection of cases said to be comparable as opposed to an analysis of **all** cases that could be said to be comparable . . .
>
> In any event, we do not accept that a trial judge, or indeed an appeals court, is obliged to trawl through a slew of cases cited to them as comparable cases so as to identify a list of factual similarities and differences and then weigh these against the facts in the immediate matter so as to determine whether they are, in fact, 'comparable'. Such an approach is contrary to authority and an unjustifiable burden on trial judges".

Justice Murphy, in a partial dissent, concluded that her Honour erred in assessing contributions, for failing to account for post-separation contributions, contributions by the husband relevant to the increase in value of property, and comparable cases. He said (at [113]):

> "Her Honour's reasons do not reveal any consideration at all of the factors within those cases which *favoured* comparability with the facts before her. I am unable to see where her Honour gave any explicit reasons for rejecting what was submitted to her as matters of genuine comparability".

¶13-045 Competing approaches to property division

There are two possible judicial approaches to the assessment of the entitlement of the parties to property under the *Family Law Act 1975* (FLA) — the global approach and the asset-by-asset approach.

- The global approach involves the division of the parties' assets on

an overall proportion of the global view of the total assets.

- The asset-by-asset approach involves a determination of the parties' interests in individual items of property.

The High Court has held that either approach is legitimate and that there is no binding principle of law controlling the exercise of discretion in the division of property — refer to *Norbis* v *Norbis* (1986) FLC ¶91-712.

However, the global approach is the most popular approach. Cases in which the asset-by-asset approach has been adopted include:

1. Where the marriage was of a short duration and during the marriage, the parties strictly divided and kept their own assets separate from each other. See, for example, *McMahon & McMahon* (1995) FLC ¶92-606. However, in *Zagari & Habib* [2010] FamCAFC 159 the Full Court said that there was no general principle that an asset-by-asset approach must be adopted in short relationships. In the particular circumstances of *McMahon*, it was appropriate. Applying the asset-by-asset approach to long relationships, even if they have kept their assets separate, is rare. For an example, where an asset-by-asset approach was taken in a 10-year relationship, see *Elford & Elford* (2016) FLC ¶93-695.

2. Where assets were divided informally at separation and there was a long delay between separation and proceedings particularly where one or both parties have built up significant assets after separation. See the comments of Finn J in *Zalewski & Zalewski* (2005) FLC ¶93-241 at [42] and the Full Court in *Polonius & York* [2010] FamCAFC 228 at [92] and [93].

3. Where there was a pension in the payment phase. In *McKinnon & McKinnon* (2005) FLC ¶93-242, Coleman J preferred the asset-by-asset approach as the husband had a pension in the payment phase. His Honour isolated the pension, which could not be converted into a lump sum, in its own separate "pool" of assets. In *Hayton & Bendle* [2010] FamCA 592, Murphy J took a similar

approach to a prospective pension.

In *Lane & Wharton* [2010] FamCA 18, Watts J looked at both approaches but preferred the global approach as he probably could not assume, as he had in the asset-by-asset analysis preferred by the husband, that one of the pools had been sourced by the husband without the assistance of the wife. Another strong argument for adopting a global approach was (at [237]):

> "the fate of what has happened to the real estate in Australia as opposed to the real estate in the United States means that the fact that the wife is ascribed a 90% contribution to the Australian property and an 80% contribution to the American properties leads to an inaccurate analysis. In this case there was a substantial intermingling of the wife's money into ventures undertaken by the husband in the United States".

Examples

***Stiller & Power* [2011] FMCAfam 996**

The parties had an unusual marriage. Baumann FM described their 20-year marriage (at [2] and [3]) as:

> "An unusual somewhat ambivalent relationship which seemed more to exist on weekly social outings and dinners and regular luxury holidays. There is an issue about whether the parties really lived very often as 'man and wife'. There is an issue about how they may have supported each other financially".

The husband's net assets had shrunk to about $315,000 and the wife's were totally unencumbered, and had swelled to just under $4m. The husband sought that the wife pay him $1.9m and the wife sought the husband pay her $84,000. They were both aged 74, having married at age 53.

Baumann FM adopted an asset-by-asset approach because:

a. Although a long marriage, the parties at best lived together for only most weekends and holidays. Despite being retired from 1993, the husband did not take up occupation in the wife's home permanently. The wife continued to operate her business in Brisbane, and they lived separately on week days.

b. The pernickety manner in which both parties delivered invoices to each other for works and goods.

c. The lack of accumulation of any substantial joint property. The husband's purchase of jewellery and souvenirs was irrelevant.

d. The husband did not claim to have made any significant direct financial

contribution to the wife's assets. He may have occasionally been a confidant in respect of the wife's business decisions. There was nothing to show the wife took his advice. The husband acknowledged the wife generally did her things her way.

e. The only possible "*joint asset*" during the entirety of the long relationship was a boat. That "joint" ownership lasted for a short period and the husband did much better out of the deal than the wife.

f. There was no evidence of "*pooling*" income. They lived separate lives, maintained separate bank accounts, and made financial decisions solely. They shared expenses (regular dining, social activities, shows, etc) but this was more compatible with a relationship between occasional companions than devoted partners.

***Scrymegeour & Scrymegeour* [2014] FamCAFC 130**

The Full Court of the Family Court upheld an appeal where the parties agreed to adopt a two-pool approach and the trial judge assured the parties that she would adopt that approach. However, the trial judge adopted a one-pool approach and gave no reasons for doing so.

The Full Court considered that by adopting a single-pool approach, the trial judge:

- failed to give any consideration to the husband's post-separation contributions to his superannuation interest which increased by about $246,000 in the two years between separation and the time of the trial, and

- made an order which resulted in the husband receiving no non-superannuation assets, having to liquidate every asset he owned and he would still be left with debt of over $27,000 to satisfy the wife's entitlements. This was not an outcome which was either just or equitable.

***Bevis & Bevis* [2014] FamCAFC 147**

The Full Court upheld the trial judge's use of three pools, being the equity in the husband's home unit acquired from a post-separation inheritance, the balance of the non-superannuation, and the parties' superannuation.

***Marcon & Cussen* [2017] FamCAFC 150; (2017) FLC ¶93-802**

The Full Court of the Family Court referred to and quoted favourably from *Calder & Calder* (2016) FLC ¶93-691, where the Full Court had rejected the argument that it was obligatory for the trial judge to advise the parties that they intended to adopt a two-pool approach where both parties had taken a global view. In *Calder*, the issue of a denial of natural justice only came into play where the trial judge's approach led to an outcome outside the parameters of the competing claims. In *Marcon & Cussen*, the Full Court distinguished *Calder* because the trial judge in that case failed to give the wife the opportunity to make submissions on the contributions and how they were to be recognised in relation to the two pools.

¶13-047 Interim property orders

Interim property orders must be distinguished from final property orders. A party may need to seek both. In *Harris & Harris* (1993) FLC ¶92-378, the Full Court was dealing with the court's power to make "interim" or, as it preferred to call them, "partial" orders. It said that the following matters need to be considered (pp 79,929–79,930):

> "(1) The exercise of the power should be confined to cases where the circumstances presented at that time are compelling. As a generality, the interests of the parties and the Court are better served by there being one final hearing of s 79 proceedings. However, circumstances may arise before there can be a final hearing which dictate that some part of the property of the parties should be the subject of orders.
>
> (2) It is an exercise of the s 79 power. Consequently it must be performed within those parameters. Since it is not the final hearing the Judge is unlikely to have the final findings, but the exercise must fall within that general framework and the material available at that time.
>
> (3) Of necessity it is likely to be a somewhat imprecise exercise. Consequently, it must be exercised conservatively and the Judge must be satisfied that the remaining property will be adequate to meet the legitimate expectations of both parties at the final hearing, or that the order which is contemplated is capable of being reversed or adjusted if it is subsequently considered necessary to do so. It is for this reason that we doubt whether the distinction which Nygh J drew between interim and partial orders is necessary or desirable".

Harris was partially overruled by the Full Court in *Strahan & Strahan* (2011) FLC ¶93-460. The Full Court rejected the first consideration, saying (at [132]):

> ". . . It is not necessary to establish compelling circumstances. All that is required is that in the circumstances it is appropriate to exercise the power. In exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s 79 is a

> once and for all order made after a final hearing".

The Full Court in *Strahan* agreed with the Full Court in *Gabel & Yardley* (2008) FLC ¶93-386 that the interim order must be capable of variation or reversal without resorting to s 79A of the *Family Law Act 1975* or an appeal. It also said (at [139]):

> "We also emphasise that in order to establish an appropriate case for an interim property settlement order more is required than the mere fact that upon a final hearing the applicant would receive the property being sought (or an amount in excess of the funds being sought) from the other party".

This is known as the ability to "claw back" or the "claw back issue". As the Full Court said in *Zschokke & Zschokke* (1996) FLC ¶92-693 (at p 83,220):

> "Given these real uncertainties concerning the outcome of the wife's property settlement claim, we consider that the order that the wife seeks in these proceedings could not be made pursuant to the provisions of s 80(1)(h) for the reason that the eventual property settlement entitlement of the wife may well not be large enough to permit the monies advanced under the s 80(1)(h) order to be satisfactory or justly taken into account in the final settlement".

The Full Court majority in *Kyriakos & Kyriakos* (2013) FLC ¶93-525 (at [37]) referred to the "common practice . . . when making an interim litigation funding order to provide that the final categorisation of funds provided pursuant to the order is to be determined at the final trial of the matter for which the funding was provided. However, such a provision does not negate the requirement to identify the source of power which is relied on for the making of the interim order (even though the nature of, or basis for, the interim order may later be changed)".

The need to identify the source of power was particularly important in *Kyriakos* as the interim litigation funding order was being sought against a third party, the husband's father. The husband's father conceded that an order could be made against him as a third party

under the court's power, but the relevant matters in s 117(2A) *Family Law Act 1975* (Cth) (FLA) were not considered by the Federal Magistrate.

In *Medlow & Medlow* (2016) FLC ¶93-692, the Full Court upheld interim orders which did not identify the source of power. It was apparent that the court had the power to make the orders pursuant to s 79 and 80(1)(h) and some pursuant to s 66L, 72 and 74.

Example

***Levy & Prain* [2012] FamCAFC 92**

The Full Court heard the wife's appeal against an order that she pay to the husband's solicitors' trust account the sum of $250,000 by way of litigation funding. Her primary arguments were her capacity to pay and that the funds paid could not be clawed back if the husband received less than $250,000 at the final hearing of his s 79 claim. The inconsistencies between her tax returns, which indicated a loan account with the Levy Trust of $25m, and her statements to the court that her net worth was only about $230,000, strengthened the husband's case for a forensic report as to the wife's wealth.

The wife's own evidence was that she had been provided with substantial funds by family members and their entities over a lengthy period of time. There was no evidence that these benefits would cease if her loan account was drawn down by $250,000.

In relation to the claw-back issue, the wife's case was that the trial judge could not have confidence that the husband would be awarded $250,000 in the s 79 proceedings but nothing established that the trial judge should have found that the husband would not, or was unlikely to be awarded less than that sum. The Full Court found the trial judge's approach was consistent with *Zschokke & Zschokke* (1996) FLC ¶92-693 saying (at [70]):

> "The trial Judge's decision was consistent with that approach. As we have earlier recorded, nothing to which we have been referred establishes that the husband is 'likely' to receive by way of final property settlement a sum which is less than 'sufficient to cover the advance' accorded by the trial Judge. The trial Judge did not, and could not, find that the husband was 'likely' to receive at least $250,000 by way of final property settlement, nor did her Honour

need to before making the order the husband sought".

IS IT "JUST AND EQUITABLE" TO MAKE AN ORDER?

¶13-048 Just and equitable

The court cannot make a property settlement order under s 79 or s 90SM unless it is satisfied that, in all the circumstances, it is just and equitable to make the order (s 79(2) or s 90SM(3)). In *Mallet* v *Mallet* (1984) 156 CLR 605, Gibbs CJ said at p 608–9 "[i]t is necessary for the court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of a particular case".

Prior to *Stanford & Stanford* (2012) FLC ¶93-518, whether an order was just and equitable was determined after the court had considered all matters under the first three steps in determining a property settlement (identify the property, assess contributions and assess s 75(2) or s 90SF(4) factors). The overriding caveat was that the court could not make an order unless it was satisfied that, in all the circumstances, it was just and equitable to make the order (s 79(2) or s 90SM(3)). In a string of Full Court cases, including *Hickey & Hickey* (2003) FLC ¶93-143, s 79(2) was generally considered to be an identifiable fourth step.

More recently in *Stanford & Stanford* (2012) FLC ¶93-518, the High Court provided its views on the proper approach to determining an application under s 79. The High Court majority emphasised that it is important to read and apply the FLA. In particular, the High Court warned against conflating the requirements of s 79(2) and 79(4) and highlighted that on the correct interpretation of the FLA, the court must consider whether it is just and equitable to make the order before looking at s 79(4), rather than considering whether the order is just and equitable as a "fourth step".

The Family Court considered the application of the decision of *Stanford & Stanford* (2012) FLC ¶93-518 in *Watson & Ling* (2013) FLC

¶93-527. Murphy J was of the view that while the principles enunciated in *Stanford* pertain to s 79, and 79(8) in particular, they should, in his view, be held to be equally applicable to s 90SM(3), and 90SM(8) in particular.

Following *Stanford*, it must be just and equitable to make an order. However, the extent to which the courts must consider that the terms of the order itself are just and equitable or even to expressly make a determination that it is just and equitable to make any order is not resolved. Strickland and Murphy JJ in the Full Court of the Family Court held that the order was required to be just and equitable in *Chapman & Chapman* (2014) FLC ¶93-592. The formulation of all three judges was similar to the so-called "fourth step" under *Hickey*. Bryant CJ said (at [40]):

> "In addition, and important to the arguments in this appeal, a trial judge is obliged to '. . . consider the effect of the findings as to contribution on the respective positions of the parties, before proceeding to determine whether any adjustment was warranted pursuant to section 75(2)' (*Wills & Wills* [2007] FamCA 819, at [50]). In that respect, the nature and form of the property or superannuation interests comprising a party's entitlement, and not just the dollar value of that entitlements are clearly central to achieving justice and equity as s 79 requires".

Earlier, Bryant CJ said in relation to interpreting the Full Court's interpretation of *Stanford* in *Bevan & Bevan* (2013) FLC ¶93-545 (at [9]):

> "that it is not a requirement to take account of the matters in s 79(4) when considering the question of whether it is just and equitable to make any order under s 79(2). But as long as they are seen as separate and not conflated, the factors in s 79(4) have the potential to inform the decision under s 79(2), along with all other relevant considerations".

Strickland and Murphy JJ expressly said that if the majority in *Bevan* "intended that a consideration of the s 79(4) matters is mandatory in answering the s 79(2) question, we respectfully disagree" [at 25].

The asset pool after a 20-year marriage was $3.67m of which the superannuation was about $2.1m. Of the superannuation, the husband's interest in a self-managed superannuation fund, of which he was the only beneficiary, was about $1.99m. He was entitled to a tax-free weekly pension which was, at the time of trial, about $3,000 per week. The wife had superannuation of about $100,000.

In addition to the $3.67m to be divided between the parties, each of the parties had earlier received a payment from the net proceeds of sale of the former matrimonial home of $1m each.

The trial judge declined to make an order splitting the husband's superannuation and divided the available cash as to 86% to the wife (about $1.4m) and 14% (about $230,000) to the husband.

Strickland and Murphy JJ said (and Bryant CJ agreed with them) that the husband's tax-free pension emanating from a superannuation fund, derived in the parties' 20-year marriage was "an extremely important factor" [at 66]. This was particularly the case when the wife was in her fifties and had a limited capacity for remunerative employment and would need to predominantly meet her future needs from income derived from property she received in the property settlement. Strickland and Murphy JJ said that at least one of the three judges may have given this factor more weight than the trial judge. They considered the case to be "close to the point at which an appellate court would interfere with a trial judge's discretion" [at 67] but could not say that the trial judge's decision was ultimately wrong.

In *Bevan & Bevan* (2014) FLC ¶93-572, the Full Court discussed the High Court's decision in *Stanford* to the extent that it was relevant to the appeal and a number of judgments of the Full Court of the Family Court in which the court had discussed the "four step process". It noted that the High Court in *Stanford* had neither approved nor disapproved of that process and that the decision served to refocus attention on the obligation not to make an order adjusting property interests unless it was just and equitable to do so.

The Full Court of the Family Court reviewed *Bevan* and *Stanford* in *Chapman & Chapman* (2014) FLC ¶93-592. Strickland and Murphy JJ said that if the Full Court in *Bevan & Bevan* (2013) FLC ¶93-545

intended to say that considering the s 79(4) matters was mandatory in answering the s 79(2) question, they disagreed. Bryant CJ said she agreed with Strickland and Murphy JJ that considering the s 79(4) factors was not a requirement, but did not believe that the Full Court said in *Bevan* that it was. Bryant CJ said (at [5]) "that it would be inappropriate to limit the wide discretion conferred by s 79(2) by requiring the court to **ignore** the matters referred to s 79(4) . . . because the matters . . . would be likely to embrace much of the factual substratum on which any exercise of discretion would be based".

However, Strickland and Murphy JJ appeared to take a different view to Bryant CJ. They pointed to statements from *Stanford* where the High Court suggested that s 79(4) matters were not relevant to the s 79(2) question (in [26]):

- "The '. . . range of potentially competing considerations' and the consequent impossibility of charting the 'metes and bounds' of what is just and equitable (at [36]);

- The ready satisfaction of the s 79(2) requirement in 'many cases' by the fact of separation (at [42]);

- The statement that 'it will be just and equitable' to make an order in 'many cases' by reason of the '. . . choice made by one or both of the parties . . .' to end the marriage (at [42]);

- Equally, the statement that 'it will be just and equitable' to make an order 'in many cases' because '. . . there is not and will not thereafter be the common use of property by the husband and wife' (at [42], emphasis in original);

- The reiteration that: '. . . nothing in these reasons should be understood as attempting to chart the metes and bounds of what is "just and equitable"' (at [46]); and

- The further reiteration that nothing in their Honours' reasons is '. . . intended to deny the importance of considering any countervailing factors which may bear upon what, in all the

> circumstances of the particular case, is just and equitable' (at [46])".

They noted (at [27]) that "crucially" the High Court did not take into account the matters in s 79(4) and [51] of its judgment "suggests they eschewed those s 79(4) matters relating to contribution". If parties concede that the making of an order is just and equitable, this does not relieve the court from considering s 79(2) but might truncate the process.

In *Chapman & Chapman* (2014) FLC ¶93-592, the Full Court said that the court may be able to infer that the s 79(2) requirement was satisfied, although the Full Court did not suggest that the question could be ignored by the court if the parties did not raise it. At trial, as neither party raised any issue in respect of s 79(2), the Full Court said the parties must therefore be implicitly conceding that the making of a s 79 order was just and equitable. The Full Court confirmed that the court still needed to address the issue and said (at [29]):

> "Of course, while those factors might truncate a trial judge's consideration of the subsection, they do not relieve it; a trial judge must decide for him or herself that justice and equity requires an order to be made".

The trial judge expressly considered the justice and equity of making an order in a short, but entirely correct, statement. The Full Court considered that the circumstances of the case, and the manner in which the parties conducted their respective cases, made further exposition unnecessary. So, despite the Full Court suggesting in *Bevan & Bevan* (2013) FLC ¶93-545 that the question raised by s 79(2) could be approved implicitly, this did not occur in *Chapman*.

In *Hearne & Hearne* [2015] FamCAFC 178, the Full Court agreed that s 79(2) did not need to be expressly addressed.

The result in *Hearne* seems to have been driven by practicalities rather than strict compliance with *Stanford*. As the husband was not arguing that it was not just and equitable to seek an order, the Full Court said that he could not criticise the trial judge for not making that finding. This seems to be a misinterpretation of *Stanford*. A positive

obligation is imposed on a trial judge to determine that it is just and equitable to make an order. The Full Court of the Family Court in *Bevan* said that such a finding could be implied from the trial judge's reasons. This is not what *Stanford* says, and in *Hearne*, the trial judge was considering justice and equity in an entirely different context from s 79(2).

The Full Court of the Family Court has held that it can be appropriate to address the s 79(2) question by distinguishing between individual assets, although it said that in the vast majority of cases, it is appropriate not to do so (*Zaruba & Zaruba* (2017) FLC 93-776).

Examples

***Farina & Naima (No 2)* [2017] FamCA 540**

The parties first met over the internet and later met in person during a 10-day holiday. The respondent became pregnant. The conception was unplanned. Following the birth of the child, the parties lived together on nine separate occasions for periods of between 13 days and five months and one week, being a total of about 16 months over almost four years.

The court found that it was not just and equitable to make an order. The applicant had made no contributions to the respondent's financial situation, her earning capacity, her property or her financial resources. He paid very limited child support and this was not likely to change. By contrast, the respondent had contributed to the applicant's earning capacity by supporting his application to obtain the right to live and work in Australia.

***Paxton & Paxton* [2016] FCCA 1689**

The husband died before the trial. The parties were married for 31 years, but were separated under the one roof after approximately 17 years of marriage. They lived apart for 10 years before their divorce. The former matrimonial home was still in the joint names of the parties at the time of trial. Under the Victorian law of survivorship, the wife was entitled to be registered as the sole proprietor.

There were significant s 75(2) factors in favour of the wife in relation to her own health and the health of the adult children of the marriage.

Watson J considered s 79(2) to be a threshold question and found that it was not just and equitable to make a s 79 order. At the date of the trial, the wife held 100% of the legal interest in the former matrimonial home by reason of her status as the sole surviving joint proprietor. The husband had no equitable interest in the former matrimonial home as at the date of his death.

***Maine & Maine* [2016] FamCAFC 270**

The parties reached an informal agreement, four years after separation, to convey the joint ownership of the home into the sole name of the wife. The husband filed his s 79 application six years later. The Full Court found that there was no implicit or express finding that it was just and equitable to make an order. As the wife argued that s 79(2)

was engaged so as to render it unjust and inequitable to make any s 79 order, the circumstances did not admit the "ready satisfaction" of the s 79(2) requirement referred to in *Stanford & Stanford* (2012) FLC ¶93-518. The trial judge also appeared to conflate s 79(4) and 79(2). The case was remitted for re-trial.

***Trang & Kingsley* [2017] FamCAFC 120; (2017) FLC ¶93-786**

The Full Court upheld the trial judge's determination that it was not just and equitable to alter the property interests of the husband. The trial judge found that the wife had failed to make full and frank disclosure of her financial circumstances and that he was unable to identify and value her property interests including interests in real property in another country. The trial judge also found that shortly prior to separation and in the two years since separation, the wife had disposed of more than $250,000. In addition, she had the benefit of a $70,000 partial property settlement.

***Newbury & Perrill* [2017] FCCA 1490; *Haight & Balog* [2017] FCCA 1192**

It was held to be not just and equitable to alter the legal and equitable interests of the parties in relationships of between three and five years where the parties maintained largely separate finances.

***Horrigan & Jennings* (2018) FLC 93-868**

The parties had a formal property settlement which was later set aside because the court found there was no jurisdiction. The transactions which occurred pursuant to those orders were not undone. Jurisdiction was then conceded. The Full Court upheld the trial judge's finding that it was not just and equitable to make any order for property adjustment, saying (at [49]):

> "The submission that there is a requirement to consider the matters in s 90SM(4) and evaluate them in the determination of s 90SM(3) is misconceived".

***Innis & Wentworth* [2018] FamCA 45**

The parties were separated for more than 15 years. The husband did not seek a formal property settlement until the wife filed for divorce. The parties maintained a degree of financial independence during the marriage. After separation, their arrangements were even more independent. Although the parties lent each other money, they were commercial transactions. There was no joint property. After separation, the husband sold a property he owned and spent about $250,000 sailing around the world for four years from March 2013. He took his member account from the parties' self-managed superannuation fund and spent it. There was no suggestion that the husband consulted with the wife regarding these financial decisions.

Justice Cronin found (at [99]):

> "There were express assumptions by the wife that not only was her property exclusively hers but also that she would not face a claim by the husband for any share of that property. It is more difficult to objectively assess what the husband had assumed . . . [but] I find however that when his evidence is take as a whole, he could not reasonably have been able to assume that he would one day share in the property acquired by the wife".

Justice Cronin (at [104]) accepted "that it is not mandatory to assess the findings in the light of s 79(4) of the Act but that consideration of them in some circumstances may assist". He indicated that even if he was wrong about whether it was just and equitable to alter the interests of the wife in her property, taking into account s 79(4), and

specifically s 79(4)(e), the husband would not be entitled to more than 15% of the total assets of the parties, which was his current holding.

IDENTIFYING AND VALUING THE PROPERTY

¶13-055 What is “property of the parties”?

The court needs to determine the nature and extent of the legal and equitable interests of the parties in property at the time that the court is making orders.[13] The phrase “property of the parties” appears in s 79(1)(a) *Family Law Act 1975* (Cth). The court may make such order as it considers appropriate “in the case of proceedings with respect to the property of the parties or either of them”.

The High Court in *Stanford* v *Stanford* (2012) FLC ¶93-518 said that the court may, under s 79(1), make an order “altering the interests of the parties to the marriage in the property”. This makes sense as interests can only be “altered” if the court has first determined what those interests are.

A number of general propositions apply to “property of the parties”:

1. The extent and value of the property of the parties will usually be considered as at the date of the hearing.[14]

2. There is no distinction between “business” or “matrimonial” property,[15] or other categories.[16]

3. All property of the parties must be considered.[17]

4. Some property, such as a post-separation inheritance, may be “quarantined” and not divided between the parties, but only after contributions and s 75(2) factors have been considered — eg *Bishop & Bishop* (2013) FLC ¶93-553.

5. While the date and manner of acquisition of property will be a relevant consideration, the property must nonetheless be included in the court’s consideration regardless of when it was acquired.[18]

Importantly, the power under s 79 and 90SM of the FLA is limited to the available property. The Full Court, in *Milankov & Milankov*,[19] stated that ". . . the court cannot make an order for the alteration of property interests that extends beyond the available assets of the parties . . . However, this restriction does not require the court to be able to clearly identify those assets". Following *Stanford & Stanford* (2012) FLC ¶93-518, a number of cases (see ¶13-200) have expressed doubt as to whether add-backs can be used to create notional property, but there appears to now be an acceptance that, although notional property or add-backs are not legal or equitable interests, they can be dealt with under s 79(4) or s 75(2)(o) if appropriate.

Income is not property. An order was made in *Marchant & Marchant* (2012) FLC 93-520 under s 79 utilising the s 80(1)(h) power which was held by the Full Court to be beyond that power. The subject matter of the order was income which was not "property" within s 79, and therefore, the order did not alter the interests of the parties in property. The order required that the husband pay to the wife the sum of $11,500 on or before the 30th day of each month being half of his personal income derived from joint assets and holdings.

A property settlement order cannot "create" property (eg *Walters & Walters* (1986) FLC 91-733 and *Tallant & Tallant* (2017) FLC ¶93-789).

In *Porter & Porter and Ors (No 2)* [2018] FamCA 497, a property settlement order made by consent required the husband to borrow $1.5m to purchase a home for the wife and make the mortgage payments for 10 years. The husband later became bankrupt and the trustee in bankruptcy sought to set the order aside under s 79A FLA. The trustee was unsuccessful. The Full Court held (at [32]):

> "Given in this case the husband had $2 million in net assets, the provision to in effect pay to the wife $1.5 million on the basis the husband kept all the other substantial assets is not a creation of new property. The fact that that payment was to be made over a ten year period is neither here nor there. Accordingly, it cannot be said that funds which were not in existence prior to the order but

came into existence as a result of a borrowing, created new property in this case".

The trustee's s 79A application on other grounds remained extant.

Particular categories of property are discussed at ¶13-070 and following.

Footnotes

13 Under s 79 and 90SM, while a court has to determine the parties' legal and equitable interests in the property, this is done as the basis for considering whether it is just and equitable to alter those interests by way of transfer or settlement: *Burgoyne & Burgoyne* (1978) FLC ¶90-467 at p 77,393; *Stanford* v *Stanford* (2012) FLC ¶93-518.

14 *Omacini & Omacini* (2005) FLC ¶93-218 at p 79,620. In some cases the court may consider the property at an earlier date, if the justice of the case requires this. However, this is rare, as the court must consider the contributions of the parties, including their contributions after separation.

15 *Napthali & Napthali* (1989) FLC ¶92-021.

16 In *Lee Steere & Lee Steere* (1985) FLC ¶91-626, the Full Court made it clear that farming properties were taken into account in the same way as any other property. In *Bonnici & Bonnici* (1992) FLC ¶92-272, an inheritance was included in the pool. See also *Pastrikos & Pastrikos* (1980) FLC ¶90-897; *Albany & Albany* (1980) FLC ¶90-905.

17 *Carter & Carter* (1981) FLC ¶91-061 at p 76,489.

18 In *Farmer & Bramley* (2000) FLC ¶93-060, a Lotto win that the husband received after separation was included in the pool, which consisted of little else. The wife's non-financial

contributions before the Lotto money was received resulted in her receiving a share of the pool (effectively a share of the Lotto money).

19 *Milankov & Milankov* (2002) FLC ¶93-095.

PROPERTY OR FINANCIAL RESOURCE?

¶13-060 Introduction

Property, such as a home or motor vehicle, is easily identified. However, other types of interests may be more difficult to categorise, such as the long service leave entitlements of an employee or the interests of a beneficiary of a trust. The term "property" is defined in s 4(1) of the *Family Law Act 1975* (Cth) (FLA):

> "(a) 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; or
>
> (b) in relation to the parties to a de facto relationship 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".

In *Duff & Duff*,[20] the Full Court said:

> "It seems unnecessary to attempt to set out a catalogue of what 'property' may include in the context of s 79. It is sufficient for the purposes of this case to say that 'property' means property both real and personal and includes choses in action".[21]

This section has been given a very broad reading by the courts. In *Holmes & Holmes*,[22] the Full Court concluded that a damages fund

held on trust for the sole benefit of the husband was “property” within the meaning of the FLA. In *Harris & Harris*,[23] the corpus of a trust was found to be “property” where the husband was both beneficiary and appointor of the trust with “complete and unfettered control” over the trust.[24]

In *Best & Best*,[25] the court found that an interest of a partner in a law firm was property even though it was not a transferable interest.

There is no doubt that the definition covers real and personal property in possession of a party. Similarly, it appears clear that it would cover a “chose in action” at law or in equity (eg a company share[26] or a bearer bond).

There is no specific test that adequately covers the great variety of property interests available in the modern world. For example, the fact that an interest is not transferable does not necessarily mean that it is outside the definition of “property” in the FLA.[27] Courts have consistently applied a broad practical test in determining what is property for the purpose of the FLA, bearing in mind the functions that must be carried out under s 79 and 90SM.

In *Stanford & Stanford* (2012) FLC ¶93-518, the High Court said (at [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”.

Importantly, the power under s 79 and 90SM is limited to the available property. Notional property or add-backs are controversial, see ¶13-200. The Full Court in *Milankov & Milankov*,[28] stated that:

> “The Court cannot make an order for the alteration of property interests that extends beyond the available assets of the parties . . . However, this restriction does not require the Court to be able to clearly identify those assets”.

Example

***In the Marriage of Mezzacappa & Mezzacappa* (1987) FLC ¶91-853**

In 1984, the husband had received various moneys totalling around $262,000. Part of this money had been accounted for ($60,000). No acceptable explanation was given for the balance (around $202,000). The balance of the funds was taken into account as part of the property pool, even though its location or precise amount could not be identified at the time of trial (1985), as a result of the non-disclosure by the husband.

It is therefore convenient to consider a number of categories that have arisen in the reported cases. However, it must be borne in mind that even if an interest or expectancy is not "property" it may nonetheless be taken into account as a "financial resource" of a party pursuant to s 75(2) or s 90SF(3). Unfortunately, except for superannuation, which due to s 90XC (formerly s 90MC) is able to be "treated" as property in s 79 and 90SM proceedings, a financial resource cannot be adjusted by orders under s 79 and 90SM. Financial resources are discussed at ¶14-170 in the Maintenance chapter.[29]

Footnotes

20 *Duff & Duff* (1977) FLC ¶90-217.

21 Ibid, at p 76,132.

22 *Holmes & Holmes* (1988) FLC ¶91-944.

23 *Harris & Harris* (1991) FLC ¶92-254.

24 Ibid, at p 78,706.

25 *Best & Best* (1993) FLC ¶92-418.

26 There is a specific power to order a company to register a share transfer: s 90AE(1)(d) FLA.

27 *Mullane* v *Mullane* (1983) FLC ¶91-303 at p 78,071; *Best*

& Best (1993) FLC ¶92-418.

28 *Milankov & Milankov* (2002) FLC ¶93-095.

29 See Chapter 19.

¶13-065 Legal and equitable interests

Section 79(1)(a) *Family Law Act 1975* (and s 90SM in relation to de facto couples) provides that:

> "the court may make such order as it considers appropriate . . . altering the interests of the parties to the marriage in the property".

The majority judgment of the High Court in *Stanford v Stanford* (2012) FLC ¶93-518 said (at [37]) that in considering an application under s 79, one of the three fundamental propositions which must not be obscured was:

> "First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order, by identifying, according to common law and equitable principles, the existing legal and equitable interests of the parties to the property".

A party must have legal or equitable interests in property for their interests to be altered.

Cases which have considered the meaning of legal and equitable interests include *Vadisanis & Vadisanis* (2014) FLC ¶93-593; *AC and Ors & VC and Anor* (2013) FLC ¶93-540; *Gabini & Gabini* [2014] FamCAFC 18; *Ebner & Pappas and Anor* (2014) FLC ¶93-618; *Trevi & Trevi* [2015] FamCA 123; *Reed & Reed; Grellman (Interverner)* (1990) FLC ¶92-105; *Carvill & Carvill* (1984) FLC ¶91-586 and *Norrish & Norrish; Rigoletto Nominees Pty Ltd (Intervener)*(1990) FLC ¶92-152.

In *Yavuz & Yavuz and Anor* (2017) FLC 93-771, there was no

challenge to the trial judge's acceptance of the approach that he had jurisdiction to determine the husband's brother's claim for $2,000,000 from the parties to the marriage as it was necessary to do so to identify the legal and equitable interests of the parties in property (at [10]).

The Full Court of the Family Court in *Comden Pty Ltd & Lane and Ors* (2018) FLC 93-840 relied upon *Stanford* in finding that the Family Court of Western Australia could exercise accrued jurisdiction and determine disputes as to the beneficial ownership of two real properties.

It must be borne in mind, as noted above, that even if an interest or expectancy is not "property", it may nonetheless be taken into account as a "financial resource" of a party pursuant to s 75(2) or s 90SF(3). Except for superannuation, which although a financial resource can be "treated" as property in s 79 and 90SM proceedings, a financial resource cannot be adjusted by orders under s 79 and 90SM. Financial resources are discussed at ¶13-060.

¶13-070 Real property

Real property must be taken into account, whether it is the home of the parties, business properties, or investment properties.[30] Often there will be registered mortgages which must be taken into account, which reduce the net value of the real property.

If a property's value increases as a result of rezoning, or other event not caused by either party, it remains part of the pool, and the increase "is simply a windfall and . . . neither party has any greater or lesser claim to the benefits of the windfall".[31]

In *Rickaby & Rickaby*,[32] an option to purchase land that was granted to the wife by her father was found to be property, even though it was not assignable. The valuation required consideration of the option price compared with the market value, and the cost of bridging finance to exercise the option.

In *Brennan & Brennan*; *Brennan & Howes*,[33] the husband's mother

gifted a property to him, subject to her having a right to occupy it for her life. The husband's interest was therefore the remainder, and taken into account in determining the pool. As with all unusual interests, care needed to be taken in assessing its value.

The Full Court explained the form of orders which should be made when real properties are to be sold in *Trask & Westlake* (2015) FLC ¶93-662. The orders made by the Full Court were more complex than the Family Law Courts usually make, using a mathematical formula to give a more precise percentage outcome.

Footnotes

30 *Napthali & Napthali* (1989) FLC ¶92-021; *Lee Steere & Lee Steere* (1985) FLC ¶91-626. The impact of *Stanford* v *Stanford* (2012) FLC ¶93-518 on this proposition has not yet been considered.

31 *Zappacosta & Zappacosta* (1976) FLC ¶90-089 at p 75,421.

32 *Rickaby & Rickaby* (1995) FLC ¶92-642.

33 *Brennan & Brennan*; *Brennan & Howes* (1991) FLC ¶92-229.

¶13-080 Goods and chattels

Motor vehicles, boats and caravans are commonly taken into account as part of the property pool. Jewellery is also commonly taken into account if it is worthwhile valuing it.[34] In many cases, furniture and items of personal property that are of little value are ignored. For example, in *M & M*,[35] jewellery was ignored by Brown FM as there was no evidence of its value and it was not thought to be significant in any event. Furniture is valued at its market value, not its insured value

or purchase price. Unless the parties have antiques, it is usually not cost effective to value it and argue about it. The court expects that parties will negotiate an in specie division, or agree on values and let the court deal with more major issues. There is an onus upon a party seeking to have chattels taken into account to produce evidence of their value (the valuation is discussed at ¶13-240).[36]

In some cases, keepsakes become significant because of their emotional value to the parties. While there is no monetary value in such items, they may nonetheless be divided and, in some cases, one party may be ordered to provide copies to the other (eg photos).

Footnotes

34 *Best & Best* (1993) FLC ¶92-418; *SL & EHL* [2005] FamCA 132 (per Warnick J); *Kennon* v *Kennon* (1997) FLC ¶92-757; *De Angelis & De Angelis* (2003) FLC ¶93-133; *Antmann & Antmann* (1980) FLC ¶90-908.

35 *M & M* [2006] FMCAfam 424.

36 *Khademollah & Khademollah* (2000) FLC ¶93-050.

¶13-090 Money owing to the parties

Money owed to a party is considered property. A debt is capable of being assigned by the creditor to another person. Money owed to the parties may be in the form of accounts receivable by a business, and form part of the business valuation. Money owed to a party, by a friend or family member, is part of the property pool.

In *Cunningham & Cunningham*,[37] the husband had operated the business of the parties after separation. The profits had been distributed equally between the parties, according to the books of the business. Thus, the wife's loan account was in credit at over

$114,000. The court ordered that the husband (who had retained the business) pay the wife the sum owing according to the loan account.

Footnotes

37 *Cunningham & Cunningham* (2005) FLC ¶93-212.

¶13-100 Business interests

While businesses are regularly discussed as though they have a separate legal identity from the parties, this is not always the case. Where a business is operated by a company, the company is a separate legal entity. Shares, even in a family company, are within the meaning of "property".[38] The law relating to companies in family law matters is discussed in Chapter 16.

Where the business is operated by a partnership, the interest in the partnership is "property".[39] The extent of that interest will depend upon the value of the partnership, and the terms of the partnership agreement. In *Best & Best*,[40] a partnership interest that was assignable (although subject to significant restrictions on assignment) was found to be property. The Full Court made it clear that assignability was not an essential quality of property. By contrast, a partnership interest that was not assignable was found not to be "property", and this was upheld by the Full Court in *B & B (No 2)*.[41]

Where the business is simply carried on by the parties in their own names or by one of them as a sole trader, it will be their property, if it has any value. Some businesses are saleable, such as a restaurant, and others are not (such as a barrister's practice). It will generally be important to take steps quickly after separation to preserve business assets and any goodwill.

Footnotes

38 *Duff & Duff* (1977) FLC ¶90-217.

39 *Miller & Miller* (1977) FLC ¶90-326 at p 76,514.

40 *Best & Best* (1993) FLC ¶92-418.

41 *B & B (No 2)* (2000) FLC ¶93-031.

¶13-110 Licences, permits and professional qualifications

Licences and permits that may be sold or transferred will usually be "property" under the *Family Law Act 1975* (Cth): for example, a taxi licence is property.[42] Licences to practise as a professional or tradesman (a doctor's or nurse's registration, lawyer's practising certificate, truck driving licence, etc) have never been considered property in Australia. Thus, a licence to work as a taxi driver is not property, but a licence to operate a taxi is property.

Footnotes

42 *Townsend* v *Townsend* (1995) FLC ¶92-569; *Kimber & Kimber* (1981) FLC ¶91-085.

¶13-120 Property outside of Australia

The power to adjust property interests under the *Family Law Act 1975* (Cth) operates *in personam*, not *in rem* (ie against the parties personally, not directly against the property itself).[43] There is no absolute impediment to taking foreign property into account, or making orders that the parties transfer or sell that property provided the Family Law Court first decides it can exercise jurisdiction which

requires that the *forum non conveniens* test be satisfied.[44]

The next difficulty will be making sure that the orders are enforceable. If the person who has to transfer or sell the property is in Australia, or is receiving something contemporaneously with the transfer or sale, this is usually able to be overcome. For example, in *Van Der Kreek & Van Der Kreek*,[45] the Full Court upheld a judgment dealing with property in Papua New Guinea.[46]

If all or most of the parties' property is outside Australia, there may be a dispute as to whether or not Australia is a "clearly inappropriate forum", and whether Australian proceedings should be stayed in favour of proceedings in another country. See ¶1-130.

Example

***Chen & Tan* [2012] FamCA 225**

Both parties were Taiwanese nationals although the husband had dual Taiwanese–Australian citizenship and they conducted the entirety of their relationship in Taiwan. The wife sought that the Family Court of Australia exercise jurisdiction primarily because the vast majority of the husband's considerable wealth was in Australia. The husband had issued proceedings in Taiwan. Kent J dismissed the husband's application to permanently stay the wife's proceedings, finding that Australia was not a clearly inappropriate forum.

Footnotes

43 *Hickey & Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143 at p 78,389; *Wilkinson & Wilkinson* (2005) FLC ¶93-222 at 79,683; [2005] FamCA 430; *Noble* v *Noble* (1983) FLC ¶91-338; *Wallmann & Wallmann* (1982) FLC ¶91-204.

44 *Oceanic Sun Line Special Shipping Co Inc* v *Fay* (1988) 165 CLR 197; *Voth* v *Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

45 *Van Der Kreek & Van Der Kreek* (1980) FLC ¶90-810.

46 In *Pastrikos & Pastrikos* (1980) FLC ¶90-897, a property in Greece formed part of the pool.

¶13-160 Compensation claims and other litigation

A right to sue is a form of “chose in action”. Depending upon its nature it may or may not be assignable to another party. A right to sue for a debt is assignable, and businesses regularly assign debts to collection companies in exchange for payment of a percentage of the total amount of the debt. This type of claim is property.

However, claims for damages for personal injury are not assignable. Thus, in *Zorbas & Zorbas*,[47] it was held that a damages claim for personal injuries that was pending in the state courts was not property for the purpose of s 79 of the *Family Law Act 1975* (Cth) (FLA). This can be distinguished from the award of damages in a personal injury claim, which will be property under s 79 or s 90SM (although considered a contribution by the spouse who received the award), and balanced against that spouse’s future needs that may have underpinned the damages award.[48]

In cases where there is no property other than the pending claim difficult questions arise. In *Pleym & Pleym*,[49] the court refused to adjourn the FLA proceedings until after the outcome of the damages claim, with the result that the wife failed in the property proceedings. However, in other cases the power to adjourn property proceedings[50] has been relied upon.[51]

Footnotes

47 *Zorbas & Zorbas* (1990) FLC ¶92-160.

48 *Williams & Williams* (1985) FLC ¶91-628; *O’Brien & O’Brien* (1983) FLC ¶91-316; *Holmes & Holmes* (1988) FLC ¶91-944.

49 *Pleym & Pleym* (1986) FLC ¶91-762.

50 *Family Law Act 1975* (Cth), s 79(5).

51 See *Tems & Tems* (1990) FLC ¶92-169; *Hamilton & Hamilton* (1984) FLC ¶91-558; *Tian & Fong* [2010] FamCAFC 255.

¶13-170 Trusts and other equitable interests

The law relating to trusts in family law matters is discussed in Chapter 16.

A party's interest under a trust, depending upon the nature of that interest and the degree of control, can be treated as property by the Family Law Courts. In *Kennon* v *Spry* (2008) FLC ¶93-388, the High Court treated the property of a trust, of which at the time of the trial neither the husband or wife were a beneficiary, as property of the parties of the marriage capable of division pursuant to s 79 of the *Family Law Act 1975* (Cth) (FLA). French CJ said (at [78]):

> "For so long as the [husband] retained the legal title to the Trust fund coupled with the power to appoint the whole of the fund to his wife and her equitable right [of due administration], it remained property of the parties to the marriage".

The wife's appeal against a finding that the units in a trust were property of the husband rather than a financial resource failed in *Harris & Dewell and Anor* (2018) FLC 93-839. Despite the control exercised by the husband in some dealings, the wife was unable to establish that the husband's father as trustee of the unit trust was the husband's "puppet" and the husband was the "puppet-master".

See also *Pittman & Pittman* (2010) FLC ¶93-430 and *Ebner & Pappas and Anor* (2014) FLC 92-618.

Other forms of equitable interest are within the definition of property, for example, the right of a bankrupt to the excess of her assets over the debts of her estate.[52] Where a person has expended money on land in circumstances that would give rise to an equitable interest, the right of action is property that can be assigned and therefore considered property for the purposes of the FLA.[53]

In *Norrish & Norrish*; *Rigoletto Nominees Pty Ltd (Intervener)*,[54] a claim by the husband's parents (and an entity they controlled) for unjust enrichment (as a result of the use of machinery owned by the parents) was taken into account in determining the property of the parties.

In *Toohey & Toohey*,[55] a constructive trust (whereby the husband's parents as trustees of a trust, were found to hold the real property in part for themselves and in part on behalf of the parties) was the subject of a declaration, and the property was taken into account. See also *Gabini & Gabini* [2014] FamCAFC 18.[56]

Obtaining access to documents of a trust to enable the party's interest in the trust to be ascertained may be problematic. Rule 13.04(1)(f) Family Law Rules 2004 requires production of documents in relation to a trust as part of the duty of full and frank disclosure of a party's financial circumstances. This extends to any trust of which a party is an eligible beneficiary as to capital or income. However, in *Masoud & Masoud* (2016) FLC ¶93-689, the Full Court upheld an appeal against a finding by the trial judge that the husband had failed to make proper disclosure of his interest in a trust. The Full Court said (at [20]):

> "The husband has no access to financial documents of the trustees beyond that required to ascertain there is due administration [of the trust]. It cannot be said that he has the requisite 'control' of the trust deed that would warrant its disclosure".

Footnotes

52 *Reed & Reed; Grellman (Interverner)* (1990) FLC ¶92-105.

53 *Carvill & Carvill* (1984) FLC ¶91-586.

54 *Norrish & Norrish*; *Rigoletto Nominees Pty Ltd (Intervener)* (1990) FLC ¶92-152.

55 *Toohey & Toohey* (1991) FLC ¶92-244.

56 See also *Epstein & Epstein* (1994) FLC ¶92-445.

¶13-180 Employment entitlements

Traditionally, long service leave and redundancy payments have not constituted property unless, in the case of the redundancy payments, the capital sum has already been received by a party and, in the case of long service leave, a capital sum has been received and was taken in lieu of the actual leave. See *Burke and Burke* (1993) FLC ¶92-356, *Gould and Gould* (1996) FLC ¶92-657 and *Tomasetti and Tomasetti* (2000) FLC ¶93-023. A future or non-vested entitlement to long service leave was held not to constitute property (*Whitehead & Whitehead* (1979) FLC ¶90-673 per Baker J; *Nolan & Ingram* (1984) FLC ¶91-585).

In *Burke & Burke*,[57] Fogarty J explained the traditional position:

> "As with a potential redundancy, the employer's obligation to provide long service leave is part of the employee's indirect remuneration arising from his or her employment, to which the non-employee spouse may have made a contribution under s 79(4)(c) during the period of the marriage that relates to the relevant period of employment.
>
> However, confined to the circumstances described above that is, an entitlement to paid leave, the entitlement would be likely to have little, if any, realistic relevance to any aspect of proceedings under s 79".[58]

However, in some cases there is a real likelihood of the leave being paid out in cash to the employee, or the employee using the leave period to generate income from another endeavour. In these circumstances, leave entitlements are a financial resource. In *Gould & Gould*,[59] the Full Court explained:

> "As a matter of principle, we find it difficult to accept that an entitlement to substantial long service leave may only be regarded as a financial resource when the employee spouse is likely to retire and receive a lump sum payment in lieu of leave taken. The ability to take a lengthy period off work, but still be paid a normal salary during that period, may constitute a financial resource in at least some circumstances. In a given case, for example, that ability may enable the relevant party to undertake other temporary employment, pursue a course of further education or retraining, or even commence or develop a business during such paid leave, none of which would otherwise be available to him or her. In such circumstances such a facility would be likely to give that party an economic advantage which can properly be categorised as a financial resource.
>
> In this case, however, our attention has not been drawn to any evidence which would lead to a conclusion that the husband would be likely to engage in any of the sorts of activities which we have identified above in the event that he took his 12.4 weeks of accrued long service leave, or that he would even wish to do anything other than merely enjoy a period of leave. In those circumstances we are unable to conclude that his Honour erred in failing to treat this long service leave entitlement as a financial resource sufficient to call for an adjustment of the parties' property interests in favour of the wife".

However, more recently the approach taken by the Family Court has been to include accrued long service leave in the property pool.

Examples

- *Summerfield & Summerfield* (2008) FamCAFC 63, the accrued annual and long service leave entitlements of both parties were included in the asset pool.

- *Payne & Payne* (2009) FamCAFC 13, a sum of $10,500 received by the husband after separation was included in the asset pool.
- *Hamilton & Thomas* [2008] FamCAFC 8, the husband's long service leave entitlements were a s 75(2) factor which favoured the wife.
- *Wen & Thom* [2010] FamCAFC 81, at trial the parties had agreed that the asset pool included accrued long service leave entitlements.
- *Zisha & Zisha* [2013] FamCA 789, the wife was successful in arguing that the husband's long service leave was an asset rather than a financial resource. The husband could take it either as a lump sum or as periodic payments but he could only take it as periodic payments if he could find a specialist to replace him while he took the leave.

Footnotes

57 *Burke & Burke* (1993) FLC ¶92-356.

58 Ibid, at p 79,764.

59 *Gould & Gould* (1996) FLC ¶92-657 at [81]-[82].

¶13-190 Superannuation

Until the superannuation-splitting amendments commenced on 28 December 2002, superannuation was not considered to be property. Section 90XC(1) (formerly s 90MC(1)) of the *Family Law Act 1975* (Cth) (FLA) states that a superannuation interest is treated as property for the purposes of para (ca) of the definition of "matrimonial cause" in s 4. Section 90XC(2) (formerly s 90MC(2)) provides a similar outcome for de facto couples.

In a case prior to the introduction of superannuation splitting, *Crapp & Crapp*,[60] Fogarty J said:

> "It appears to me that generally an interest in a superannuation fund or the like is not 'property' as defined in sec 4 of the *Family*

> *Law Act* or at all. It is normally a contingent interest only; until [the superannuant] actually receives it in [their] hands [they have] no control over it; [are] unable to alienate it in the meantime and in the event of [their] death prior to retirement the right does not form part of [their] estate. In my view such an interest falls outside the term 'property' as ordinarily understood or as defined in sec 4 of the *Family Law Act*".

However, in most cases superannuation is an absolute right upon retirement. Superannuation is dealt with in detail in Chapter 19.

Footnotes

60 *Crapp & Crapp* (1979) FLC ¶90-615 at p 78,181.

¶13-200 Notional property (add-backs)

The nature of notional property (or add-backs) was reviewed following *Stanford & Stanford* (2012) FLC ¶93-495. Since *Stanford & Stanford*, it is unclear whether notional property (or add-backs) can be justified as a "legal or equitable interest". It is possible add-backs may only be considered as a factor under s 75(2) *Family Law Act 1975* (Cth) (FLA) or under s 79(4). However, there appears to have been a swing back to the pre-*Stanford* position of reluctant acceptance in some circumstances, but the outcome is justified not on the basis of "notional property" but under s 79(4) and 75(2)(o). The previous position was conveniently stated in *Milankov & Milankov*:[61]

> "In several circumstances, well identified by the cases, this first step often involves including in the 'pool of assets' items which no longer exist but which in order to do justice and equity to the parties need to be notionally considered in determining what a fair share of the existing pool of assets should be (see *Kowaliw* v *Kowaliw* (1981) FLC ¶91-092, 7 Fam LN 13; *Townsend* v *Townsend* (1995) FLC ¶92-569, 18 Fam LR 505; *Farnell* v *Farnell* (1996) FLC ¶92-681, 20 Fam LR 513; *Cerini* v *Cerini* [1998]

FamCA 143, unreported). Frequently this involves a notional consideration of assets which have been in the possession of one of the parties at some time after separation but which have been dispersed for that party's own use. It often includes adding back monies that each party has spent in respect of their legal costs. Not to do so would be to offend the principles of s 117 of the *Family Law Act* which require that each party to proceedings should bear their own costs unless the Court otherwise orders.

The inclusion of these notional add-backs to the pool of assets ought not to be seen as a method of increasing the size of the pool but merely assists the Court in determining what should be a fair share of the pool that is available for distribution".

While there is no fixed limit to the circumstances where it may be appropriate to add property back into the pool, common categories have emerged through the cases. In *Omacini & Omacini*,[62] the Full Court identified three types of add-backs that are commonly encountered:

"To date, three clear categories of cases have emerged where the Court has determined that it is appropriate to notionally add back to the pool of assets, that is, assets that no longer exist. They are:

(a) Where the parties have expended money on legal fees. In *DJM* v *JLM* (1998) FLC ¶92-816 the Full Court said at 85,262:

'11.6 For reasons set out in *Farnell*, s 117 provides that each party to proceedings under the *Family Law Act* shall bear their own costs unless the Court otherwise orders. Failing to add back monies expended by parties on costs frequently has the effect of defeating the policy of s 117 by permitting the pool of available assets for distribution between the parties to be diminished by any monies that either of the parties have managed to spend on their costs up to the date of trial. We are of the view that the normal approach ought be to add costs already paid back into the pool. Whilst there may be cases where that approach is inappropriate, the reasons why it is not taken ought normally be spelt out'.

(b) Where there has been a premature distribution of matrimonial assets. In *Townsend* v *Townsend* (1995) FLC ¶92-569 Nicholson CJ as he then was with whom Fogarty and Jordan JJ agreed, said at p 81,654:

> ‘In my view, what occurred in this case, as I said during the course of argument was, in fact, a premature distribution of a proportion of the matrimonial assets. What the husband did was to distribute to himself an asset in which the wife had a legitimate interest. In such circumstances I consider that it would be unjust in the extreme to simply treat such conduct by the husband as a matter to which regard should be had under section 75(2). It seems to me that the husband has had the benefit of that money. Had he retained, for example, the taxi licence instead of selling it, that would have been brought into account as an item of property which would have been dealt with in the same way as the remaining items of property in this case. Accordingly, I am of the view that the correct way in which to deal with the husband’s receipt of those moneys is to bring them into the pool of assets on a notional basis and make a distribution accordingly’.

(c) In the circumstances outlined by Baker J in *Kowaliw & Kowaliw* (1981) FLC ¶91-092 at p 76,644:

> ‘As a statement of general principle, I am firmly of the view that financial losses incurred by parties or either of them in the course of a marriage whether such losses result from a joint or several liability, should be shared by them (although not necessarily equally) except in the following circumstances:
>
> (a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or
>
> (b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their

value.

Conduct of the kind referred to in para (a) and (b) above having economic consequences is clearly in my view relevant under s 75(2)(o) to applications for settlement of property instituted under the provisions of s 79'.

As the Full Court said in *Browne* v *Green* (1999) FLC ¶92-873 at p 86,360:

> '44. We agree with her Honour that the principles stated by Baker J in *Kowaliw* certainly do not constitute any form of fixed code. They are no more than guidelines for use in the exercise of the discretionary jurisdiction conferred by s 79 of the *Family Law Act 1975*. Nevertheless, they have over the considerable period of time since they were enunciated, become a well accepted guideline in this jurisdiction — a guideline the use of which assists in the achievement of the important goal of consistency within the jurisdiction'".

It is important to distinguish "premature distributions" from the reasonable day-to-day expenses of the parties, which even prior to *Stanford* were not added-back to the pool. Thus, in *Omacini & Omacini*,[63] the Full Court found that a trial judge had erred in adding-back money spent by a party on reasonable self-support.

In *Weir & Weir* (1993) FLC ¶92-338, the Full Court extended the application of add-backs to where there has been deliberate non-disclosure and said (at p 79,593):

> "It seems to us that once it has been established that there has been a deliberate non-disclosure, which follows from his Honour's findings in this case, then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature".

In *Kouper & Kouper (No 3)* [2009] FamCA 1080, Murphy J sought to distil the principles from the Full Court authorities on the question of

add-backs by reference to five questions. Bryant CJ quoted these questions with approval in *Shimizu & Tanner* [2011] FamCA 271. Murphy J said (at [108]):

> "(a) Is it contended that property (including money), that would otherwise be available for distribution between the parties if a s 79 order is made, has been dissipated with a consequential loss to the property otherwise potentially divisible between the parties at the date of trial?;
>
> (b) If so, is it alleged that the dissipation of property was in respect of things other than what, in the particular circumstances of this particular marriage, can be classified as 'reasonable living expenses'?;
>
> (c) If it is asserted that any loss to the divisible property results from dissipation of property other than in respect of such expenses, why is it asserted that the result should be a sharing of that loss by the parties other than equally?
>
> (d) If it is contended that this be the result, why should there be an add back (which brings to account, dollar for dollar, such past expenditure in current dollars) as distinct, for example, from there being an adjustment being made pursuant to s 75(2)(o)?; and
>
> (e) How should either any 'add back', or adjustment pursuant to s 75(2)(o), be quantified?"

In *Mayne & Mayne (No 2)* [2011] FamCAFC 192, Strickland J did not agree that the decisions of the Chief Justice in *Shimizu & Tanner* [2011] FamCA 271 and Murphy J in *Kouper & Kouper (No 3)* [2009] FamCA 1080 were definitive of the issues or added anything.

In *Mayne & Mayne (No 2)* (2012) FLC ¶93-510, when re-exercising the discretion, the issue of the add-back was further discussed. At trial, the Federal Magistrate added back as a notional asset the sum of $173,841, which was an inheritance received by the wife. The wife could not explain what happened to it.

In *Mayne & Mayne (No 2)*, Faulks DCJ considered the inclusion of an add-back in the pool was inappropriate and erroneous. His view was that the proper approach was to consider it as a s 75(2)(o) factor or at the fourth step. He said (at [83]):

> "It may be that the proper place for consideration of adjustments to property division in the nature of 'add-backs' is in the fourth step of the Court's consideration. If one party has unjustly appropriated funds or assets to himself or herself it will be inequitable to disregard that fact".

Strickland J considered its inclusion as an asset notionally added back was open to the Federal Magistrate but that the Federal Magistrate fell into error when taking it into account a second time as a s 75(2) factor.

May J considered the better course was to take it into account when considering the parties' contributions. The effects of the different approaches taken by the members of the Full Court in *Mayne & Mayne (No 2)* were:

- May J — She gave 70% for contributions to non-superannuation to the wife, with a reduction of 10% for the unexplained inheritance. She made no adjustment for s 75(2) factors.

- Strickland J — He agreed with May J's percentage division for contributions and s 75(2) factors but applied them to a larger non-superannuation pool which included the add-back.

- Faulks DCJ — He said that the wife should receive 80% of the non-superannuation for contributions with an 11% reduction for s 75(2) factors because of the unexplained use of the inheritance leaving her with 71%. In the circumstances, he agreed with the 70% adjustment of May J because the difference was so slight.

In *Sand & Sand* (2012) FLC ¶93-519, the Full Court was satisfied that jurisdiction for the court to make property orders could not be enlivened where the only "property of the parties" was notional.

The post-*Stanford* doubt as to whether add-backs could be considered in s 79 proceedings was illustrated in *Watson & Ling* (2013) FLC ¶93-

527. The sum of $85,000 was drawn down by Ms Ling on one of the mortgages in her name and paid to various family members. The application for an order that the sum of $85,000 be added back into the asset pool as a notional asset and attributed to Ms Ling was refused by Murphy J. He considered that the options for recognising conduct which amounted to “waste” or the “premature distribution” of the existing legal and equitable interests of the parties were pursuant to s 75(2)(o) or within the assessment of contributions. He said (at [33]) that the “non-dissipating party” might have made “a disproportionally greater indirect contribution to the existing legal and equitable interests . . . if it is established that, but for the other party’s unilateral dissipation, those existing legal and equitable interests would have been greater or had a greater value”.

Murphy J did not consider (at [36]) “that justice and equity requires the withdrawal and use of the money by Ms Ling to be taken into account”. Considering the effect of *Stanford* on add-back arguments, Murphy J said (at [30], [32–33]):

> “In many other cases, for example those which come within the convenient rubrics of ‘waste’ . . . or ‘premature distribution’ . . . legal and equitable title to the money or property will have passed. It could not be said that the money or property is part of the ‘existing legal or equitable interests’ of a party or the parties. The notion that such money or property should be treated as a ‘notional asset’ or ‘notional property’ appears to run contrary to the thrust of the decision in *Stanford*: at issue is the consideration of two separate questions, the first of which is whether *existing legal or equitable interests* should be altered . . .
>
> Where the court has determined that it is just and equitable to make an order pursuant to s 79(2) or s 90SM(3) and there is clear evidence that one party has engaged in conduct and, but for that conduct, the legal and equitable interests of a party or the parties (or the value of those interests) would have be significantly greater, justice and equity may require recognition of the unfairness inherent in those circumstances in the terms of the orders to be made.

> How might that be recognised? First, consistent with existing authority, it can be recognised pursuant to s 75(2)(o) (cf s 90SF(3)(r)) . . . Secondly, it might be contended that it might be recognised within the assessment of contributions. This Court has long eschewed the notion of 'negative contributions' . . . Nevertheless, it might be argued that the 'non-dissipating party' can be seen to have made a disproportionally greater indirect contribution to the existing legal and equitable interests (for example to their preservation) if it is established that, but for the other party's unilateral dissipation, those existing legal and equitable interests would have been greater or had a greater value".

Murphy J also considered that there might need to be further consideration in an appropriate case, of the automatic add-back of legal fees paid by the parties from pre-separation property or post-separation income. The justification for adding back legal costs paid from the pre-separation property pool appears to be s 117 FLA, which requires that generally each party pay their own costs.

In *Bevan & Bevan* (2013) FLC ¶93-545 the Full Court considered *Stanford*. In relation to add-backs, the majority in *Bevan* (with whom Finn J agreed on this point) said (at [79]):

> "We observe 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 thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the disposal of them forms part of the history of the marriage — and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property. . ."

Finn J agreed and also queried whether the courts were properly treating the unsecured liabilities of one or both parties.

The Full Court took a softer approach in *Vass & Vass* [2015] FamCAFC 51. It said (at [138]) that neither *Bevan* nor *Stanford* meant that an error was committed ". . . in adjusting the parties' actual property interests by a calculation involving notionally adding back into the pool sums which have been dissipated by the parties".

Interestingly, the High Court, in *Chang & Su* [2002] HCATrans 549 when dismissing an application for special leave to appeal from the Full Court of the Family Court in *Chang & Su* (2002) FLC ¶93-117, was supportive of the Family Court ordering that the wife receive more than the known assets. The husband had told the Department of Immigration several years previously that he had $4.55m in assets. Callinan J said:

> "You would have to be pretty good to lose $4 million in four years, if he was a man of any prudence at all".

Gleeson CJ and Callinan J rejected the proposition of the husband's counsel that it was open to the trial judge to make an order for payment of a sum certain from a pool (being the overseas assets) of which she could not ascertain the limits. Gleeson CJ said:

> "But does that mean that if a man is entitled to a property settlement to be made on him by his wife then she can place an upper limit on the amount to which he is entitled by simply deciding that she is not going to reveal any more than X dollars?"

Examples

***Pencious & Pencious* [2014] FamCAFC 171**

Add-backs to the pool were upheld by the Full Court including a sum of $243,779 because the trial judge could not be satisfied as to what became of the funds.

***Stone & Stone* [2015] FamCAFC 18**

The Full Court upheld a s 75(2)(o) adjustment of 8%, primarily based on the husband's failure to make proper financial disclosure. The husband had demonstrated to the trial judge that he was prepared to conceal significant sums of money.

***Milne & Joyce* [2016] FamCAFC 125**

The Full Court upheld the add-backs totalling $123,735 to the pool of which about 80% were notionally added to the husband's property. The husband took more than his employee entitlements from a company just prior to it going into liquidation, had the sole use of some rental income and used company funds to pay income protection

insurance.

***Quickley & Pelisser* [2016] FamCAFC 124**

It was not an error for the trial judge to fail to add back the legal expenses of the parties when neither party raised the issue at trial.

Footnotes

61 *Milankov & Milankov* (2002) FLC ¶93-095 at [113]-[114].

62 *Omacini & Omacini* (2005) FLC ¶93-218 at [30]-[31].

63 *Omacini & Omacini* (2005) FLC ¶93-218 at p 79,619.

¶13-210 Debts

The principles in relation to debts were summarised by Evatt CJ in *Prince & Prince* (1984) FLC 91-501 at p 79,076:

- The assessment of debts and liabilities is not necessarily arrived at by a strictly mathematical approach and deducted from the gross property pool in calculating the assets and liabilities to be divided between the parties. Although some liabilities can be accurately assessed at a certain date, other liabilities have not been precisely determined or are contingent (eg tax liabilities).

- The court can make an allowance for a particular liability if it is appropriate to do so, but if there are sufficient uncertainties, the court can disregard it entirely or partly. A loan from a parent of a party which is not likely to be enforced is an example of this.

- In other cases, the court may take the view that because of the circumstances surrounding the incurrence of the liability it ought, in justice and equity, to be wholly or partly disregarded in determining the appropriate order to be made under s 79 or s 90SM *Family Law Act 1975* (Cth) as between the parties of the

marriage. Such a result can be reached where a spouse has incurred a liability in a deliberate or reckless disregard of the other party's potential entitlement under s 79 or s 90SM (*Kowaliw & Kowaliw* (1981) FLC ¶91-092, see ¶36-125 and ¶37-050) or it is a debt to a family member which is unlikely to be required to be repaid.

- The court cannot ignore the fact that there is or may be a liability. The effect may be simply that it does not consider the other spouse should be called upon, in effect, to contribute to the liability by having that spouse's fair share in the property reduced by virtue of its existence. The result may be that the party who has incurred the liability will be left to meet it out of whatever funds remain to that party after satisfying the property order made under s 79.

Prior to *Stanford* v *Stanford* (2012) FLC ¶93-518, it was clear that the debts of the parties had to be identified and carefully considered as to whether they should reduce the property pool or be borne by one party, usually the party in whose name the debt was in, unless it is assigned under Pt VIIIAA FLA or an indemnity given. As the Full Court said in *Biltoft & Biltoft*:[64]

> "A general practice has developed over the years that, in relation to applications pursuant to the provisions of s 79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset".

However, this was not a fixed rule, as the Full Court in *Biltoft* went on to point out:

> "Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would include but are not limited to a liability which is vague or uncertain, if it is unlikely to be

enforced or if it was unreasonably incurred".[65]

The general rule was stated by the Full Court in *Campbell* v *Kuskey* (1998) FLC ¶92-795 (at p 84,924) as:

> "In addition, it is inappropriate *in most* cases to use s 75(2) as a means of bringing to account in a general way a liability, or potential liability, which has not otherwise been brought to account as a liability when determining the overall net pool of assets. The reason for this is that by so doing, a trial Judge may produce a result that works an injustice as against one party or the other. For example, in the circumstances of this case, his Honour gave the husband the benefit of an adjustment pursuant to s 75(2) of somewhat less than $86,328. If the husband had then entered into the scheme suggested by the accountants he would have accrued a taxation liability of $86,328 and would therefore be at a disadvantage. If however, the Commissioner of Taxation failed to deem the loan accounts to be dividends under s 108 the husband will receive the s 75(2) adjustment in his favour as a windfall benefit. This would work an injustice to the wife".

The Full Court in *Rodgers & Rodgers* (2016) FLC ¶93-703 quoted this passage favourably and emphasised that there was no binding rule of law that the court must deduct liabilities unless the case falls into an exceptional category, but that this applied in most cases.

Taxation debts

The Full Court in *Adair & Milford* [2015] FamCAFC 29 confirmed that there is no principle or general application that merely because a taxation debt accrued prior to separation, it must be brought to account as a joint matrimonial liability (*Trustee of the Property of G Lemnos, a Bankrupt & Lemnos & Anor* (2009) FLC ¶93-394). It found that the facts amounted to what the Full Court in *Johnson & Johnson* (2000) FLC ¶93-039 described as "compelling circumstances" which enabled the court to leave one party solely responsible for a taxation debt. The "compelling circumstances" were that the wife was unaware prior to separation that the husband was failing to pay his tax as and when it fell due and that she was misled after separation into believing that payments were being made.

The general rule regarding the treatment of realisation expenses, including capital gains tax, in determining the value of the asset pool was set out by the Full Court of the Family Court in *Rosati & Rosati* (1998) FLC 92-804. See ¶13-220.

Where a debt is uncertain, such as the possibility of a taxation liability, the contingency can be assessed and taken into account, although this is not a preferred option. In *Campbell* v *Kuskey*,[66] the Full Court said:

> "In our opinion, in most cases it would not be appropriate for trial judges to treat a contingent taxation liability in this fashion. As a general rule trial judges should make a finding, on the balance of probabilities, as to whether or not such a liability exists, and if so in what amount. If it be found that such a liability exists, the Court should take it into account when calculating the net amount available for distribution between the parties, but in an appropriate case discounting the amount of such liability if circumstances warrant, for example, through uncertainty as to the time for payment".[67]

Is a debt a legal or equitable interest?

The ability of the court to take into account debts at their full dollar amount or at all has been re-considered following *Stanford* v *Stanford* (2012) FLC ¶93-518. In *Bevan & Bevan* (2013) FLC ¶93-545, Finn J suggested (at [160]) that the treatment of the unsecured liabilities of one or both of the parties might need to be re-considered (presumably as they may not be legal or equitable interests). The Full Court, in a bench which included Finn J, looked at the issue of unsecured liabilities in *Layton & Layton* [2014] FamCAFC 126. The husband appealed against the trial judge's refusal to "add-back" to the pool a joint loan of $50,000 taken out by the parties to meet the legal costs of the wife's son in criminal proceedings. The husband argued that it was agreed that the wife would be solely liable for the debt and the wife conceded that she arranged to have the loan statements sent to her sister's address.

The Full Court considered that there was substance in the husband's complaint that the trial judge's reasoning was inadequate as to why

she ignored the fact that the wife had apparently had the sole use of the funds. The trial judge's findings as to the purpose of the loan suggested that the wife should be the party responsible for the loan. The Full Court said (at [38]):

> "It may well be, of course, that in light of certain of the observations made by members of the Full Court in their judgments in *Bevan & Bevan* . . . (which were delivered subsequently to her Honour's decision in this case and to the hearing of this appeal), that it would not have been appropriate for her Honour to treat the loan funds in question as 'notional property' to be added back to, or included in, the property available for distribution between the parties. But however that may be, it would seem on the basis of the evidence to which we were taken, and have earlier recorded, that justice and equity would require that the wife's use of these loan funds should have been taken into account in some way in favour of the husband either as a contribution by him or as a matter under s 75(2)(o) of the Act. It might even have been open to a court on a proper analysis of the evidence, to have concluded that the sum of $50,000 representing the loan funds was a debt which the wife owed to the husband and which should have been repaid out of the net proceeds of the sale of the matrimonial home".

The Full Court seemed to take a broad view of the definition of legal and equitable interests so as to encompass the possibility that there may be a contract between the parties as to the payment of a debt. In practical terms, this may mean that if the parties have agreed that both parties will use a credit card or incur an electricity or telephone debt in the sole name of one of the parties and that it will be paid from the incomes and/or property of both parties, that this "contract" will be recognised in determining appropriate s 79 orders.

The Full Court left open the option of dealing with the debt as, for example, a contractual issue if an add-back was not appropriate.

Section 75(2)(ha)

The pivotal section in determining how the competing claims of a creditor and the creditor's spouse are to be resolved is s 75(2)(ha)

FLA which requires the court to consider:

> "(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant . . ."

Section 75(2)(ha) is incorporated into the property adjustment exercise as a result of s 79(4)(e) that requires the court to take into account the matters referred to in s 75(2) "so far as they are relevant". There is a strong argument that the interests of a trustee are not relevant under s 75(2)(ha). The Full Court in *Official Trustee in Bankruptcy* v *Galanis* (2017) FLC ¶93-760 interpreted another section of the FLA which referred to a "creditor" as not extending to a trustee in bankruptcy.

The Family Law Courts have considerable powers to deal with debts, including assigning them, under Pt VIIIA, which is discussed at ¶16-360 and following.

Examples

***Trustee of the property of G Lemnos, a Bankrupt & Lemnos & Anor* (2009) FLC ¶93-394**

The trustee of the bankrupt estate of the husband appealed against orders for property settlement which provided that the matrimonial home vested in the trustee be sold, and that the net proceeds be divided equally between the trustee and the wife. The debt lodged by the Deputy Commissioner of Taxation in the husband's bankrupt estate, as a consequence of his improper tax deductions over many years, far exceeded the net equity in the matrimonial home which was the only significant asset of the parties. The members of the Full Court noted that property is not confined to net property and thus, subject to s 90AE(3)(b), there is no legislative impediment to the making of property settlement orders where unsecured liabilities exceed the parties total equity in property and that the relevant provisions of Pt VIII of the FLA, including s 75(2)(ha), do not require the exercise of discretion to afford priority or particular weight to the interests of unsecured creditors.

***Commissioner of Taxation & Worsnop* (2009) FLC ¶93-392**

The Commissioner of Taxation appealed against an order that the former matrimonial home be sold and, after the costs of sale, the proceeds be divided equally between the wife and the Commissioner. The only substantial asset was the home worth $4.75m. There was conflicting evidence as to the wife's knowledge of the husband's tax avoidance but the trial judge accepted that the wife did not know. The trial judge made no adjustment in favour of the wife for s 75(2) factors although she had the primary care of four children aged between 1 and 13 years and this affected her earning capacity. He offset her s 75(2) factors against the husband's indebtedness to the ATO as a factor in

the Commissioner's favour under s 75(2)(ha).

In balancing the competing claims of the wife against the Commissioner, the Full Court found that the trial judge clearly appreciated the critical features of the exercise. The Full Court said (at [86]):

> "In our view, the Commissioner of Taxation is in a position distinguishable from that of a commercial creditor. Commercial creditors have a choice about to whom they extend credit. On the other hand, the position of the Commissioner as a creditor of taxpayers is of a completely different origin. The onus is on taxpayers to make full and proper disclosure to the Commissioner of Taxation. The Commissioner does not extend credit at all, but becomes a creditor by virtue of the conduct of the affairs of the taxpayer. As seen, Rose J gave '. . . much weight to the fact that the outstanding tax indebtedness of the husband is a debt to the Crown and implicitly there is a public interest issue', though he also recognised that the Commissioner had no priority over the wife's claims".

***Rodgers & Rodgers (No 2)* (2016) FLC ¶93-712**

The trial judge did not deduct a calculation of the total future taxation payable by the parties' corporation when determining the net asset pool. The husband appealed and although the appeal was allowed, it was not allowed on the ground that it was an error of law not to deduct the tax liability in calculating the property to be divided between the parties. The Full Court agreed with the Full Court in *Chorn & Hopkins* (2004) FLC ¶93-204 (at [71]) that a decision as to whether both parties should bear responsibility for the taxation debts of one party to the marriage was to be decided by reference to what was just and equitable in the circumstances of each particular case.

***Hooper & Hooper* [2017] FCCA 124**

The husband's liability to pay a costs order arising from defamation proceedings was not a liability which the judge included when determining the property pool.

***Turner & Turner* (2016) FLC 93-719**

The husband appealed in circumstances where he did not take part in the trial. He was ordered to pay just over $12m from a pool of assets totalling $25.4m. As to the finding that there was no need to take into account realisation costs and consequential tax because there was no evidence of a sale or borrowing, the husband submitted that the trial judge could have made such a finding only if there was evidence that the husband's siblings would actively assist him to meet the obligations under the order without the necessity of selling shares.

The Full Court agreed that there was no such evidence. The problem would not have arisen if the wife sought a sale and division on a percentage basis; however, she sought a dollar figure.

***James & Snipper and Anor* [2018] FamCAFC 235**

The trial judge found that the parties' combined debt to the ATO eclipsed the value of their net property of $1,284,142. The husband's tax debt at the time of the trial of $2.01m and the wife's tax debt was about $113,000. A significant proportion of the husband's tax liability was accumulated post-separation. Approximately $773,000 related to the husband's pre-separation tax and interest. The ATO sought that the wife contribute $600,000 to the husband's overall tax debt.

The trial judge took into account that the wife received a substantial benefit from the

husband's post-separation income and concluded that it was just and equitable for the wife to contribute $200,000 to the husband's tax debt, which was 10% of that debt and 18% of the net assets available to the wife after paying her own tax debt.

The appeal was dismissed.

Footnotes

64 *Biltoft & Biltoft* (1995) FLC ¶92-614 at [52].

65 *Biltoft & Biltoft* (1995) FLC ¶92-614 at [57].

66 *Campbell* v *Kuskey* (1998) FLC ¶92-795 at p 84,917.

67 See also *DJM* v *JLM* (1998) FLC ¶92-816 at p 85,260.

¶13-220 Realisation expenses and capital gains tax

Whether realisation expenses and prospective taxation liabilities will be taken into account in determining the property pool depends upon findings as to the likely sale or transfer of assets and the timing of any sale or transfer.[68] As the Full Court said in *Rosati v Rosati*,[69] with respect to capital gains tax (CGT):

> "It appears to us that although there is a degree of confusion, and possibly conflict, in the reported cases as to the proper approach to be adopted by a court in proceedings under s 79 of the Act in relation to the effect of potential capital gains tax, which would be payable upon the sale of an asset, the following general principles may be said to emerge from those cases:
>
> (1) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable

future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.

(2) If the Court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon such a sale in determining the value of that asset for the purpose of the proceedings.

(3) If none of the circumstances referred to in (2) applies to a particular asset, but the Court *is* satisfied that there is a significant *risk* that the asset will have to be sold in the short to mid term, then the Court, whilst not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, *may* take that risk into account as a relevant s 75(2) factor, the weight to be attributed to that factor varying according to the degree of the risk and the length of the period within which the sale may occur.

(4) There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing that asset. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or at some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs".

A significant defect that arises in many cases concerning this issue is the lack of appropriate expert evidence quantifying the costs, or tax liabilities. In *Harris & Dewell and Anor* (2018) FLC 93-839, the Full Court found that the husband had ample opportunity to lead evidence about CGT but did not do so. There was no procedural unfairness to the husband. The husband sought special leave to appeal to the High Court (reported at [2018] HCASL 276), although the grounds were

unclear, but failed.

In *JEL & DDF*,[70] the court identified that past taxation losses may have value as they can be off-set against future income, and may therefore be a financial resource, but are not "property".

Example

The husband was to receive a number of properties. He gave evidence that he only intended to sell one of the properties in the foreseeable future. He intended to retain the balance of the properties if he could. The trial judge allowed for CGT on all of the properties. The Full Court found that CGT allowances should only have been made on the property that the husband intended to sell immediately.[71]

Tax is discussed in more detail in Chapter 17.

Commonly, in orders for the sale of real property, the net proceeds of sale are divided between the parties after deducting the "costs of the sale". In *Kelby & Kelby* [2017] FamCA 438, the phrase "the legal costs of sale" was interpreted by McClelland J, relying on *Rosati & Rosati* [1998] FamCA 38, to exclude the CGT payable with respect to the sale of the real property.

Footnotes

68 As to realisation expenses, see *Gamer & Gamer* (1988) FLC ¶91-932; *Rothwell & Rothwell* (1994) FLC ¶92-511 at 6.36.

69 *Rosati* v *Rosati* (1998) FLC ¶92-804 at p 85,043; [1998] FamCA 38.

70 *JEL & DDF* (2001) FLC ¶93-075 at p 88,328.

71 See *Blake & Blake* [2007] FamCA 10.

¶13-230 Borrowing capacity

The capacity to borrow money is not "property" under the *Family Law Act 1975* (Cth). In *Walters & Walters*,[72] Lindenmayer J said:

> ". . . there [is no] authority, of which I am aware, which . . . asserts that this Court in exercising its power under s 79 of the *Family Law Act* has power to make an order for the payment of a lump sum when there is neither property available from which such a sum could be raised, either by sale, mortgage or otherwise, nor any fund of money existing from which it could be paid, but only a capacity to borrow in the future. A capacity to borrow money is not property and counsel for the wife did not submit to the contrary.
>
> Whilst it is certainly stated in that case, relying upon a statement by former Chief Justice Barwick in *Sanders* v *Sanders* (1967) 116 CLR 366 at p 375 that the power of the Court under s 79 is 'extensive and flexible', in my opinion there is no power to convert a capacity to borrow money into property".

Similarly, the device of calculating a present capital value of income that will be earned in the future cannot be used to create notional property[73] where the wife unsuccessfully argued that a future pension entitlement of the husband should be capitalised and treated as property.

However, the fact that borrowing capacity, of itself, is not property does not stop the court from ordering the payment of a sum of money from one party to the other in cases where that money needs to be borrowed. It is common for one party to retain the matrimonial home in circumstances where they must borrow to pay the other party's entitlement to them. If the borrowings are referable to property that the party will receive (or has received or retained) the borrowings are neither part of the pool, nor offend against the general principle.

A capacity to borrow money may be a factor in determining how property is to be divided. For example, the capacity to borrow and purchase a house may mean that party retains more superannuation

and less of the non-superannuation property (eg *Hayton & Bendle* [2010] FamCA 592).[74]

Footnotes

72 *Walters & Walters* (1986) FLC ¶91-733 at p 75,344.

73 *Perrett & Perrett* (1990) FLC ¶92-101.

74 See generally *Collins & Collins* (1977) FLC ¶90-286 at p 76,539 and *Rowan & Rowan* (1977) FLC ¶90-310 at p 76,646.

¶13-240 Valuing the property of the parties

Just as the nature of the property must be assessed as at the date of the hearing or the settlement, so too must the valuations be at that time. This should not be taken literally, as it is virtually impossible to value all property on the precise day. Valuations close to that time are sufficient.

The starting point for most valuations is “fair market value”. This is the price that a willing, but not anxious, purchaser who is at arm’s length and has adequate information would be prepared to pay a willing, but not anxious, seller of the property.[75] The assessment of value is a question of fact. Usually expert evidence is required, such as evidence from a valuer, or dealer in the type of property. In many cases, parties have regard to “kerbside valuations” by estate agents and the RedBook (redbook.com.au) values of motor vehicles as indicators of market value; although such values are not generally admissible at a hearing unless the values are agreed.

In some cases, there is no market for the particular property, or the market value would be far less than the value of the property to the particular parties. This has been recognised in a number of cases. In

Turnbull & Turnbull,[76] Baker J said:

> "I am satisfied therefore in the context of proceedings under the *Family Law Act* that when a judge is determining the value of shares held by a party in a family company, [the judge] must look at the reality of the situation and value the shares on the basis of their worth to the shareholder".[77]

Similarly, in *Harrison & Harrison*,[78] the Full Court said:

> "In our opinion, the trial Judge correctly interpreted the law as it stands in relation to the value to be placed upon interests in family companies. Revenue and taxation cases . . . have little relevance to the value which a Court, exercising jurisdiction under the *Family Law Act*, places upon such interests. The value to be ascribed to shares in a family company must be a realistic one, based upon the worth of the shares to the party himself or herself. That was clearly the approach which the trial Judge took, and therefore no error, in our opinion, can be demonstrated".[79]

Where a party's estimate of the value of chattels is the only evidence before the court, and unchallenged, it is open to a trial judge to rely upon that evidence: *J & J* [2006] FamCA 951.

Where the trial judge is unable to determine the value of an asset, it may be appropriate to order that it be sold. In *Smith & Smith*, the Full Court said:

> ". . . where the state of the evidence makes the process of valuation hazardous or uncertain, or where there are wide differences between legitimate valuations . . . the ascertainment of value by judicial process may become too uncertain and the preferable course is to order the sale of the property so that its real value can be revealed by market forces".[80]

A detailed consideration of the various methods of valuation used by valuers is beyond the scope of this chapter, but is discussed in *Australian Family Law and Practice* at ¶36-140 and following.

Footnotes

75 *Spencer* v *Commonwealth of Australia* (1907) 5 CLR 418.

76 *Turnbull & Turnbull* (1991) FLC ¶92-258.

77 Ibid, at p 78,738.

78 *Harrison and Harrison* (1996) FLC ¶92-682.

79 Ibid, at p 83,087.

80 *Smith & Smith* (1991) FLC ¶92-261 at p 78,759.

CONTRIBUTIONS

¶13-250 Introduction

In an application under s 79(1) or s 90SM(1) of the *Family Law Act 1975* (Cth) (FLA), the court is required to make such order as it considers appropriate to alter the interests of the parties in the property of the parties. In considering the appropriate order to make, the court must take into account the matters set out in s 79(4) or s 90SM(4).

Sections 79(4) and 90SM(4) are divided into two broad limbs. The first limb, in s 79(4)(a)–(c) or s 90SM(4)(a)–(c), are commonly referred to as the "contribution" factors. The second limb, in s 79(4)(d)–(g) or s 90SM(4)(d)–(g), involves the ongoing needs of both of the parties and the effect of any orders upon the parties and creditors. Sections 79(4) and 90SM(4) provide that in considering what order (if any) should be made the court shall take into account the following:

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or de facto relationship or a child of a marriage or de facto relationship to the acquisition,

conservation or improvement of any of the property of the parties to the marriage or de facto relationship

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or de facto relationship, or a child of the marriage or de facto relationship to the acquisition, conservation or improvement of any of the property of the parties to the marriage or de facto relationship

(c) the contribution made by a party to the marriage or de facto relationship to the welfare of the family, including any contribution made in the capacity of homemaker or parent

(d) the effect of any proposed order upon the earning capacity of either party to the marriage or de facto relationship

(e) the matters referred to in s 75(2) or s 90SF(3) so far as they are relevant

(f) any other order made under the FLA affecting a party to the marriage or de facto relationship or a child of the marriage or de facto relationship, and

(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage or de facto relationship has provided, is to provide, or might be liable to provide in the future, for a child of the marriage or de facto relationship.

The court has a wide discretion under s 79. Gibbs CJ in the High Court in *Mallet* v *Mallet* (1984) FLC ¶91-507 said at ¶79,110–111:

> "The Act does not indicate the relative weight that should be given to different circumstances, or how a conflict between opposing considerations should be resolved — those things are left to the Court's discretion, which must, of course, be exercised judicially . . . It is necessary for the Court, in each case, after having had regard to the matters which the Act requires it to consider, to do what is just and equitable in all the circumstances of the particular

case”.

Mason J said (at ¶79,120) that the proposition of equality developed by the Family Court:

> “obscures the need to make an evaluation of the respective contributions of husband and wife by arbitrarily equating the direct financial contribution of one to the indirect contribution of the other as homemaker and parent”.

With regard to the balancing and assessment of the respective contributions of husband and wife, Gibbs CJ said (at ¶79,111) that “the respective values of the contributions made by the parties must depend entirely on the facts of the case . . . .”

The Full Court of the Family Court in *Ferraro & Ferraro* (1993) FLC ¶92-335 indicated (at ¶79,571) that the homemaker contribution “should be recognised not in a token way but in a substantial way”.

The task of evaluating and comparing the parties’ respective contributions where one party has exclusively been the breadwinner and the other exclusively the homemaker is a difficult one to perform, because the evaluation and comparison cannot be conducted on “a level playing field” (at ¶79,572). The Full Court said:

> “Firstly it involves making a crucial comparison between fundamentally different activities, and a comparison between contributions to property and contributions to the welfare of the family. Secondly, whilst a breadwinner contribution can be objectively assessed by reference to such things as that party’s employment record, income and the value of the assets acquired, an assessment of the quality of a homemaker contribution to the family is vulnerable to subject value judgements as to what constitutes a competent homemaker and parent and cannot be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role”.

¶13-260 Direct financial contribution

Sections 79(4)(a) and 90SM(4)(a) of the *Family Law Act 1975* (Cth)

(FLA) require the court to take into account the financial contributions made directly or indirectly by or on behalf of the party or a child to the acquisition, conservation and improvement of the property or otherwise in relation to the property.

The financial contribution must be to the acquisition of the property or otherwise in relation to the property. A direct financial contribution to some other aspect, such as to the family's welfare, is not relevant under s 79(4)(a) or s 90SM(4)(a), but may be relevant under s 79(4)(c) and 90SM(4)(c).

The assessment of financial contributions is not a meticulous mathematical exercise.[81]

In a long marriage, where the parties' resources and incomes have been devoted to the benefit of the family as a unit, it is impossible and inappropriate to have a detailed accounting of the amounts of the parties' respective financial contributions.[82]

Footnotes

81 *Hayne & Hayne* (1977) FLC ¶90-265; *Lovine & Conner and Anor* (2012) FLC ¶93-515; *Wallis & Manning* (2017) FLC ¶93-759.

82 *Garrett & Garrett* (1984) FLC ¶91-539.

¶13-270 Direct financial contribution to acquisition

A financial contribution is made directly to the acquisition of the property by way of contribution to the original purchase price and associated expenses.

The most common contribution is to the matrimonial home; but contributions to investment properties, businesses, motor cars and shares are also common.

The importance of a direct financial contribution to the purchase price may be off-set by other factors relevant under s 79 or s 90SM of the *Family Law Act 1975* (Cth), particularly as the duration of the marriage increases.[83] Direct financial contributions to the acquisition of the property are usually of greater importance than other contributions in short marriages.[84]

Footnotes

83 *Crawford & Crawford* (1979) FLC ¶90-647; *White & White* (1982) FLC ¶91-246; *Bremner & Bremner* (1995) FLC ¶92-560.

84 *G & G* [2006] FamCA 877.

GUIDELINES FOR ASSESSING DIRECT FINANCIAL CONTRIBUTION TO ACQUISITION

¶13-280 Timing of contributions

The time at which a contribution is made can be very relevant. For example, if it is made at the commencement of a long marriage or de facto relationship it is likely to be treated differently than if made near the end of a long marriage or de facto relationship. The general approach to initial financial contributions is discussed at ¶13-442. Post-separation contributions are discussed at ¶13-445.

However, there is no requirement to assess contributions, for example in relation to the pre-separation period and the post-separation period, differently. See *Fields & Smith* (2015) FLC ¶93-638 (at [75]):

> "As we have already said, there is no requirement to attribute different percentages to different periods in the relationship. Indeed the Full Court has cautioned against it: see *Dickons & Dickons* [2012] FamCAFC 154, *Lovine & Connor and Anor* (2012)

FLC ¶93-515 and *Bolger & Headon* [2014] FamCAFC 27 where the Full Court said at [28], '[d]oing so . . . is not consistent with a holistic assessment of the parties' contributions which is what s 79(4) requires'. It is only if error can be demonstrated in the overall result that the appeal would succeed".

An early and often quoted case on the relevance of the timing of a particular contribution when contributions are being assessed was *Aleksovski* v *Aleksovski* (1996) FLC ¶92-705. During an 18-year marriage each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Late in the marriage, the wife received a large capital sum due to a personal injury claim after a motor vehicle accident. All three judges allowed the appeal by the husband. The majority judgment considered that less weight may be given to a contribution made by a party early in a long period of cohabitation than one made shortly before separation. Kay J, dissenting, in a minority judgment, agreed with the majority that the appeal should be allowed but, for different reasons, considered that the time at which the contribution was made did not necessarily affect the outcome. All contributions needed to be weighed up.

¶13-290 Financial contributions in "short" relationships

"Short marriage" is an expression often used when a marriage has lasted for less than about five years, particularly where there are no children.

The relatively short duration of the marriage means there is a closer examination of the parties' financial contributions. Part VIIIAB of the *Family Law Act 1975* (Cth) largely reflects Pt VIII, and "short" de facto relationships are dealt with similarly to a "short" marriage.[85]

Sections 75(2) and 90SF(3) factors are less likely to be important, and it may be just and equitable to make an order which reflects only contributions.

Examples

***Quinn & Quinn* (1979) FLC ¶90-677**

The parties cohabited for just less than two years. During cohabitation a home was purchased for $25,000 of which $15,000 was provided by the wife. The balance was borrowed and during cohabitation the mortgage debt was reduced by $2,200. The property doubled in value between its purchase and the date of the trial. The trial judge doubled the husband's contribution to the reduction of the mortgage debt ($1,424) and added $650 on account of other factors. The trial judge ordered that the husband transfer his interest to the wife upon the payment of $3,500. The Full Court refused an appeal by the husband. It was important to reach a view as to the proportions which should be regarded as the contributions of each spouse to the acquisition, conservation or improvement of the property. Mathematical precision in calculations was not necessary, but it was important to reach a view as to whether the contributions of one party were greater than or equal to those of the other party.

***Anastasio & Anastasio* (1981) FLC ¶91-093**

The parties cohabited for 14 months. Both had savings at the time of the marriage and worked during the cohabitation. The wife's earnings represented 22.78% of the parties' total income. While the trial judge was not ordinarily attracted to a mathematical approach, having regard to the facts and, in particular, the shortness of the marriage, he held each party should take what they contributed to it directly financially.

***Bushby & Bushby* (1988) FLC ¶91-919**

The parties cohabited for nearly four years. Each party owned a home at the time of the marriage but during cohabitation they lived in the husband's residence. During the course of the marriage, the wife received cash benefits from the husband by way of direct contribution of some $12,508, in addition to living in his house and being maintained by him. The Full Court took into account that the husband's income substantially exceeded that of the wife. Looking at the total property in cash and kind which the wife received during the marriage, to confer any further benefit upon her would be a grave injustice to the husband.

***McMahon & McMahon* (1995) FLC ¶92-606**

The parties began cohabiting in 1987, married in 1988 and separated in 1993. At first instance, the wife was awarded slightly more than 55% of the parties' total asset pool, including an adjustment of 5% for s 75(2) factors. Early in the marriage the parties had made joint investments, but from approximately mid-1991 they conducted their financial affairs separately. The parties conceded they each made equal contributions during the marriage.

The Full Court held that, in the circumstances, an asset-by-asset approach was preferable to a global approach. The circumstances included: the short duration of the marriage, the number of separations during the marriage, the parties' strict separation of their assets; and their methods of dealing with them, particularly when the parties had identified another group of assets as joint and that the loss in value of the wife's assets had occurred after separation. The Full Court held that each party should be entitled to their separate assets and that their contributions to the joint assets should be regarded as equal reflecting the agreement between them at trial. No further adjustment was made for s 75(2) factors.

***Cohen & Cohen* (2008) FamCAFC 54**

The Full Court upheld a decision of the Federal Magistrate in *Cohen & Cohen* [2008]

FMCAfam 64. After a three-year marriage the wife received 7.5% of the non-superannuation assets totalling $436,853 and none of the husband's superannuation in the payment phase valued at $778,384. She retained her superannuation of $2,197.

***Damiani & Damiani* [2010] FamCA 217**

There was a short marriage, the parties had a child and there was a long period of separation before the matter was determined by a court. The husband contributed the bulk of the capital of marriage and at the time of trial, the property pool was worth in excess of $3.9m. The wife earned significantly less than the husband, had the primary care of the child post-separation and argued that family violence committed by the husband made her contributions "significantly more arduous" in accordance with *Kennon* v *Kennon* (1997) FLC ¶92-757. The parties purchased a home and the title reflected their contributions to it, being 20% as to the wife and 80% to the husband. The husband received a post-separation inheritance of over $400,000.

Watts J increased his assessment of the wife's contributions during cohabitation to 25% (more than otherwise because of the husband's conduct) and 5% more than otherwise post-separation. He assessed the wife's contributions to the whole pool as 20% and gave an 8% adjustment for s 75(2) factors.

Footnotes

85 Ibid.

¶13-300 Windfalls

Until *Zyk & Zyk*,[86] if the value of a property increased during a marriage due to an outside circumstance such as rezoning or a lottery win, rather than due to the activities of a party, it was referred to as a "windfall". It was originally treated differently from a contribution to other property, made through the efforts of a party or on behalf of a party. A windfall is treated as a contribution under s 79(4) or s 90SM(4) of the *Family Law Act 1975* (Cth). Section 75(2) or s 90SF(3) factors are also relevant. The timing of the receipt of a "windfall" can be very relevant to the overall outcome. Examples are lottery wins and rezoning.[87]

Gifts are considered at ¶13-310, inheritances at ¶13-315 and lottery wins at ¶13-335.

Footnotes

86 *Zyk & Zyk* (1995) FLC ¶92-644.

87 *Zappacosta & Zappacosta* (1976) FLC ¶90-089; *Wells & Wells* (1977) FLC ¶90-285.

¶13-310 Gifts

During a marriage or de facto relationship it is not uncommon for one of the party's parents to provide moneys or transfer property which benefits both of the parties to the marriage or de facto relationship.

If the evidence enables the court to determine that a gift is to one or other or both of the parties, that is an important first step in determining who should retain the item. If the gift was to one of the parties rather than to both parties, that party will have a greater claim to retain it (*Gosper & Gosper* (1987) FLC ¶91-818; *Kessey & Kessey* (1994) FLC ¶92-495).[88]

In *Pellegrino* v *Pellegrino* (1997) FLC ¶92-789, Chisholm J considered that there may be evidence that the donor intended to benefit both spouses where, for instance, the parents' gift is in recognition for some service made to them jointly by the parties. The rent-free accommodation provided by the wife's parents for a period of years was regarded as a significant contribution on behalf of the wife.

Footnotes

88 *Gosper & Gosper* (1987) FLC ¶91-818.

¶13-315 Inheritances

A bequest that has been received is property under the *Family Law Act 1975* (Cth). The Full Court in *Bonnici & Bonnici* (1992) FLC ¶92-272 said (at [2]) a "property does not fall into a protected category merely because it is an inheritance".[89]

Examples

***Sinclair & Sinclair* [2012] FamCA 388**

The parties had over $7m of assets, most, if not all, of which was contributed by the wife who received it from her father many years before. His Honour concluded that about three-quarters of the pool was unrelated to the direct contributions of the parties

themselves. He assessed the husband's contributions as 12.5% of the pool.

***Schirmer & Sharpe* (2005) FLC ¶93-213**

The Full Court noted that significant property had been received by the wife subsequent to separation through inheritance and that, up until separation, contributions had otherwise been equal. The assets were all included in "the pool" and the trial judge determined the contributions as to 90% to the wife and 10% to the husband but made a further adjustment of 2.5% in favour of the husband. The Full Court noted the discretionary nature of the assessment and found that it was within the range.

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

The Full Court upheld the trial judge's exclusion of the wife's inheritance from the calculation of the asset pool. The wife received about $250,000 from an aunt about a year prior to separation. The inheritance was placed in a trust and not mingled with joint assets or the husband's assets.

Other useful cases showing the diversity of outcomes include *Jarrott & Jarrott (No 2)* [2012] FamCAFC 72; *Singerson & Joans* [2014] FamCAFC 238 and *Calvin & McTier* (2017) FLC ¶93-785.

The interest of a beneficiary under a will, before the estate is administered, is regarded as property.

The situation is different where the testator has not yet died. In *Parker & Parker*,[90] Nygh J found that a covenant between the husband and wife requiring the husband to leave stated property to the wife by will was an enforceable right to an expectation under his will, and therefore "property". Where a potential beneficiary under a will has no enforceable right to stop the testator from altering their will, the expectation will not be sufficient to fall within the meaning of "property".[91]

An entitlement under a will of a living testator who has ceased to have testamentary capacity may be a "financial resource". See ¶13-320 and also ¶14-170 of the Maintenance chapter.[92]

Footnotes

89 *James & James* (1978) FLC ¶90-487; *Bonnici & Bonnici* (1992) FLC ¶92-272.

90 *Parker & Parker* (1983) FLC ¶91-364.

91 However, it may be taken up as a factor under s 75(2)(o): see the 1999 case of *De Angelis & De Angelis* (2003) FLC ¶93-133. Notably, it is not a financial resource: *White & Tulloch* v *White* (1995) FLC ¶92-640.

92 See *Sapir* v *Sapir (No 2)* (1989) FLC ¶92-047. However, note the comments of the Full Court in *White & Tulloch* v *White* (1995) FLC ¶92-640.

¶13-320 Expectation of an inheritance

If one party has an expectation of a significant inheritance, the other party may argue that this should be relevant in proceedings under s 79 or s 90SM of the *Family Law Act 1975*. Inheritances are discussed at ¶13-315.

The grounds on which an expectation of an inheritance may be relevant are:

- s 75(2)(b) and 90SF(3)(b) require the court to consider the "financial resources of each of the parties"
- s 75(2)(o) and 90SF(3)(o) require the court to consider "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account", and
- s 79(5) and 90SM(5) enable the court to adjourn s 79 and 90SM proceedings provided the requirements of the section are met if "there is likely to be a significant change in the financial circumstances of the parties to the marriage or a de facto relationship or either of them" (s 79(5)(a) and 90SM(5)(a)).

Examples

***White & Tulloch v White* (1995) FLC ¶92-640**

The wife's mother was 81 years old, widowed and in reasonable health and had two

children. The husband was allowed to proceed with a subpoena seeking the production of her will but not documents detailing her financial position. The Full Court rejected the proposition that a prospective inheritance is a financial resource. The Full Court said that there was no absolute rule. The ultimate criterion was whether the evidence was, or might be, relevant to the just and equitable process under s 79. An expectancy of inheritance will not be relevant in many s 79 proceedings. In the end, relevance must depend upon the nature of the claims being put forward and the facts of the particular case. The likelihood of a benefit to the party cannot be so speculative that it is irrelevant to a s 79 determination.

It was oppressive to the wife's mother to have to disclose detailed financial records in circumstances where that may prove ultimately to be of no more than marginal relevance. It was likely to widen the scope of the proceedings far beyond what was legitimate or useful.

***C v M* (30 August 2000, unreported, Moore J)**

After referring to s 75(2)(o) and *De Angelis & De Angelis* (2003) FLC ¶93-133 (decided in 1999), Moore J referred (at [32]) to the submissions on behalf of the husband that the wife had an expectation of an inheritance from her mother in relation to a property situated in Murrumburrah. Her mother was aged 90 years and had lost testamentary capacity. The wife was the sole beneficiary of her mother's estate.

Moore J was reluctant to take the prospective inheritance into account but ultimately did so.

***Grace v Grace* (1998) FLC ¶92-792**

The wife sought an adjournment until the husband's interest in a family trust vested or his mother died (thus realising his 50% remainderman interest in the estate of his late father) whichever was the earlier. The trial judge refused. The wife successfully appealed and was granted an adjournment which was ultimately for 2½ years.

***Warner & Warner* [2008] FamCAFC 156**

The wife was entitled to a one-third interest in a house under her late father's will. The wife estimated that she could receive $100,000 but there was no valuation evidence; nor was there any evidence to support her assertion that her stepmother might be successful in claiming a life interest, if she chose to make such a claim. The Full Court said that arguably the wife's interest was a vested interest but dealt with it as a s 75(2) factor as the parties contended.

¶13-335 Lottery wins

Lottery wins after separation remain property for the purposes of the proceedings. Although generally considered a sole contribution by the person who purchased the ticket, particularly if it significantly skews the contribution-based entitlements of the recipient, it may be relevant to the assessment of factors under s 75(2) *Family Law Act 1975* (Cth).[93]

In *Zyk & Zyk*,[94] the court held that where the winning ticket was purchased during the marriage it was a windfall and a contribution by both parties, saying:

> "In our view, the critical question in such cases is — by whom is that contribution made? In the ordinary run of marriages a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue. Where both parties are in receipt of income and where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly: see *Anastasio* [(1981) FLC ¶91-093–¶13-290]. Where one party is working and the other is not the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties. The income of the working member is treated as joint in the same way as the domestic activities of the non-working partner are regarded as being for their joint benefit. In the essential sense this analysis is similar to that provided by the Full Court in *Hauff & Hauff* [(1986) FLC ¶91-747] in discussing the rationale for treating superannuation benefits of one party, including contributions by the employer, as the product of joint contributions.
>
> In the sort of case to which we have referred above the conclusion would be that the ticket was purchased by joint funds and the contribution of the prize would be seen as a contribution by the parties equally. There may be cases where the parties have so conducted their affairs and/or so expressed their intentions that this would not be the appropriate conclusion, but in the generality of cases with which this Court would normally deal this appears to us to be the correct approach and the correct outcome".[95]

An example of a case where the win was not considered a windfall (and therefore was dealt with as a shared contribution) occurred in

Brease v Brease,[96] where the court found that the parties had not commenced to cohabit before the lottery win by the wife.

Examples

***Zyk & Zyk* (1995) FLC ¶92-644**

The Full Court reviewed earlier cases dealing with lottery wins. It considered that the use of the term "windfall" created conceptual difficulties within s 79. The term "contribution" was preferable as the prize contributed to the property of the parties. The critical question was by whom the contribution was made. If both parties are in receipt of income and the marriage is predicated upon the basis of each contributing their incomes towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context, and would be treated accordingly. If one party is working and the other party is not, the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties.

The treatment of the lottery win as a "contribution" rather than a "windfall" made an important difference. Treating it as an equal contribution rather than as a windfall to one party, resulted in a significant adjustment to overall contributions and increased the wife's contribution from 72% to 82.5%.

***Brease v Brease* (1998) FLC ¶92-793**

The husband won $473,745. He asserted that he won it before cohabitation commenced. The wife alleged it was after. The parties married about nine months after the win, and separated 21 months after the win. The trial judge concluded that the important questions were:

1. Were the parties cohabiting at the time of the purchase of the ticket?

2. Were the parties pooling their funds in any way at the time of the purchase of the ticket?

3. Who provided the moneys for the winning entry?

The Full Court agreed. The legal title to a lottery ticket vests in the person or persons in whose name the ticket issues. In disputes about entitlement to a share in the prize, the onus lies upon the claimant to prove the entitlement.

***Bradley v Weber* [1998] FamCA 90**

The wife had the care of two young children. The husband's Lotto win of $1,270,000 was only about six months after separation. The wife received 20% of the pool on appeal. The Full Court increased her entitlements from $125,000 to $225,000.

***Farmer & Bramley* (2000) FLC ¶93-060**

The husband won $5m in a lottery after separation. The Full Court had to determine the wife's property entitlements. She had made contributions after separation to the welfare of the family. Were these contributions together with her financial and non-financial contributions during the marriage sufficient to justify an order that she receive a proportion of the lottery proceeds?

The parties lived together for 12 years. There was no property of any value at the time of separation. Their financial circumstances were at all times modest. The husband was a heroin addict in the early part of the marriage. The wife supported him financially and emotionally through his addiction. She also financially supported him while he was studying and assisted him with his literacy skills. Partly because of her efforts, the husband, at the time of the hearing, was in full-time gainful employment.

At the time of the hearing, the child of the marriage was almost 15 years of age. The child lived with the husband for approximately two years after separation, but otherwise lived with the wife. The husband did not have regular contact and did not pay child support.

After the husband won the lottery he arranged his financial affairs to reduce his child support liability to nil. He gambled over $100,000. He denied to the Full Court that he won the lottery, saying that his mother had won.

The wife remarried in September 1997, 12 months after the lottery win. In March 1998, she applied for a $1m property settlement. At the time of the hearing, five years after separation, the husband and his new partner had a child.

Purdy J gave $750,000 or 15% of the winnings to the wife. He considered that whether a direct connection between the property interests to be adjusted and the parties' contributions was required was only a minor issue. The major issue at trial was whether the lottery prize belonged to the husband or to his mother.

The full amount of $5m was available for allocation between the parties because of:

- the wife's significant financial and non-financial contributions throughout the marriage
- the disparity in the parties' financial circumstances
- the wife's ongoing care of the child without financial and practical support from the husband, and
- the s 75(2) factors, particularly s 75(2)(a), (b) and (c), weighed very heavily in the wife's favour.

The husband appealed. His appeal was dismissed by a 2:1 majority, Guest J dissenting. The majority upheld the award of $750,000 to the wife. Guest J would only have given the wife $250,000.

Finn J considered the wife had made contributions generally to the marriage even though she had not directly contributed to the Lotto win. Her contributions were significant as "life cannot have been all roses" for her.

Guest J dissented, on the basis that the occurrence (or time) of the contribution to the welfare of the family and the actuality of property under consideration must either partially or substantially coexist. There need not be a specific nexus between the property and the contribution but (at p 87,977) "they both must occupy the same time and space, that is, have parallel or fractional contemporaneity".

***Eufrosin & Eufrosin* [2014] FamCAFC 191**

The Full Court rejected the significant focus by the husband at trial on the source of funds used by the wife to purchase the winning ticket. The parties were living "separate"

lives, including separate financial lives.

The Full Court upheld the two-pool approach taken by the trial judge and the orders she made which gave the husband 50% of the property excluding the Tattslotto win of about $2.4m, on the basis of contributions with no s 75(2) adjustment, and $500,000 of the Tattslotto pool of $3.4m for s 75(2) factors.

***Elford & Elford* (2016) FLC ¶93-695**

The husband won a lottery of $622,842 in January 2004, about a year after cohabitation commenced. Cohabitation lasted slightly less than 10 years. He retained the winnings in a separate account, topped up by about $27,000 from his savings and that sum of $650,000 remained intact at the end of the marriage. From a pool of $1.4m, the trial judge ordered that the wife retain about 10% of the assets. She sought 32%. Perhaps not surprisingly, the wife appealed. She failed, although as a majority the Full Court said (at [64]):

> "Some or all of us **may** have reached a decision different to His Honour but that circumstance does not warrant appellate interference. In the absence of any demonstrable criteria by which it is said that His Honour's decisions [sic] was 'plainly wrong', we are in the position of being asked to provide a 'second opinion' as to the appropriate exercise of discretion. We are unable to persuade ourselves that the result is outside the parameters upon which reasonable judicial minds might differ". [emphasis added]

Footnotes

93 *Mackie & Mackie* (1981) FLC ¶91-069; *Farmer & Bramley* (2000) FLC ¶93-060. The law relating to ownership of lottery winnings is set out in *Van Rassel* v *Kroon* (1953) 87 CLR 298 and *Voulis* v *Kozary* (1975) 180 CLR 177.

94 *Zyk & Zyk* (1995) FLC ¶92-644.

95 Ibid, at p 82,515.

96 *Brease* v *Brease* (1998) FLC ¶92-793.

¶13-340 Reduction of assets by conduct of parties or waste

Financial losses incurred by the parties or either of them in the course of the marriage, whether such losses result from a joint or several liability, are generally shared by them (although not necessarily equally). Baker J said in *Kowaliw & Kowaliw* (1981) FLC ¶91-092 (at [10]):

> "As a statement of general principle, I am firmly of the view that financial losses incurred by parties or either of them in the course of a marriage whether such losses result from a joint or several liability, should be shared by them (although not necessarily equally) except in the following circumstances:
>
> (a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or
>
> (b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value".

A party may try to convince the court that the other party has made a negative rather than positive contribution to the assets thereby "wasting" rather than increasing the value of the assets. Notional property or "add-backs" are also discussed at ¶13-200.

Examples

***Kowaliw & Kowaliw* (1981) FLC ¶91-092**

The husband had lost money and been left with certain liabilities as the result of the failure of the business from which he had derived his income during most of the marriage. The court held that these losses and liabilities should be borne by both of the parties but not equally. The husband had also lost money by permitting a prospective purchaser, who in fact did not finally purchase the property, to occupy the matrimonial home free of rent or contribution for approximately a year. It was held that this action was commercially and economically reckless and the husband should be solely responsible for the consequent loss.

Baker J was firmly of the view that financial losses incurred by parties or either of them in the course of a marriage whether such losses result from a joint or several liability, should be shared by them (although not necessarily equally) except if:

- one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, or

- one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

***Mantle & Mantle* [2014] FamCAFC 95**

The husband contended that the sum of $122,000 spent by the wife during a four-week period after separation should be added back as notional property because the only reasonable conclusion was that the wife was wanton or reckless in her expenditure or sought to unilaterally diminish the pool along the lines of *Kowaliw*. The Full Court dismissed the husband's appeal, finding that the trial judge's conclusion that the wife's explanations for the expenditure was reasonably open on the evidence.

***Polonius & York* [2010] FamCAFC 228**

The Full Court was bound by the Federal Magistrate's inability to make a positive finding that the husband had acted recklessly, negligently or wantonly. The husband admitted to poor business practices including not filing a tax return for 15 years and entering into a deed of compromise with false recitals.

***Polito & Polito* [2009] FMCAfam 511**

The major issue was whether $121,344 should be added back to the pool due to the husband's gambling, drug and alcohol addictions.

Baker FM adopted the wife's mathematical approach and said (at [89] and [90]):

> "I find that the husband's conduct, in losing $41,201.88 or $139 per week over a period of five years and seven months, which included a time when he was not employed for a period of 12 months, was conduct which was reckless, negligent or wanton and reduced or minimised the value of the assets.
>
> I am of the view that the total amount of $41,201.88 should not be added back to the property pool. This amounts to a large percentage of the property pool, about 40% of it. I am of the view that in the circumstances of this case, having regard to the financial circumstances of the parties, and the fact that the husband used alcohol and marijuana for entertainment, that it was reasonable to allow $30 per week for entertainment for gambling over the five year and seven month period. The loss therefore amounts to $32,264 (296 weeks x $109). In respect of the husband's gambling prior to May 2000, I am of the view that he did not gamble unreasonably and his losses were minimal".

***Field & Basson* [2013] FamCAFC 32**

The parties started a business during their marriage. Loans for the business were secured over the properties of the wife. The business was not a success and the husband left it and obtained outside employment. The wife abruptly closed the business several months later.

The trial judge said that he was "bewildered" that the wife closed the business just before Christmas, given that was the busiest time of the year for that business. If she had kept the business open, she could have reduced the stock level and paid off some of the debt.

On appeal, the Full Court was not prepared to find that the wife's actions were within *Kowaliw*. There was no evidence that detailed the specific financial effect, that the wife's actions had or that established that the wife acted recklessly, negligently or wantonly.

***Hawkins & Hawkins* [2016] FamCA 440**

The wife's expenditure of $634,000 on Supreme Court litigation and causing the husband to spend $235,000 on that litigation was wastage under the principles of *Kowaliw & Kowaliw* (1981) FLC ¶91-092.

¶13-360 Over-capitalisation

Contributions to a real property may not be given full weight if they result in over-capitalisation. Installing an in-ground swimming pool which adds no value to the real property is one example.

Example

***Vrbetic & Vrbetic* (1987) FLC ¶91-832**

The husband purchased land before the marriage for about $14,000. At the time of the marriage he owed $3,400 which was paid off by the wife. The wife contributed almost $58,000 to the building of a house on the land. The marriage lasted 2½ years. The Family Court ordered that the net proceeds of sale be split 75% to the wife and 25% to the husband. The gross value of the house was $125,000: the net value $85,000 and the land value was $40,000. The Full Court held that it could not separate the land and said that, of the present value of the property, the husband contributed the better part of something worth $40,000. Because of over-capitalisation, each party had contributed more than the net worth to them of their contributions. The loss had to be shared between the parties in a meaningful way.

¶13-370 Damages awards

Once damages are received, they are property, but a pending claim for damages may only be a financial resource. There is also the possibility that a s 79 *Family Law Act 1975* (Cth) (FLA) proceeding can be adjourned under s 79(5) if the property pool is likely to change significantly once the damages claim is determined.

Contributions and s 75(2) factors are not assessed differently in relation to personal injury claims than with respect to other property. It is important to look at the timing of the contributions and the timing of the receipt of the damages.

The High Court in *Williams* v *Williams* (1985) FLC ¶91-628, said that the nature of the damages may be relevant. It said (at p 80,093):

> ". . . when the property available for division between the parties represents an award of damages for pain, suffering and loss of amenity, it may be relevant, in some situations, to have regard to the circumstances relating to that award, but there is no general presumption that the award should be left out of account in determining what order should be made under s 79. . ."

A majority of the Full Court in *Aleksovski* v *Aleksovski* (1996) FLC ¶92-705 confirmed that damages are not quarantined. It said (at p 83,437):

> "In our opinion, in most cases, a damages verdict arising from a personal injury claim, whenever received, is a contribution by the party who suffered the injury. It should not be considered in isolation, for the reason that each and every contribution, which each of the parties makes to the relationship, must be weighed and considered at the same time".[97]

Example

***Danford & Danford* [2011] FamCAFC 54**

The husband received a damages award of $1,441,941 following prolonged litigation. Ten days later, the parties separated under the same roof. The total asset pool at trial almost four years later was $3,010,257, of which $554,516 was in superannuation.

The trial judge found that the contributions to the non-superannuation assets were 55%/45% in favour of the husband and their contributions to the superannuation were equal. He made a 3% adjustment on the non-superannuation for factors under s 75(2) FLA in favour of the husband and did not order a superannuation split so that the husband retained $38,000 more superannuation than the wife.

The trial judge took into account the wife's contributions as a whole and found (at [122]) that subsequent to the accident, she had made a "Herculean effort". The children were 12, 11 and nine at the time of the accident. She ran a company and business, was solely responsible for the care of the children, was the primary homemaker for the family and devoted herself to the care of the husband.

Footnotes

97 *Aleksovski* v *Aleksovski* (1996) FLC ¶92-705.

¶13-380 Direct financial contribution to conservation or improvement

Contributions of this kind are common. Typical examples are paying the cost of ordinary repairs and maintenance to a matrimonial home which preserve the capital value of the property, such as roofing, guttering, plumbing, electrical repairs and garden maintenance, or maintenance and repairs in respect of a motor car or other appliance.

The interest component of payments on a mortgage on a piece of real property is more correctly considered to be payments for the conservation of the property and not payments for the acquisition of the property.

The distinction between conservation or improvement may be important. It can be reasonable for a party with the use of property, say real estate or a motor vehicle, to conserve the item in exchange for the use of it.

On the other hand, a genuine improvement of property as distinct from mere decoration, will improve the value of the property. Therefore, it ought to be reflected directly in the same way as a contribution to the initial acquisition.

¶13-390 Indirect financial contribution to acquisition, conservation or improvement

This type of contribution occurs quite frequently where one party permits the other party to provide a direct financial contribution such as a mortgage repayment to property owned by the parties. For instance, one party may pay for household items such as groceries, electricity, gas, telephone and other outgoings, while the other pays the mortgage.

The party who is paying those household expenses could claim to have made an indirect financial contribution to the acquisition, conservation or improvement of the matrimonial home, but could also claim that they had made a contribution to the welfare of the family pursuant to s 79(4) or s 90SM(4) of the *Family Law Act 1975* (Cth).

Care must obviously be taken in cases where parties may in effect be able to double dip, claiming contributions made both indirectly and pursuant to another head of contribution in s 79 or s 90SM.

¶13-400 Financial contribution by or on behalf of a child of the relationship

Sections 79(4)(a) and (b) and 90SM(4)(a) and (b) of the *Family Law Act 1975* (Cth) (FLA) specifically provide that financial and non-financial contributions by or on behalf of a child of the relationship are relevant to the determination of a property settlement.

A child who is not an adult rarely has made any financial contribution, or had any contribution made on their behalf. An adult child may be permitted to intervene in a property dispute between the parents to protect the child's interest in property, eg *Hampton & Farley & Ors* [2013] FamCA 213.[98] Since Pt VIIIAA of the FLA commenced in December 2004, the opportunities for a child to seek orders as to who has made contributions are even greater.

Footnotes

98 *Macpherson & Clarke* (1978) FLC ¶90-446.

¶13-410 Non-financial contributions

Sections 79(4)(b) and 90SM(4)(b) of the *Family Law Act 1975* (Cth) mirror s 79(4)(a) and 90SM(4)(a) save that they deal with contributions other than financial contributions. The various points made at ¶13-260 and following in relation to s 79(4)(a) and 90SM(4)(a) are paralleled in s 79(4)(b) and 90SM(4)(b):

- the contributions still have to be to the acquisition, and so on, *of the property* or otherwise *in relation to the property*
- the contribution may be to a property which one or both of the

parties had at one stage but which they no longer have

- the contribution may be made by or on behalf of a child, and
- the contribution may be made on behalf of a party.

No guidance is given in s 79(4) or s 90SM(4) as to how non-financial contributions are to be weighed up in comparison with financial contributions. The process of weighing up different contributions is discussed at ¶13-440 and following.

Examples

***Brazel & Brazel* (1984) FLC ¶91-568**

A wife's ability as a money manager and her entrepreneurial expertise as an investor were held by the Full Court to be significant contributions which the wife made to the marriage.

***Whiteley & Whiteley* (1992) FLC ¶92-304**

A wife was found to have been an inspiration to the husband in his creative activities. While the court found that the husband, because of his special skill as an artist, had made the major contribution to the parties' substantial assets, the wife's contribution was unusually helpful to him in the process.

***Zubcic & Zubcic* (1995) FLC ¶92-609**

A wife made a substantial contribution to the conservation of a damages award received by the husband because she performed nursing activities free of charge.

¶13-420 Contributions to the welfare of the family

Contributions to the welfare of the family arise under s 79(4)(c) and 90SM(4)(c) *Family Law Act 1975* (Cth) (FLA). Section 79(4)(c) refers to:

> "The contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage including any contributions made in the capacity of homemaker or parent".

Contributions to the welfare of the family made when parties cohabit before marriage and post-separation but before divorce are covered.

Contributions made before or after a de facto relationship also appear to have the same relevance as those made during a de facto relationship, eg *Warnold & Beauchamp* [2010] FamCAFC 154; *Bateman & Bowe* [2016] FamCAFC 39.

Sections 79(4)(c) and 90SM(4)(c) of the FLA do not extend to contributions made on behalf of a party by some other person, unlike s 79(4)(a) and (b), and s 90SM(4)(a) and (b).

Example

***AB v ZB* (2003) FLC ¶93-140**

Childcare provided by the wife's parents while she was at work was not considered to be a contribution to the welfare of the family within s 79.[99]

***W v W* (1997) FLC ¶92-723**

The parties had a child during a brief liaison about seven years before commencing cohabitation, and married a year after commencing cohabitation. The parties had a further child during the marriage. The actual marriage lasted for about three years. The husband contributed substantially greater property than the wife. The trial judge excluded the wife's contributions to the care of the elder child during the period from the child's birth until the date of the marriage. The husband had paid $5 per week maintenance for about nine months and paid a lump sum of $2,000 apparently in full settlement of his liability to maintain the child.

The Full Court held that the trial judge had erred in making no allowance for the premarital contributions by the wife to the care of the elder child. The fact that the parents of the child subsequently married was sufficient to make contributions before the marriage relevant. The wife's award was increased from 30% of the net assets to 40% to take account of her role as a sole parent and homemaker for seven years.

"A child of a de-facto relationship" is defined differently from a "child of marriage" which may affect the assessment of contributions. For example, it is unclear whether a child of a de facto relationship can be born after the end of the relationship.

The Full Court in *Fields & Smith* (2015) FLC ¶93-638 considered the homemaking and parenting contributions made by a homemaker spouse after separation when the children had left home, and took a broad approach. The Full Court said (at [97]):

> ". . . it is inevitable in some cases that a very significant contribution to the welfare of the family will be a different kind

when parties have separated and the family is no longer constituted by the husband, wife and children. That does not mean that the role completely ceases . . . The section has been given wide interpretation and there is no reason to read it down".

Examples

***Williams & Williams* (1984) FLC ¶91-541 (FamCA); (1985) FLC ¶91-628 (HCA)**

The husband and wife separated in 1975 and in January 1984 a judge made an order in favour of the wife, taking into account the care by the wife of the children after the separation as a contribution to the welfare of the family within s 79(4)(c). The Full Court held that contributions to the welfare of the family include contributions made to the welfare of the children of the family after the parties have separated.

***Kirby & Kirby* (2004) FLC ¶93-188**

A husband who had made significant payments to the family post-separation was entitled to have those payments taken into account as contributions under s 79(4)(c), in addition to offsetting arrears of child support payments.

***Schirmer & Sharpe* (2005) FLC ¶93-213**

The parties were married for nine years, and had four children. The total net property at separation was $9,000. At the time of hearing it was $833,833, largely due to the wife's inheritances. The Full Court found that after considering the value of the properties inherited by the wife three years after separation, the virtually rent-free accommodation provided to the parties and their children by the wife's parents throughout the marriage, the advance of $55,000–$60,000 to the parties from the wife's mother, and the wife's care of the children after separation with "little or no" child support being paid by the husband, his Honour's conclusion that the parties' contributions should be assessed in the proportions of 90:10% in favour of the wife was within the range of discretion, although the Full Court might have been more generous to the husband.

***Kennon v Kennon* (1997) FLC ¶92-757**

The parties cohabited for about five years. The husband's assets were about the same at the time of trial as they were at the start of cohabitation, being about net $8.7m. He had an income of $1m. At the start of cohabitation, the wife had an income of $45,000 per annum and property of $49,000. She worked part-time in the husband's company during the marriage. At the time of trial, she worked in a similar occupation to the one she had in 1989 but earned less. Her notional assets were $94,000. The wife sought between $800,000 and $1.3m. The husband offered $150,000. The trial judge gave her $400,000, half of which was for contributions and half for s 75(2) factors. Both parties appealed. A majority of the Full Court said the trial judge seriously undervalued the wife's welfare contributions. It assessed her contributions as $700,000 (about 8% of the pool). Although the majority would have placed greater weight on the wife's indirect financial contributions, it did not conclude that the trial judge's discretion miscarried. It was more concerned with the trial judge's treatment of the wife's welfare contributions.

***Fields & Smith* (2015) FLC ¶93-638**

The Full Court upheld an appeal by the wife and found that contributions should be

assessed as 50/50 after a 29-year marriage in which the wife was the primary homemaker. The wife referred to the "implicit prejudice" of discounting her homemaking and parenting role as the children became adults and more independent. The Full Court pointed out that the same outcome could have been achieved with a s 75(2) adjustment.

Post-separation financial contributions are discussed in more detail at ¶13-445.

Footnotes

99 *G & G* (1984) FLC ¶91-582.

ASSESSING AND BALANCING OF CONTRIBUTIONS

¶13-440 Comparison of the parties' contributions

The task of evaluating and comparing the parties' respective contributions, where one party has exclusively been the breadwinner and the other exclusively the homemaker, is a difficult one to perform because the evaluation and comparison cannot be conducted on "a level playing field".[100]

The comparison is between fundamentally different activities, being a comparison between contributions to property and contributions to the welfare of the family. A breadwinner contribution can be objectively assessed by reference to such things as that party's employment record, income and the value of the assets acquired. An assessment of the quality of a homemaker contribution to the family is vulnerable to value judgements as to what constitutes a competent homemaker and parent, and cannot be readily equated to the value of assets acquired. There is a tendency to undervalue the homemaker role.[101] However, the High Court held in *Mallet v Mallet*,[102] that equality was not a convenient starting point in the assessment of contributions.

There is a wide discretion under s 79 and 90SM as the *Family Law Act 1975* (Cth) does not indicate the relative weight that should be given to different contributions. The court, in each case, must have regard to the matters which the Act requires it to consider, and do what is just and equitable in all the circumstances.[103]

Examples

***Aldred & Aldred (No 3)* (1988) FLC ¶91-933**

After a 12-year cohabitation, at the time of trial the parties had $3.625m in assets. The husband had made significant initial financial contributions. These contributions were largely to business assets, and the trial judge assessed his initial contribution as one-third of the total assets. Nygh J found that the wife was entitled by virtue of her contributions to 25% of the total assets. This was just short of 40% of two-thirds of the assets. No adjustment was made for s 75(2) factors.

***Dawes & Dawes* (1990) FLC ¶92-108**

The parties had been married for 30 years. There were no assets of significance at the commencement of the marriage but at the time of trial there was just over $1m. The wife was largely a homemaker although she was paid a salary, mainly for tax minimisation purposes. The trial judge concluded that the husband was the brains of the companies and was in complete control of them. Then after considering s 75(2) factors, the contribution factors of 90% in the husband's favour were reduced to 65%. The Full Court held that the trial judge had grossly undervalued the wife's contributions and that, after such a long marriage, the assets should be divided virtually equally.

***Spiteri & Spiteri* (2005) FLC ¶93-214; [2005] FamCA 66**

The husband's post-separation contributions, which increased the value of the property, were off-set by the wife's post-separation contributions to the care of the children.

***Wah & Golay* [2016] FamCAFC 67**

The Full Court upheld the assessment of contributions by the trial judge by the husband as 87.5% of the $3.9m after an eight-year period of cohabitation in which the husband brought in 89% of the pool. The Full Court made a s 75(2) adjustment in favour of the wife of 7.5% whereas the trial judge had made no adjustment.

Footnotes

100 *Ferraro & Ferraro* (1993) FLC ¶92-335.

101 Ibid; *Mallet* v *Mallet* (1984) FLC ¶91-507.

102 *Mallet* v *Mallet* (1984) FLC ¶91-507 at p 79,126.

103 Ibid, at pp 79,110–79,111.

¶13-442 Initial financial contributions

If a party brings real property or other significant assets into a marriage, this contribution is considered to be very important, although the disparity in the contributions may be diminished over a long marriage. This usually occurs by the offsetting of later contributions, to "erode" earlier contributions. This is a generally accepted principle, but it is not always adopted. For example, in *Fields & Smith* (2015) FLC ¶93-638, in relation to the timing of contributions, the Full Court said (at [168]):

> "However, the task is to consider the contributions holistically over the whole period from the commencement of cohabitation to trial and the analysis requires the court to weigh all of the contributions of all types prescribed by s 79(4) made by both parties across the entirety of the relationship until the time of the hearing, including the post-separation period".

In *Wallis & Manning* (2017) FLC ¶93-759, the husband's father gifted to the parties a half share in a farming property, two years after the marriage and 28 or so years before the trial. The parties purchased the other half of the property at the same time. The husband's father also gifted parts of another farming property to the parties a year after the initial gift. The combined value of the land and water licences gifted by the father represented about 35% of the gross value of the property and the superannuation interests available for distribution at the time of trial, and about 56% of the net overall value of the property.

The Full Court said (at [116]) that "talk of 'erosion' of the early capital contribution obscures the issue rather than illuminates it. However, it can be taken as well settled that the length of the relationship has a significant impact on how early significant capital contributions should be viewed in assessing the totality of the parties' contributions".

It was found by the Full Court to be important that (at [120]):

> "The gifts made by the husband's father were made early in a long marriage. The use to which those gifts were put rendered them of fundamental importance to the parties throughout the marriage. They provided the foundation for a farming business, operated as a partnership between the husband and the wife, from which the marriage derived income during its duration. They provided land upon which the parties' home was situated and, thus, a place to live".

The trial judge had assessed contributions as 70%/30% in favour of the husband and made a 10% adjustment in favour of the wife for s 75(2) of the *Family Law Act 1975* (Cth) (FLA) factors.

The wife appealed. The Full Court assessed contributions as 57.5%/42.5% in favour of the husband. The disparity of 15% was, in dollar terms, $294,500. The s 75(2) adjustment was assessed in dollar terms as $150,000, which when converted to percentage terms was 7.5%. The property was therefore divided equally.

Elford & Elford (2016) FLC ¶93-695 is discussed at ¶13-335 in the context of lottery wins, but it is also relevant here.

Examples

***Bremner & Bremner* (1995) FLC ¶92-560**

At the start of the 23-year marriage, the husband owned a four acre block of land. The parties both worked in paid employment during the marriage, but the wife was the primary caregiver of the children. The trial judge assessed the contributions as equal and made no adjustments for factors under s 75(2) FLA. Baker J, with whom the rest of the Full Court agreed, followed Fogarty J (rather than Lindenmayer J who said that the contributions could only be equal if the contribution of a spouse during the marriage exceeded the initial contribution of the other spouse) in *Money & Money* (1994) FLC ¶92-485 who held at p 81,054 that:

> "an initial substantial contribution by one party may be 'eroded' to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party".

***Pierce v Pierce* (1999) FLC ¶92-844**

The trial judge found that the husband's substantial initial contribution had been eroded over the period of cohabitation which was just over 10 years. The trial judge divided the assets on a 55:45 basis in favour of the husband due to the disparity in the parties' initial contributions. He made no adjustment for s 75(2) factors.

The Full Court allowed the husband's appeal. The husband was entitled to 70% of the assets on the basis of his greater initial contributions, and a further 5% for s 75(2) factors. The Full Court said it was not so much a matter of erosion of contribution but a question of what weight was to be attached, in all the circumstances, to the initial contribution. The use made by the parties of that contribution was relevant. Here it was a substantial contribution to the purchase price of the matrimonial home.

***Spiteri & Spiteri* (2005) FLC ¶93-214**

The Full Court agreed with the husband that, particularly given the income-producing nature of the husband's initial assets and their value when compared with the value of the wife's assets at the commencement of the marriage, this disparity should have been the subject of a finding by the trial judge which was taken into account in assessing the parties' contributions. The husband's initial contribution was $189,000 including an $80,000 banana crop and the wife's initial contribution was no more than $10,000. At separation the asset pool was about $445,000 but the wife was found to have wasted at least $150,000 during the nine-year period of cohabitation. There were three children.

¶13-445 Post-separation contributions

The weight to be given to post-separation contributions is a difficult question. As for pre-separation contributions, the party who makes the more significant post-separation contributions may argue that an asset should be quarantined or excluded from the rest of the property pool which is to be divided between the parties. It is erroneous, when considering a s 75(2) *Family Law Act 1975* (Cth) adjustment, to take into account only those assets in respect of which some contribution had been made (*Polonius & York* [2010] FamCAFC 228).

There does not need to be a connection between a post-separation contribution (such as an inheritance) and the parties' matrimonial relationship. The Full Court in *Calvin & McTier* (2017) FLC ¶93-785 rejected the husband's argument that the High Court's judgment in *Stanford & Stanford* (2012) FLC ¶93-518 supported Guest J's dissenting judgment in *Farmer & Bramley* (2000) FLC ¶93-060 that there should be "fractional contemporaneity" of property and contributions so that they occupy "the same time and space".

Following the *Williams & Williams* (1984) FLC ¶91-541 line of authority, post-separation contributions of a homemaker and parent as against those of a primary income earner were often equated. In *Coghlan & Coghlan* (2005) FLC ¶93-220, the parties had been

separated for about two years at the time of the trial. The Full Court considered that an assessment of contributions to both superannuation and non-superannuation assets was required.

Examples

***Spiteri & Spiteri* (2005) FLC ¶93-214**

The Full Court was dealing with a property pool of $1.65m and a nine-year period of cohabitation. The parties did not make equal contributions at cohabitation or during the marriage. The wife wasted at least $150,000 during the marriage. The value of the assets at separation was about $445,000. The asset pool increased to about $1.6m in the four years to the date of the trial due to the husband's work and expenditure.

The Full Court considered that the contributions until the date of separation were 75:25 in favour of the husband.

There were three children of the marriage who lived with the wife. The wife lacked qualifications and there was a huge disparity between the parties' respective earning capacities. Another s 75(2) factor was the capital disparity resulting from the contribution assessment. A further 20% was given to the wife for s 75(2) factors, so she was entitled to 40% of the pool.

***Ilett & Ilett* (2005) FLC ¶93-221**

The wife appealed against an order giving her 70% of a pool from which a home acquired post-separation was excluded. She received only 36.5% of the total pool. The parties' superannuation had increased considerably since separation. The wife was the primary carer of the children who were aged four and six at the time of separation, 8½ years before the trial. To the time of separation, the parties' contributions were assessed as equal. The Full Court (consisting of the same judges as in *Coghlan & Coghlan* (2005) FLC ¶93-220) assessed contributions to the time of trial as 65% by the husband and 35% by the wife. A 10% adjustment in favour of the wife for s 75(2) factors meant that the wife was entitled to 45% of the pool.

***Schirmer & Sharpe* (2005) FLC ¶93-213**

The Full Court upheld the 90% contribution assessment in the wife's favour as being within the range of discretion. During the nine-year relationship the parties had four children. The parties' contributions were not equal before separation. The parties lived virtually rent-free in accommodation provided by the wife's parents and received an advance of $55,000–$60,000 from the wife's mother. The wife made further contributions after separation. The most significant was an inherited property, valued at $560,000. Furthermore, in the nearly eight years between separation and the date of trial, the husband paid little or no child support for the three younger children who were at all times in the wife's care and for the oldest child who was in the wife's care until 2½ years before the time of the trial.

***Hill & Hill* (2005) FLC ¶93-209**

The wife appealed against an order that she receive 30% of a $10.6m pool. She sought 50%. The parties cohabited for 16 years and had three children aged 17, 16 and three at the date of the trial. The asset pool doubled after separation. During the marriage, the husband established his own stockbroking business and a series of companies to

manage the family's investments. The wife was employed in the stockbroking business for seven years, but the trial judge made no findings as to the role she carried out. The husband made substantially greater initial contributions of $165,000. The wife argued that the importance of these were overstated.

Whether the increase in the parties' asset pool post-separation ought to have been regarded by the trial judge as a result of the husband's special stockbroking skills or as a result of "market forces", in the nature of a windfall, was a point of contention between the parties. There was no finding as to what it was that the husband did in that 15-month period that actually led to the pool being doubled. Counsel for the wife obtained from the husband several admissions that the major growth in the portfolios resulted from holding long-term stock investments accumulated during the parties' cohabitation. The Full Court held that the trial judge erred in not giving adequate reasons for finding that contributions were 75% in the husband's favour, and remitted the matter for re-trial.

***Marsh & Marsh* (2014) FLC ¶93-576**

The parties separated in late 2000 and divorced in January 2008. The wife was granted leave to commence proceedings in July 2010.

The trial judge accepted that at the date of separation the contributions of the parties were equal, but made an adjustment in the husband's favour of 20% for his post-separation contributions. A 10% adjustment was made in the wife's favour for s 75(2) factors.

Ainslie-Wallace J found that the trial judge's assessment failed to give proper weight to:

- the wife's contributions as a homemaker and parent to the children who were aged about 17, 14 and 10 at separation
- the wife's indirect contributions and the husband's career, and
- the wife's continuing indirect financial contributions to the husband's income (albeit in a different way from those she made during the relationship with the husband).

Murphy J agreed with Ainslie-Wallace J that the appeal should be upheld. The trial judge gave too much weight to the husband's financial contributions after separation in circumstances where, as Murphy J said (at [120]):

> "The foundation for the property transactions which occurred subsequent to separation was the property acquired during the marriage and the husband's income acquired through advancement in his employment. The wife contributed significantly to each".

The property pool was approximately $4.7m including $1.6m of the husband's superannuation. The trial judge awarded the wife 40% of the non-superannuation property and 30% of the property.

The Full Court remitted the matter for re-hearing.

***Polonius & York* [2010] FamCAFC 228**

The Full Court was particularly critical of the Federal Magistrate's reference to the wife's "overwhelming and total post-separation financial contributions" serving to "negate any contributions made by the [Husband] during the course of the marriage" and His Honour's conclusion that the husband "should not receive any consideration on account of contributions". The Full Court discussed the correct approach under s 79 and noted

that “it is not an exercise of considering whether the contributions of one party nullify the contributions of the other party”.

The Federal Magistrate’s orders had the effect of allowing the wife to keep the entirety of the property pool, save for the husband receiving his $1,500 superannuation. As the Full Court articulated, the husband received “virtually nothing, which is what His Honour intended”. The parties’ net assets totalled $1,287,168. Their marriage spanned approximately 37 years and they had two children.

The Full Court ordered a re-hearing.

***Fields & Smith* (2015) FLC ¶93-638**

The trial judge assessed the wife’s post-separation contributions as less than her contributions during the marriage, and assessed the husband’s contributions, which were primarily financial, as being greater than those of the wife both during cohabitation and after separation. The wife’s contributions were primarily as a parent and homemaker. Following separation, her role had altered because the children had left home and the parties no longer belonged to a household where they provided each other with mutual support. After a 29-year marriage, the trial judge distributed the property on the basis of contributions as to 60% to the husband and 40% to the wife and made no s 75(2) adjustment.

Before the Full Court, the wife pointed to the “implicit prejudice” of failing to acknowledge the intrinsic changes to the role of a long-term homemaker and parent as the children grow older, where the parties had accepted and agreed on that role during the marriage. Bryant CJ and Ainslie-Wallace J agreed that there was a potential for prejudice but pointed out that s 75(2) could be used to take account of matters other than contributions where it was appropriate to do so. Also relevant though, was that there was no evidence that new assets had been acquired or existing assets improved or conserved due to the efforts of one party rather than another following separation, despite the husband’s observations that he had made greater post-separation contributions than the wife. The Full Court effected a 50/50 division of property.

***Zaruba & Zaruba* (2017) FLC ¶93-776**

The parties had been divorced for over 20 years and had separated their finances for over 30 years. There were two pieces of real property. The former matrimonial home was jointly owned by the parties and had an agreed value of $450,000. Another property, purchased solely by the wife after they separated their finances, had an agreed value of $1,000,000.

The Full Court found that there was no evidence on which the trial judge could have concluded that it was just and equitable to alter the wife’s legal and equitable interests in her property.

On the basis of contributions, the parties were equally entitled to the jointly owned home and the wife was solely entitled to her property. The husband was required to pay the wife $225,000, being half of the value of the home. There were s 75(2) factors which favoured each party but the wife’s better financial position lead to an adjustment of $75,000 in favour of the husband, reducing the payment by the husband to the wife to $150,000.

***Needham & Trustees of the Bankrupt Estate of Needham* (2017) FLC ¶93-777**

The trial judge ordered that the former matrimonial home be sold and the net proceeds

of sale be divided between the wife and the husband's bankruptcy trustees so as to effect a 68%/32% division of non-superannuation property in the wife's favour. This was arrived at based on a finding of equality of contributions during cohabitation, with an adjustment of 13% for the wife's post-separation contributions and a further adjustment to the wife of 5% for s 75(2) factors.

The parties were married for 14 years, but by the time of trial they had been separated for 17 years. The husband's bankruptcy was the result of the husband's activities after separation.

Post-separation, the wife solely raised the husband's two children, her own child and the two children of the marriage, while the husband resided overseas. He paid no child support, other than to pay boarding school fees for his two children, but this did not free up the wife to pursue a career as she remained the sole homemaker and parent for all five children in the husband's absence.

The Full Court found that the trial judge was in error to give the trustees 32% of the wife's post-separation assets to which the husband made little or no contribution.

The Full Court assessed the wife's contributions as 75%, and because of that assessment her s 75(2) factors were substantially less, being 5%. The wife received 80% of the net sale proceeds of the home. The trustee received no adjustment for her post-separation assets and personal property.

***Fields & Smith* (2015) FLC ¶93-638**

The Full Court gave a broad interpretation when assessing contributions to the welfare of the family made post-separation. It was held that the wife's contributions to the welfare of the family did not cease when the family was no longer constituted by the husband, wife and children.

¶13-450 Special skills

In the late 1990s, there was a series of cases in Australia dealing with significant asset pools ("big money cases") and "special", "extra" or "extraordinary" skills, factors or contributions. There was controversy about whether this principle should apply and when it should apply. Part of the controversy related to the fact that the principle was only applicable to financial contributions, and not to homemaking and parenting contributions. The debate was revived in *Kane & Kane* [2011] FamCA 480 and *Smith & Fields* [2012] FamCA 510.

The Full Court in *Kane & Kane* (2013) FLC ¶93-569 rejected the notion of "special skills" or "special contributions" saying that it would result in disproportionate weight being given to one party's contributions although it was possible to find that one party had made greater contributions than the other.

The husband argued that his investment acumen resulted in the substantially greater success enjoyed by the investments in his superannuation portfolio than those of the wife. He argued that his contributions were quadruple those of the wife. Austin J accepted that the husband should receive extra credit for his investment skill. The superannuation was apportioned two-thirds to the husband and one-third to the wife. The rest of the assets were divided 50/50. After a marriage of almost 30 years, the husband received about $2.7m and the wife about $1.5m. This decision was over-turned by the Full Court and the matter was remitted for re-hearing.

The Full Court in *Fields & Smith* (2015) FLC ¶93-638 referred favourably to both *Kane & Kane* (2013) FLC ¶93-569 and *Hoffman & Hoffman* (2014) FLC ¶93-591. *Fields & Smith* involved a 29-year marriage. The pool was between $32m and $40m. The trial judge distributed the property on the basis of contributions as to 60% to the husband and 40% to the wife. The Full Court had difficulty reconciling the statements of the trial judge that the husband's contributions should not be assessed as "special" and ordered an equal division of the assets.

Examples

***McLay & McLay* (1996) FLC ¶92-667**

The parties cohabited for 21 years, and had one child. The parties' net assets were valued at $8m. The vast majority of the wealth was accumulated through the husband's financial activities. The trial judge identified the existence of special factors or special skills.

The trial judge concluded that the husband's contributions overall exceeded those of the wife because of the activities which he undertook, and assessed the contributions at 60%:40% in the husband's favour. The husband appealed. The Full Court referred to *Ferraro & Ferraro* (1993) FLC ¶92-335. It rejected a submission at p 82,903 that in weighing the contributions the dominant feature must be to favour the one who is said to be directly responsible for "the accumulation of that wealth" or that this issue must be judged by the "financial product" of the parties.

***Stay v Stay* (1997) FLC ¶92-751**

There was an asset pool of $3.7m. The trial judge found that the contributions made by the husband had the quality described as "special" or "extra". The Full Court found that the application of the skills from his ingenuity and enterprise produced assets in the medium range rather than in the high range. The trial judge had found that the husband should receive 55% plus his superannuation entitlements, and the wife 45% plus her superannuation entitlements. The Full Court said the trial judge had erred in such a

finding. The Full Court pointed to the marriage lasting 27 years, from which there were five children. The Full Court assessed the contributions in the same percentages, but included the parties' superannuation as a contingent asset in the pool thereby increasing the pool by about $565,000. It also gave the wife an extra 5% for s 75(2) *Family Law Act 1975* factors.

***JEL & DDF* (2001) FLC ¶93-075**

The period of cohabitation was about 20 years. There were three children and an asset pool of about $37m. Both parties appealed against orders dividing the net property 35%:65% in the husband's favour.

The Full Court expressed concern about the "quality of the contributions of the parties". The court said that "extra", "special" or "extraordinary" skills, factors and other contributions were not only recognised in large asset pools. These comments, although dicta, are contrary to the *Ferraro* and *McLay* line of authority.

The court accepted that special contributions could be made by a homemaker or parent. Examples were given of contributions made where there has been domestic violence or the homemaker has received no financial, physical or emotional support from the other party. However, the husband was absent from home a great deal due to his employment. Delays in selling the parties' homes meant that the husband often moved several months before the wife and the children. By contrast, no credit was given to the wife for these "extra" homemaker and parenting contributions. The court took into account the fact that the wife's contributions during the latter part of the marriage were less because of her illness.

The court held that the wife should have received between 25% and 30% of the property pool. It gave her 27.5% being the mid-point of that range. The wife's claim for a 2.5% adjustment in her favour for s 75(2) factors was rejected.

***Phillips v Phillips* (2002) FLC ¶93-104; [2002] FamCA 350**

The asset pool was $26m. The Full Court upheld the decision of the trial judge, May J, who was also the trial judge in *JEL & DDF* who gave the wife 40% of the net assets after a marriage of 31 years.

***Farmer & Bramley* (2000) FLC ¶93-060**

The husband won a $5m lottery about 19 months after separation. The wife's s 79 application was filed about 11 months after the *decree nisi* became absolute and nearly three years after separation. By that time both parties had re-partnered. The husband had a child from his new relationship, and the wife had remarried.

At the time of separation, neither party had assets of any value. In the Full Court the primary issue was whether the wife's contributions to the marriage entitled her to a share of the husband's property acquired after separation.

The wife's non-financial contributions to the marriage had been substantial. The husband was a heroin addict. She had helped him to recover and assisted him in his studies. The husband was gainfully employed as a social worker partly through her efforts.

A majority of the Full Court gave the wife $750,000 of the $5m win, or 15%. In a dissenting judgment, Guest J only gave her $140,000 being $50,000 for post-separation contributions to the child of the marriage and $90,000 for s 75(2) factors. His Honour's judgment has been criticised for many reasons and particularly for the following

passage (at p 87,977):

> "Although there need not be a specific nexus between the property and the contribution, they both must occupy the same time and space, that is, have parallel or fractional contemporaneity".

For a dissenting judgment, the decision of Guest J received a great deal of attention. This was in part due to the unusual phrase "parallel or fractional contemporaneity". Other factors were the unusual fact situation and that in *JEL & DDF* he was a member of a unanimous Full Court taking a distinct change in direction.

***Kane & Kane* [2011] FamCA 480**

The husband argued that his investments acumen resulted in the substantially greater success enjoyed by the investments in his superannuation portfolio than those of the wife. He argued that his contributions were quadruple those of the wife. Austin J accepted that the husband should receive extra credit for his investment skill. The superannuation was apportioned two-thirds to the husband and one-third to the wife. The rest of the assets were divided 50/50. After a marriage of almost 30 years, the husband received about $2.7m and the wife about $1.5m.

***Hoffman & Hoffman* (2014) FLC ¶93-591**

The Full Court noted that they did not consider that there is any "legitimate guideline" of "special contributions" or any such guideline pertaining to particular contributions containing "special" factors or features that "eases the burden" in establishing a miscarriage of discretion. The husband appealed against orders distributing almost $10m of property of the parties, who had cohabited for 36 years, equally. The husband contended that the trial judge's finding that contributions were equal was not open because his contributions should have been regarded as "special". The husband had made substantial investments in property and the share market.

***Grier & Malphas* [2016] FamCAFC 84**

The husband tried to argue that he brought a "skill set" into the marriage which largely generated the net property pool and that this "skill set" could be distinguished from "special skills". The Full Court rejected the husband's argument.

¶13-460 Small asset pools

Small asset pools pose particular problems. The s 75(2) and 90SF(3) *Family Law Act 1975* (Cth) factors are often of greater significance in the outcome than in larger asset pools. There are also more likely to be insufficient assets to distribute between the parties to take account both of their contributions and the s 75(2) and 90SF(3) factors.

The problems are exacerbated by the lack of reported decisions. By definition it is usually not cost effective for parties with a small asset pool to litigate at all. Proceeding to a final hearing and judgment may

not achieve a financial benefit for either of the parties.

Examples

***H & T* [2002] FMCAfam 209**

The Federal Magistrates Court dealt with an asset pool of approximately $59,000. The parties lived together for about 4½ years but were married for less than two years. At the date of the trial the husband was aged 39, a full-time shearer and had a modest income. The wife was 41 and a wool classer and shearer. There was a three-year-old child of the marriage, and the wife had two other children, aged 15 and 12.

At the commencement of cohabitation the husband owned an unencumbered property in Western Australia, a motor vehicle and tools and equipment, and had some savings. The wife had modest possessions. At the end of the marriage the real property was the most significant item in the property pool, albeit of modest value.

The husband's earning capacity was limited by his age. The wife's earning capacity was limited by her care of the three children, particularly the three-year-old and a court order requiring her to live within a 200 km radius of Hamilton.

The husband argued that the wife made little or no contribution to the real property largely because the real property had approximately the same equity or even less than at the time the parties commenced cohabiting.

Bryant CFM (later CJ of the Family Court of Australia) found that on the basis of contributions the property of the parties should be divided as to 80% to the husband and 20% to the wife.

Her Honour said (at [19]): "[I]n some senses the smaller the asset pool the more critical the adjustment for other factors beyond contribution may be". She made a 25% adjustment in favour of the wife largely because of the different income earning capacities and the husband's superannuation. She rejected the husband's argument that the wife's care of their child was taken into account by his payment of child support.

After taking into account the 20% share for contribution and the further 25% adjustment for s 75(2) factors, the wife was entitled to 45% of the property of the parties. The husband retained his superannuation of $12,000 as against the wife's superannuation of $600.

***Sullivan & Cunez (No 2)* [2016] FamCA 366**

The trial judge made orders by consent for the division of chattels. Orders made not by consent were for the division of the net proceeds of sale of the former matrimonial home (approximately $54,751) in equal shares and for a superannuation split of the husband's superannuation to the wife. The husband was held solely liable for pre-separation and post-separation debts.

***Tomlin & Nilsen* [2011] FMCAfam 166**

The mother had the primary care of the parties' three children, including one with special needs, and had a lower earning capacity than the father. The net proceeds of sale after the payment of the mortgage and other liabilities was about $98,000. The mother was ordered to receive 80% of this, but she did not receive a superannuation split of about $20,000 (if it had been split equally). Her argument that she should receive

only non-superannuation was accepted by the court.

***Cauldwell & Sumner* [2017] FCWA 55**

The parties lived together for 17 years. The trial took place four years after separation, when the parties' three children (who all lived with the wife), were aged 18, 14 and 11 years. The husband made an initial contribution of equity in a property, but the wife made greater post-separation contributions:

- the husband sold some property and retained the proceeds
- the husband retained rental income from the properties
- the husband provided diminished support to the wife and children and later no support at all
- the husband failed to pay the mortgages
- the wife maintained one of the properties, negotiated with lenders to avoid foreclosure and to preserve the assets, and
- the wife was solely responsible for the care of the children and received no financial support from the husband.

The wife's contributions were assessed as greater than those of the husband.

With respect to s 75(2):

- the husband's income was presumed to be significantly higher than that of the wife, consistent with his earnings when he was previously employed overseas
- the husband had re-partnered and had another child, and
- the husband was in arrears of child support of about $8,000.

The total net value of the property of the parties was $32,220. The husband made no claim for a property settlement. It was just and equitable for the wife to retain all the known assets where the husband had a significant earning capacity and paid no child support. Retaining all the property meant that the wife would be able to retain ownership of the home, where she had lived with the children and have some security for the future.

¶13-470 The relevance of conduct to contributions

The overall construction of the *Family Law Act 1975* (Cth) has excluded questions of conduct from consideration of financial matters, particularly excluding fault or misconduct from s 79 and 90SM.

However, in a number of cases it has been suggested or accepted that fault or misconduct may be relevant and therefore admissible

when assessing contributions as homemaker and parent or financial contributions. In *Ferguson & Ferguson*, a majority of the Full Court said:

> "There may also be the rare or exceptional case where a party has ignored completely the basic concepts upon which the 'partnership' of marriage is founded".[104]

Examples

***Weber & Weber* (1976) FLC ¶90-072**

A woman who had been an alcoholic for some years during her marriage sought orders that her former husband transfer his joint interest in the former matrimonial home to her. During the marriage she had been hospitalised three times for alcohol consumption reasons and was also unable to perform her "normal matrimonial duties" at other times to such an extent that her husband was unable or less able to work. Frequently she spent money on alcohol "which should have been devoted to the running of the household". Zelling J found that something like 10% of her time was time when she could not do her normal household duties. Her contributions were less than a spouse who was not affected by alcohol. His Honour declared that the husband's interest in the house was 60% and the wife's interest was 40%.

***Aldous & Aldous* (1996) FLC ¶92-715**

A wife entered into a settlement of litigation commenced against both spouses by a third party, and the husband had filed a defence to the litigation. The husband argued that the wife had unreasonably compromised the litigation. The trial judge was obliged to consider, first, whether the compromise, was reasonable and, second, if it was not reasonable, what would have been a reasonable compromise and then add that sum to the parties' liabilities. The wife would remain liable for the full sum of the settlement which was relevant under s 75(2). The majority in the Full Court judgment indicated that the parties should be jointly liable.

***P & P* (2003) FLC ¶93-161**

Walters FM (as he then was) concluded that the parties' contributions from the commencement of cohabitation to the date of trial were either equal or slightly in favour of the husband. However, the husband's behaviour had "a discernible impact upon the contributions of the other party". The wife's ability to keep house (or assist the husband in keeping house), work efficiently and with focus on an attempt to improve the economic circumstances of the parties and to provide a happy, secure and supportive environment for the small family comprising the husband and herself, was significantly affected by the husband's at times selfish and thoughtless behaviour. Having regard to the amount of money spent by the husband on alcohol, the husband's behaviour had an adverse economic impact on the welfare of the family. Overall, the wife's contributions were significantly more arduous than they ought to have been, had the husband behaved in a fair and responsible manner.

***Crampton & Crampton* (2006) FLC ¶93-269**

The husband argued on appeal that the wife's gambling losses should have been taken

into account at first instance and that she should have borne the entirety or some other proportion of the loss. The onus was on the husband to prove that the wife was reckless, wanton or negligent. The court was not satisfied that the husband had demonstrated this. The trial judge had accepted evidence which established:

- the pathological nature of the wife's gambling
- her irrational belief that she would recover the losses
- the estrangement in her relationship with the husband, and
- that the wife suffered an illness.

The Full Court found that the trial judge was entitled to treat the gambling losses in the way he did.

Evidence of conduct may be admissible and relevant where it is tendered to rebut the claim by a wife to have made a contribution of a homemaker or parent. However, the fault is not the central issue, but merely a means by which proof may be offered of that which is the central issue, namely the extent of the contribution made as homemaker and parent.[105]

Footnotes

104 *Ferguson & Ferguson* (1978) FLC ¶90-500 at p 77,606; see also Wilson J in *Mallet* v *Mallet* (1984) FLC ¶91-507 at p 79,126.

105 *Sheedy & Sheedy* (1979) FLC ¶90-719.

¶13-480 Domestic violence

The concept of negative contribution as a rationale for considering violence in s 79 and 90SM *Family Law Act 1975* (Cth) proceedings has been rejected by the Full Court of the Family Court.[106] The existence of domestic violence has been taken into account in assessing the victim's contributions. If there is a course of violent

conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or their contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79 and 90SM. This approach is preferable to the concept of "negative contributions" which is sometimes referred to in this discussion.[107] It is a relatively narrow band of cases to which these considerations apply. It is necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party.

In *Kennon*, the Full Court referred to a "narrow band of cases" and "exceptional cases" but the Full Court in *Spagnardi & Spagnardi* [2003] FamCA 905 (reported in austlii.edu.au as *S & S*) said (at [46]):

> "[W]e would not want the reference in *Kennon* to 'exceptional' at ¶84,294 to be understood to mean rare. We do not agree with this qualitative description and would be more inclined to the view expressed by the trial Judge (at [17]):
>
> > 'In his submissions, Mr Schonell, quite understandably and quite correctly, drew my attention to the strength of the language, referring to "exceptional cases" and "the relatively narrow band of cases". However, it seems to me that, reading these passages as a whole, the references to "exceptional cases" and "narrow band of cases" occurs in the context of the principle of misconduct in general rather than the more narrow formulation about domestic violence. My reading of these passages, therefore, is that it is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles. It seems to me that reading these passages carefully, the key words in a case where there are allegations of domestic violence are "significant adverse impact" and "discernable impact". That reading of the passage is, I think, given some additional force by the actual decision in the *Doherty* case and the judgments of Baker J in both *Doherty* and *Kennon*'".

The appeal succeeded as although the Full Court found that the trial Judge correctly found that there was no explicit evidence by the wife to the effect that the violence made her performance of her contributions more arduous, the trial Judge simply assumed that her contributions must have been significantly more arduous.

Examples

***Doherty & Doherty* (1996) FLC ¶92-652**

The domestic violence complained of related to a relatively small period of time at the end of the marriage, but it was found that, because of the appellant's conduct, the respondent's contribution as a homemaker was increased and the appellant's similar contribution diminished as a consequence, leading to the contributions in favour of the wife being increased, albeit only slightly.

***Marando v Marando* (1997) FLC ¶92-754**

Gee J took account of the fact that the wife's homemaking and parenting contributions were: "made especially hard by the husband's abuse and denigration of her and the children . . . as well as by his attitude to 'women's work' and by his drinking which necessitated the wife working especially hard and harder than would be usual in normal situations as homemaker, parent and as the prime navigator of the welfare of this family through the many seas of problems and difficulties which confronted them over the years" (at pp 84,168–84,169). These amounted to "special factors" that justified an allocation of contributions 55% to the wife and 45% to the husband.

***Kozovski & Kozovski* [2009] FMCAfam 1014**

Altobelli FM accepted that a Kennon-type adjustment was warranted but questioned whether the 10% sought by the wife and found by him, was sufficient. He concluded (at [77]):

> "Assessing the extent that the more arduous contribution should be reflected in the property settlement is difficult, and rather arbitrary. Counsel for the wife submitted it should be 10%. I accept this figure as being appropriate under the circumstances of this case, but, quite frankly, if I had been asked to assess contribution at a higher figure, I would have. My real concern, however, is as to the artificiality of a Kennon-type adjustment, whatever the percentage is. Having regard to the nature of the violence suffered by the wife during a long marriage it is clear that neither 10% or any other figure could possibly be characterised as compensatory because no amount could compensate her for what she experienced at the hands of the husband".

***Coad & Coad* [2011] FamCA 622**

> The husband was convicted of attempting to murder the wife, intentionally causing serious injury to her and conduct endangering life in respect of a person who came to her assistance. Her Honour concluded that the contributions favoured the husband at separation because of his greater financial contributions. However, in the four years post-separation the wife's financial, homemaking and parenting contributions were greater, being a period of about one-third of their relationship.

The husband was expected to be in prison for at least another eight years. Her Honour did not consider it appropriate to take into account the criminal injuries compensation monies which the wife received and spent. Her Honour concluded that although the wife's entitlement on contributions was greater than that of the husband, the wife should receive a further 30% for s 75(2) factors increasing her entitlement to 90% of the assets.

***Jarvis & Seymour* [2016] FCCA 1676**

Altobelli J found that the husband's violence to the wife in the years leading up to separation and in the post-separation period made the wife's contribution significantly more arduous within *Kennon*. The husband breached an apprehended family violence order four times, threatened to kill the wife and burn the house down, left abusive messages on the answering machine and generally had "vile behaviour". The wife was fearful of the husband, could not sleep undisturbed, was preoccupied with matters relating to the safety of herself and their sons, was hypervigilant about her sons' safety and felt physically unwell and anxious.

A 5% adjustment in the wife's favour was made to the non-superannuation pool but no adjustment was made to the superannuation pool because it could not be said that the wife's contributions to the husband's superannuation were rendered more arduous by the husband's conduct.

***Britt & Britt* (2017) FLC ¶93-764**

The wife's evidence about family violence was not accepted by the trial judge as being too general. The Full Court held that "routinely" and "regularly" had a common meaning which was capable of some probative weight and that there was not a higher standard for the admissibility of evidence of family violence.

The Full Court appeal succeeded as although it found that the trial judge correctly found that there was no explicit advice by the wife to the effect that the violence made her performance of her contributions more arduous, the trial judge incorrectly assumed that her contributions must have been significantly more arduous.

***Scheer & Scheer* [2018] FCCA 3285**

The wife argued that violence by the husband made her financial and non-financial contributions more difficult. Both the wife and the husband were found to have made significant contributions to the marriage and children. The husband admitted to the violence, including an incident which required the wife to be hospitalised.

Justice McNab accepted (at [76]) that the husband's aggressive and physically violent behaviour towards the wife and children "meant that the family environment was difficult, and at times frightening and that a corollary of this is that the everyday effort of working will have been more difficult". However, as no discernible impact upon the wife's contributions could be shown and no medical evidence was adduced to support a finding that the wife's contributions were impaired, McNab J concluded that a *Kennon* claim could not succeed.

***Shah & Duras and Anor* [2018] FamCA 854**

There was a long history of violence by the husband against the wife and children, occurring on a daily basis. He also prevented her from undergoing training or finding employment.

Justice Rees accepted that the wife's contributions were made more arduous by the

violence, as well as the children's behavioural and medical problems. Although she could not reach a conclusion on the evidence that the violence was a cause of the children's problems, they were still relevant in assessing the wife's contributions.

***Gallego & Mackweth* [2018] FamCA 787**

The husband was violent towards the wife on multiple occasions. On one occasion, he caused her to suffer a burst eardrum, on another she was knocked unconscious. There was also a history of verbal abuse.

It was accepted that the violence made the wife's contributions more onerous. Justice Stevenson simply found that the contributions were "made in the circumstances of family violence". She referred to *Britt & Britt* and was prepared to infer from the evidence that there was a nexus between the conduct and the relevant contributions.

Footnotes

106 *Kennon* v *Kennon* (1997) FLC ¶92-757.

107 Ibid, at pp 84,294–84,295.

CONSIDERING THE S 75(2) AND 90SF(3) FACTORS

¶13-490 Introduction

As part of the s 79 or s 90SM *Family Law Act 1975* (Cth) process, the court must consider the matters in s 79(4)(d)–(g) or s 90SM(4)(d)–(g). The most important of these considerations are s 79(4)(e) or s 90SM(4)(e) which require the court to take into account matters referred to in s 75(2) or s 90SF(3) so far as they are relevant. The fourth step is to determine that the order is just and equitable.

The matters to be taken into account under s 75(2) or s 90SF(3) are set out in the table below:

Issue	s 75(2)	s 90SF(3)
Age and state of health	(a)	(a)

Income, property, earning capacity, etc	(b)	(b)
Care of child of relationship under 18 years	(c)	(c)
Commitment to support self and those the party has duty to maintain	(d)	(d)
Responsibility to support others	(e)	(e)
Eligibility for pension, allowance, superannuation, etc	(f)	(f)
Standard of living	(g)	(g)
Education or training	(h)	(h)
Effect on creditor	(ha)	(i)
Contribution to financial position of the other	(j)	(j)
Duration of relationship and effect on earning capacity	(k)	(k)
Need to protect parent role	(l)	(l)
Financial circumstances of cohabitation with another	(m)	(m)
Terms of order proposed or made	(n), s 79	(n), s 90SM
Terms of order or declaration made or proposed under Pt VIIIAB	(naa)	(o)
Child support	(na)	(q)
Any other fact or circumstance which justice requires to be taken into account	(o)	(r)
Terms of any Pt VIIIA financial agreement	(p)	(t)
Terms of order or declaration made or	–	(p)

proposed to be made under Pt VIII		
Terms of Pt VIIIAB financial agreement	(q)	(s)

Relevant case law and factors under s 75(2) or s 90SF(3) are considered at ¶13-280–¶13-470. Other relevant issues are:

- understanding the difference between s 75(2) or s 90SF(3) factors and maintenance (see ¶13-490)
- understanding how the court takes into account the s 75(2) or s 90SF(3) factors (see ¶13-500).

A further matter that is dealt with specifically in relation to s 75(2) or s 90SF(3) is superannuation (see ¶13-520). This is not as significant since the advent of superannuation-splitting unless the superannuation cannot be split. The existence of superannuation should not be double counted as a factor under s 75(2) or s 90SF(3) if its full value has already been taken into account as property which can be split.

¶13-500 The distinction between s 75(2) and 90SF(3) factors and maintenance

Applications for property settlement and maintenance are separate proceedings, although they may be dealt with by the court in the one hearing.

When considering the order that the court considers proper for the provision of maintenance for a party to a marriage under s 74 or s 90SE of the *Family Law Act 1975* (Cth), the court must take into account the matters referred to in s 75(2) (s 75(1)). For a maintenance order for a party in a de facto relationship the s 90SF(3) factors are relevant (s 90SF(1)).

The court must take into account the s 75(2) or s 90SF(3) factors, so far as they are relevant under s 79(4)(e) or s 90SM(4)(e), in an application for property settlement.

Confusion is more likely to arise when applications for property

settlement and maintenance are determined at the same time by the court. A party's entitlement to an order under s 79(1) or s 90SM(1) (including consideration of s 75(2) or s 90SF(3) factors) is assessed before the question of entitlement for spousal maintenance under s 72 or s 90SF(1) is considered.[108]

Footnotes

108 *Anast & Anastopoulos* (1982) FLC ¶91-201; *Clauson & Clauson* (1995) FLC ¶92-595.

¶13-510 The court's treatment of s 75(2) and 90SF(3) factors

The court must take into account each of the factors in s 75(2) and 90SF(3) of the *Family Law Act 1975* as far as they are relevant to the particular circumstances of the case. The question of how much weight is placed on each of these relevant factors in s 75(2) and 90SF(3) is a matter for the discretion of the trial judge.

The s 75(2) and 90SF(3) factors are expressed very broadly and are fundamentally prospective. Despite the emphasis on future needs, it is not a provision which invites a process of social engineering.[109]

Frequently, the assessment of s 75(2) factors is in percentage terms, but it can be a dollar adjustment. Examples include *Waters & Jurek* (1995) FLC ¶92-635 and *Wallis & Manning* (2017) FLC ¶93-759.

Footnotes

109 *Waters & Jurek* (1995) FLC ¶92-635.

¶13-520 Superannuation and s 75(2) or s 90SF(3)

Before the court had the ability to split superannuation, superannuation was primarily relevant to the property settlement exercise as a s 75(2) *Family Law Act 1975* (Cth) factor. It arose specifically under s 75(2)(g) of the *Family Law Act 1975* (Cth). This is still the case in Western Australia where superannuation cannot be split for de facto couples.

The *Family Law Legislation Amendment (Superannuation) Act 2001* and related legislation came into effect on 28 December 2002. For a detailed discussion of superannuation splitting, see Chapter 19.

There is nothing in Pt VIIIB to indicate with certainty that the s 75(2) and 90SF(3) factors apply in the same way to superannuation as to non-superannuation property. The s 75(2) and 90SF(3) factors may impact on superannuation differently and to a different extent than on non-superannuation assets.

The only specific reference in Pt VIII to superannuation is in s 75(2). Section 75(2)(f) requires the court to look at the parties' eligibility for superannuation. Sections 75(2)(g) and 90SF(3)(g), although not specifically referring to superannuation, could also be relevant. Whether a party has superannuation has an impact on the current and future living standards of the parties. Sections 75(2)(g) and 90SF(3)(g) provide that where the parties have separated, a standard of living that in all the circumstances is reasonable.

Superannuation must be considered in the s 79 and 90SM process. It must be valued, contributions assessed and s 75(2) and 90SF(3) factors considered. When considering the s 75(2) and 90SF(3) factors, all factors are relevant, not just s 75(2)(f) and 90SF(3)(f). Arguably, the s 75(2) and 90SF(3) factors are more relevant and have greater impact on superannuation than they did previously. It may be difficult to separate matters relating to contributions and matters relating to s 75(2) and 90SF(3) factors regarding superannuation. There is a considerable overlap.

Example

***Pitt & Pitt* [2011] FamCA 172**

The wife was aged 55 and the husband was aged 59. They were both in good health

but the husband had a greater earning capacity. The wife had tertiary education qualifications but had been involved in the husband's business until the separation nearly four years before the judgment was delivered.

Rose J commented (at [391]):

> "The range of employment opportunities for the wife and the ability to generate income is not necessarily enhanced by her undoubted intellectual qualities and education".

His Honour divided the net non-superannuation property and the superannuation in the same proportions, namely 55/45 in the wife's favour.

The non-superannuation pool was $15,641,462 and the superannuation pool was $1,119,452.

¶13-530 Discretion under s 75(2) and 90SF(3)

The following case examples illustrate the way in which the court treats the different factual scenarios under s 75(2) and 90SF(3) of the *Family Law Act 1975* (Cth).

Disputes regarding disparity of incomes and earning capacities, care of children under 18 years, and financial resources are among the factors most regularly encountered under s 75(2) and 90SF(3).

Assessing the impact of s 75(2) and 90SF(3) factors is more difficult with small asset pools. This is discussed in the context of assessing contributions at ¶13-450.

The first set of examples are well-known, and consider several s 75(2) and 90SF(3) factors.

Examples

***Clauson & Clauson* (1995) FLC ¶92-595**

The marriage was of approximately nine years' duration. The four young children were in the care of the wife. At trial, the parties' net worth was approximately $1.4m. The husband had made significant financial contributions at the commencement of the marriage.

At the time of the hearing, the wife was 34 years of age and in good health. She had the physical and mental capacity for obtaining gainful employment, but her ability to earn an income was severely restricted by the ongoing care and control of the four young children. The court found that eventually she might re-enter the workforce and use her skills and experience. The period of cohabitation and marriage had affected the wife's earning capacity, and her standard of living was held to be materially affected.

At the time of the hearing, the husband was 49 years of age and in good health and had the physical and mental capacity for gainful employment. Further, he had the capacity to earn a substantial income of approximately $200,000–$220,000. The husband had to pay approximately $25,000 in child support, but his disposable income was still in excess of the wife's and the court held that his standard of living would not be materially affected.

After considering these factors, the trial judge made a further adjustment of 15% in the wife's favour under s 75(2).

The Full Court rejected this adjustment as inadequate. The adjustment had to be looked at in monetary terms, rather than strictly percentage terms. The court re-exercised its discretion and increased the adjustment for s 75(2) factors from 15% to 25%.

With respect to s 75(2)(c) and (na), the Full Court said at p 81,911:

> ". . . In addition, it should not be forgotten that the payment of child support in no way compensates the custodial parent for the loss of career opportunity, lack of employment mobility and the restriction upon an independent lifestyle which the obligation to care for children usually entails. . ."

***Best & Best* (1993) FLC ¶92-418**

The wife had the full-time care and control of four young children of the marriage, and there was a substantial disparity between the earning capacities of the parties. There was little equity in the matrimonial assets, despite the long duration of the marriage.

At trial, the wife received 70% of the assets. On appeal, the wife's s 75(2) adjustment increased so that she received 100% of the available assets and ongoing periodic spousal maintenance. The Full Court said:

> "The wife had significant responsibilities to support herself and four children, but had limited financial means. Although the husband had earned a very substantial income over a number of years, the parties had been involved in property transactions for a significant period of time, at the hearing, there was a very small margin between their assets and liabilities. The most striking feature in the case was the husband's very substantial and continuing earning capacity. His profession gave him a continuing capacity to steadily earn his way out of his then financial position. The wife had no such capacity. This was even more significant here because of the husband's acquisition and development of his professional skills during the marriage and the loss by the wife of the professional skills which she had at the time of the marriage".

***Mitchell & Mitchell* (1995) FLC ¶92-601**

The net pool was approximately $300,000. The trial judge ordered that the wife receive 90% of it.

The marriage was of a long duration and all the children were over 18 years of age. The wife was a qualified nurse, but had been out of the workforce for a significant period of time and was only working on a part-time basis. She had a limited earning capacity. The husband, however, was a barrister and had a gross income of approximately $300,000 per year.

On appeal, the Full Court increased the wife's property settlement from 90% to 100% of the available assets.

The court will consider any disparity in the property, incomes and earning capacities of the parties under s 75(2)(b) or s 90SF(3)(b).

Examples

***Cunningham & Cunningham* (2005) FLC ¶93-212**

The Full Court reduced the trial judge's s 75(2) adjustment in favour of the wife. This was because the asset distribution ordered by the trial judge made capital immediately available to the wife which could be used to reduce the disparity in the parties' incomes.

***Dickson & Dickson* (1999) FLC ¶92-843**

The Full Court upheld the trial judge's assessment of contributions as 75%:25% in favour of the wife although this was at the far end of possible outcomes. The trial judge declined to make an adjustment in favour of the husband for s 75(2) factors as the orders would still leave the husband wealthy, although less so than the wife. He was nine years younger than the wife and had a considerable earning capacity. Each party had substantial superannuation entitlements. The Full Court ordered a 5% adjustment for s 75(2) factors. It was unjust and inequitable to leave the wife, after 20 years of marriage, with three times the capital as the husband and a much greater earning capacity than him. The 5% adjustment increased the husband's entitlements to $1,971,770, being an increase of $328,630. The reduction in the disparity in their capital positions was almost $660,000.

***Elsey v Elsey* (1997) FLC ¶92-727**

The Full Court found the result at trial was not just and equitable. The trial judge did not consider the effect of the orders on the husband's earning capacity. He would be unable to borrow a further $95,000 to pay the wife and continue to operate the business from the home. If the home was sold he would be paying a commercial rent for business premises.

***Waters & Jurek* (1995) FLC ¶92-635**

The marriage was lengthy. There was one adult child of the marriage. Both parties had an adequate earning capacity practising as psychiatrists. At the time of the trial, the husband was earning approximately $170,000 pa and the wife, about $75,000 pa.

The trial judge, when considering the s 75(2) factors, made an adjustment of $50,000 in favour of the wife on the basis of the husband's greater income being a sum sufficient to equalise their income for one year. The husband appealed, primarily on the basis that there should have been no adjustment made because both parties were high income earners and capable of supporting themselves. The Full Court dismissed the appeal.

***Burke & Burke* (1993) FLC ¶92-356**

The court accepted that the husband was unemployable and that, due to the current economic circumstances, he had no prospects of obtaining employment.

The wife was 54 years of age and was employed full time as a teacher. There was uncertainty at the time in Victoria as to the future employment of teachers. Fogarty J held that it was permissible to take judicial notice of the circumstances that there would be over the next number of years a significant excess of teachers above placements, many of whom would be highly qualified and younger than the wife. The court then

looked at the question of whether the wife would be able to retain her employment until age 60 on a conservative basis, namely that she would be employed for a period of one to five years, but that her employment may terminate at any time during that period.

***Gould & Gould* (1996) FLC ¶92-657**

The Full Court considered the treatment of long service leave. If an employer permits a party to take accrued long service leave as a capital sum (rather than as actual leave) it may be appropriate to take that into account as a financial resource of that party.

If a spouse is unable to take a capital sum (rather than leave), this did not mean that the long service leave could not be treated as a financial resource.

That party may receive an economic advantage which can properly be categorised as a financial resource.

The ill-health of a party can have a significant impact on the consideration of s 75(2) or s 90SF(3) factors in a property settlement under s 75(2)(a) and (b) or s 90SF(3)(a) and (b). If a party dies during the course of the proceedings, the proceedings can still continue (s 79(8) and 90SM(8)) although s 75(2) or s 90SF(3) factors for that party will be largely irrelevant, save for the ability of the deceased estate to pay debts of the deceased (s 75(2)(ha) and 90SF(3)(i)).

Examples

***Lawrie & Lawrie* (1981) FLC ¶91-102**

The husband had cancer and was expected to die within six months. The evidence that the husband's life expectancy was short was not in dispute.

The court held that except for the husband's limited future financial needs (due to his pending death) there was no reason for diverging from a 50:50 division of property. However, due to the husband's limited future financial needs a further adjustment of 15% in favour of the wife was made. The court noted, however, that this decision should not lead to dispute in other cases as to the parties' future life expectancy as, in the particular circumstances of this case, the evidence as to the husband's life expectancy was not in dispute and he only had a short period of time to live.

***Re Parrott v Public Trustee of NSW* (1994) FLC ¶92-473**

The husband died during the course of the proceedings. On appeal, the Full Court in considering the s 75(2) factors said that the death of a party had a profound effect on the balance of s 75(2) factors.

The wife received a very substantial portion of the relatively small property pool having regard to the ponderance and nature of the s 75(2) factors in her favour and the absence of such factors in favour of the Public Trustee.

If one party is cohabiting with another party (either in a de facto marriage, or has remarried) the financial circumstances relating to the cohabitation are considered under s 75(2)(m) or s 90SF(3)(m).

Example

***F & F* (1982) FLC ¶91-214**

The court held that the de facto partner of the wife made no financial contributions to the wife's household. However, the court still held that the circumstances of the cohabitation were relevant under s 75(2)(o).

The court was entitled to take the potential appropriate arrangements into account.

The interpretation of s 75(2)(ha) and 90SF(3)(i) is unclear. These refer to the effect of any proposed order on the ability of a creditor of a party to receive the creditor's debt, so far as that effect is relevant.

Prior to *Official Trustee in Bankruptcy & Galanis and Anor* [2014] FamCA 832 (which was upheld in *Official Trustee in Bankruptcy & Galanis* (2017) FLC ¶93-760), s 90K(1)(aa) was interpreted to exclude the trustee in bankruptcy. If the same narrow reading is applied to s 75(2)(ha), the interests of the trustee in bankruptcy are not considered under s 75(2). This narrow interpretation is supported by the fact that other sections of the Family Law Act expressly refer to trustees in bankruptcy.

There may be other facts or circumstances which the justice of the case requires to be taken into account under s 75(2)(o) or s 90SF(3)(r).

Examples

***Robb & Robb* (1995) FLC ¶92-555**

The parties had one child of the marriage and during the marriage their household also included the wife's two daughters from a previous marriage. The Full Court considered that the husband's contributions to the care of the wife's children from her previous marriage ought to be taken into account under s 75(2)(o), but did not take into account the wife's contribution to her children from her previous marriage.

The wife had a legal duty to maintain the children of her prior marriage, which duty had primacy over the duty of any other person, other than the children's father, to maintain them. The husband had no legal duty to maintain these children at any time during the

marriage because the preconditions of s 66G did not exist.

In contributing to the support of these children the wife was merely honouring a legal obligation which she owed to the children, while the husband, in making his contribution, was acting essentially as a volunteer assisting the wife in the discharge of her legal obligations. The justice of the case required the husband's contribution to be taken into account under s 75(2)(o).

***Foda v Foda* (1997) FLC ¶92-753**

A party's intentional failure to make a full disclosure of their financial affairs can be taken into account under s 75(2)(o). The Full Court said that the trial judge did not take into account the husband's deliberate attempt to hide assets from the knowledge of the wife and, ultimately, from the court. The husband's attempt to keep the account secret was a deliberate non-disclosure by him of a significant asset.

One of the parties may embark on a course of conduct designed to reduce or minimise the value of matrimonial assets or may act recklessly, negligently or wantonly with matrimonial assets so as to reduce their value. In such circumstances, the court may take such matters into account under s 75(2)(o) or s 90SF(3)(r).

Prior to *Stanford* v *Stanford* (2012) FLC ¶93-518, if there had been a premature distribution of property, the property could be "notionally" added back into the pool[110] rather than merely taking this into account under s 75(2)(o) or s 90SF(3)(r). Notional add-backs are discussed in the context of determining the size of the pool at ¶13-200.

Example

***Kowaliw & Kowaliw* (1981) FLC ¶91-092**

The husband lost money by permitting a prospective purchaser (who did not purchase) to reside in the home free of rent or contribution to outgoings for about a year. The husband was held solely responsible for these losses. Baker J at p 76,645 commented that if a party acted either by

> "(a) embarking upon a course of conduct designed to reduce or minimise the effect of value or worth of matrimonial assets, or
>
> (b) acting recklessly, negligently or wantonly with matrimonial assets the overall effect of which has reduced or minimised their value,

then such conduct in my view and the economic consequences that flow therefrom are clearly matters to which the Court may have regard pursuant to the provisions of s 75(2)(o).

If, on the other hand, losses of a financial kind have been suffered by the parties to a marriage in the course of the pursuit of matrimonial objectives, such as the

gaining of income or the acquisition of assets whether the liability for such losses be joint or several then, in my view, such losses should be shared by the parties (although not necessarily equally) and taken into account when altering property interests".

The expectancy of an inheritance may be relevant under s 75(2)(o) or s 90SF(3)(r), but not often. Its relevance depends upon the facts of the particular case. There must be a worthwhile connection between a specific element of the party's case and the possible expectancy.

The initial relevance in a particular case needs to be established and then it becomes a question of weight and degree. Weight and degree involve considering it in a broad, general way by taking into account the age and state of health of the testator, a general assessment of their financial position, and a general assessment of the possible inheritance expectancy. Detailed evidence of these matters is rarely allowed.

Example

***White & Tulloch v White* (1995) FLC ¶92-640**

A party's prospect of an inheritance under the terms of an existing will of an elderly relative was considered thoroughly by the Full Court.

In this case, the husband served a subpoena on the mother of the wife seeking production and inspection of documents including a copy of the wife's mother's current will. The wife's mother was 81 years of age and said to be in good or reasonable health. In this case, the husband asserted that the wife had a close relationship with her mother and an expectation of inheriting upon the mother's death. The husband also asserted that the wife's mother had substantial property.

The Full Court firstly determined that the wife's expectancy or prospect of an inheritance under her mother's will was not a financial resource. The Full Court said that such an expectancy could not be a financial resource. There was no degree of entitlement to, control over, or relative certainty of receipt of property. A will is a mere expression of intention at the time that it is made and may be freely revoked or altered.

The expectancy of an inheritance is discussed further at ¶13-320.

Using s 75(2)(o) or s 90SF(3)(r), the court can take a "robust" approach where there has been non-disclosure by a party in making findings in favour of the other party as to the net assets — eg *Gould &*

Gould (2007) FLC ¶93-333; *Kannis & Kannis* (2003) FLC ¶93-135; *Weir & Weir* (1993) FLC ¶93-338 and *Harris & Dewell and Anor* (2018) FLC ¶93-839.

Footnotes

110 *Townsend* v *Townsend* (1995) FLC ¶92-569.

¶13-540 Checklist of potentially relevant matters on which to obtain evidence in considering s 75(2) and 90SF(3) factors

The following is a checklist of potentially relevant matters on which to obtain evidence in considering s 75(2) and 90SF(3) *Family Law Act 1975* (Cth) factors.

Checklists

Age and state of health of parties

- ☐ If one of the parties is close to retirement age, is it likely that the party will be retiring in the near future or continuing to work?
- ☐ If one of the parties is in ill-health, then what is the extent and nature of the illness?
- ☐ Is any illness or injury transient or long-term?
- ☐ Does any bad health or illness affect the party's ability to earn an income?
- ☐ If a party suffers from a terminal illness, what is the party's life expectancy? What financial and other requirements does

the party have currently and in the future?

☐ Does a party's ill-health or injury affect the party's ability to care for any relevant children?

☐ Has a party's ill-health or injury been caused by, or contributed to by the other party (eg through domestic violence perpetrated against the party)?

Income, property and earning capacity of the parties

☐ What is the history of the parties' earning capacities, including at the start of the relationship, during the relationship and currently?

☐ Has the relationship (due to its length or otherwise, such as due to the care of children or violence) affected the earning capacity of one of the parties?

☐ Compare the current actual incomes earned by the parties and the potential earning capacities. Look at the disparity (if any) — is the disparity minimal or substantial?

☐ If a party is not working or is not working full-time or not utilising their earning capacity, can that party obtain employment or other employment? What type of employment? What is the expected remuneration? What training or qualifications might the party need to do before obtaining such employment?

☐ What is the size of the property pool compared with the incomes and earning capacities of the parties? The size of the pool may have a significant impact on the s 75(2) and 90SF(3) adjustment as in a more modest pool. The court may prefer to make the adjustment in dollar terms rather than in percentages.

☐ What specific property can each party hope or expect to retain? For example, is one party retaining an income-

producing property such as a business rather than a home?

Financial resources of the parties

☐ Is the item a financial resource or a mere expectancy rather than property?

☐ If it is a financial resource, does it have an immediate benefit to the party, such as receipt of income? If so, what is the size of the benefit and probability of its continuation?

☐ Superannuation benefits of a party are usually not a financial resource. Instead they are “treated” as property. It may be necessary to consider superannuation under s 75(2) or s 90SF(3) if it is an overseas entitlement or a two-pool approach is taken and it is determined the non-member made no contributions to it, or it is a pension in payment phase and treated as an income stream and not property. Some of the following factors might be relevant:

– the age of the party

– expected number of years the party has to work for and intended age of retirement

– when the party intends to retire

– length of the marriage or de facto relationship and period during which contributions were made to the fund

– number of years to elapse before intended retirement and possible receipt of benefits under the fund

– contingencies that may arise between the current date and the expected future receipt of entitlements under the fund, and

– the size of the current entitlements compared with the size of the whole pool.

Care and control of children/protecting the party's continuing role as a parent

☐ In relation to the party with whom the children under the age of 18 live, look at:

– the number of children

– the ages of the children

– the number of years until the children turn 18

– the amount of supervision required

– the circumstances of the party's day-to-day care and upbringing of the children

– the extent to which the care of the children has an impact upon the party's freedom of lifestyle, work, recreation time, etc

– the extent to which child support contributes to the children's expenses. If the children are in a shared care arrangement, the extent to which expenses are shared, and

– the financial circumstances of that party.

☐ In relation to the party who spends time with the children, consider the following:

– the amount of time that party has with the children and the extent (if any) that this relieves the other party of the major burden of caring for the child

– the number of children

– the ages of the children and the length of time until they turn 18

– the history of child support payments made for the children, whether by way of child support assessment or otherwise. What has been the history of child support payments since separation and what is the probability of payments continuing in the future?

– what is the level of child support payments having regard to the ages of the children, financial circumstances of the party with whom they live, etc?

Commitments of the parties to support themselves and any children or responsibility to support any other person

☐ Examine the financial circumstances of each party, especially in relation to their income and necessary expenses, and the financial circumstances relating to the care of any children that the parties have a duty to maintain or any other person that a party has a responsibility to maintain.

A standard of living that is reasonable

☐ What standard of living was enjoyed by the parties during the marriage or de facto relationship?

☐ What standard of living is enjoyed by each party since separation?

☐ What financial circumstances of each party has an impact upon the standard of living of the parties?

☐ What other factors, including the care of children and duties to maintain any other person or child, have an impact upon the standard of living of the parties?

Cohabitation with another person and financial circumstances relating to such cohabitation

☐ Is either party cohabiting? Is there a potential for it?

- ☐ What are the financial circumstances relating to the cohabitation? Does a benefit to the party arise out of the cohabitation with the other person (eg paying a mortgage and car expenses)?

- ☐ Is the relationship transient or permanent?

- ☐ What are the financial circumstances of the other person involved in the relationship?

- ☐ For how long have the parties been cohabiting?

Orders to be made or proposed to be made under s 79 or s 90SM or agreements made or proposed to be made under Pt VIIIA or Pt VIIIAB

- ☐ Have any orders been made or are any proposed in relation to property or maintenance between these parties or one party and another person in relation to property of the parties or vested bankruptcy property of a bankrupt party?

- ☐ Has a Pt VIIIA or VIIIAB financial agreement been made between the parties or one party and another person?

- ☐ What potential orders could be made? What impact would they have upon the parties?

- ☐ Does one party have a need to reside in the home with the children?

- ☐ Do the proposed orders have any effect on the income-earning capacity of either party?

Any other fact or circumstance that the justice of the case requires to be taken into account

- ☐ Is the matter which seems relevant one that should properly be considered under the contribution step or under in s 75(2) or s 90SF(3)?

☐ What is the relevance of the particular matter raised? Is it relevant to the court's overall exercise of discretion in making an order that is just and equitable?

☐ Has any disparity in the financial positions of the two parties been contributed to by conduct of one of the parties (and particularly domestic violence)?

☐ Has there been any dissipation by one of the parties of assets before separation or that warrants an adjustment in favour of the other party?

Creditors and bankruptcy

☐ Was the debt incurred for family expenses?

☐ Was the debt incurred recklessly?

☐ Did it arise before cohabitation or after separation?

☐ Is it a debt for which both parties should be jointly liable and therefore deducted from the gross assets to determine the property interests available for alteration between the parties?

¶13-550 Consideration of s 79(4)(d), (f) and (g) or s 90SM(4)(d), (f) and (g)

In a s 79 or s 90SM *Family Law Act 1975* (Cth) (FLA) application, when considering s 79(4)(d)–(g) or s 90SM(4)(d)–(g), although the major emphasis is on the treatment of the s 75(2) or s 90SF(3) factors, also relevant are:

- the effect of the orders on the earning capacity of either party (s 79(4)(d) or s 90SM(4)(d))

- any other order made under the FLA affecting a party to the marriage or a child of the marriage (s 79(4)(f) or s 90SM(4)(f)), and

- any child support under the *Child Support (Assessment) Act 1989* (Cth) that a party to the marriage is to provide or has provided for a child of the marriage or de facto relationship (s 79(4)(g) and 90SM(4)(g)).

There is some overlap. For example, s 79(4)(g) or s 90SM(4)(g) overlap to an extent with s 75(2)(na) or s 90SF(3)(q) in relation to the need of the court to take into account child support that a party is providing or is to provide.

When looking at the weight to attach to s 75(2)(na) or s 90SF(3)(q), and s 79(4)(g) or s 90SM(4)(g), the following matters are relevant:

- the amount of child support being paid

- the history of whether child support has been paid in the past

- any conclusions or inferences the court can draw as to the likelihood of the continued payment of child support

- the ages of the children and the length of time that child support must be paid in the future, and

- the impact of the child support payments upon both parties' overall financial positions.

The court considered the relevance of child support in *Clauson & Clauson*[111] and *Ramsay v Ramsay*.[112]

Sections 79(4)(d) and 90SM(4)(d) require the court to take into account the effect of any proposed order on the earning capacity of either party, but does not require the court to refrain from making an order which has an effect upon the earning capacity of either party. The sections merely state that it should be taken into account. The most common examples of s 79(4)(d) being considered by the court is where a proposed order affects the business of one party, rural

property and/or compels one party to borrow or raise money against other assets that may affect that party's earning capacity.

In *Lee Steere & Lee Steere*,[113] the Full Court said:

> "Section 79(4)(d) directs the Court to consider the effect of any proposed order on the earning capacity of either party to the marriage. This is clearly a relevant consideration where the only or major asset available for division between the parties is the asset from which one of the parties derives his or her livelihood, whether it be a business, a professional practice or a farm. But it is not an absolute factor: it is one of several factors to be considered in arriving at an order which in all the circumstances is just and equitable: s 79(2). An order which would deprive a party substantially of what he or she is entitled to by reason of contribution would not normally be considered just and equitable".

Example

***Elsey v Elsey* (1997) FLC ¶92-727**

The economic consequences which flow from orders must be considered before they are made. Otherwise, the result achieved may not be just and equitable, as s 79 requires.

For the husband to borrow a further $92,000 and continue to run the business from the home appeared to be an absolute impossibility. If the home was sold, the husband would have the cost of relocating the business elsewhere and be required to pay a commercial rent.

The trial judge did not consider any of these matters and, therefore, the result achieved was manifestly unjust to the husband.

In *Stanford & Stanford* (2011) FLC ¶93-483, the Full Court pointed out that s 75(2)(g) is only relevant where the parties are separated or divorced. Interestingly, although not commented on by the Full Court, s 90SF(3)(g) does not apply the same limitation to de facto couples.

Footnotes

111 *Clauson & Clauson* (1995) FLC ¶92-595.

112 *Ramsay* v *Ramsay* (1997) FLC ¶92-742.

113 *Lee Steere & Lee Steere* (1985) FLC ¶91-626 at p 80,077.

¶13-570 Summary

In every property case, it is necessary to consider all the matters in s 79 or s 90SM *Family Law Act 1975* (Cth) and make specific findings with respect to each. This requires a careful listing of each of the legal and equitable interests of the parties. On a practical level, the starting point for considering property cases is to prepare a list of all items of property with the estimated values that each party places upon each item of property. This should not be done without ensuring that the High Court's requirement of identifying the legal and equitable interests set out in *Stanford & Stanford* (2012) FLC ¶93-518 is followed. This also enables the parties to identify more clearly what their respective contributions may have been and the impact of any division of the property on each of them.

MAINTENANCE

Editorial information

Written by Jacqueline Campbell

¶14-000 Introduction

In certain circumstances, one party may be ordered to pay maintenance for the other. An application for maintenance may be made at the same time or separately from an application for s 79 or s 90SM (property) orders of the *Family Law Act 1975* (Cth) (FLA) (discussed in Chapter 13). Maintenance provisions can also be in a financial agreement (discussed in Chapter 20).

Types of maintenance provisions

Maintenance provisions can take various forms. They can be:

- made by consent
- made after a contested hearing
- directed to meet interim maintenance needs (s 80(1)(h) or s 90 ss(1)(h))
- directed to meet urgent maintenance needs (s 77 or s 90SH)
- periodic payments, which continue indefinitely (final)
- periodic payments, which continue for a fixed term or until further order (interim)
- terminated automatically on the occurrence of one or more of various contingencies (eg if the payee enters into a “permanent

de facto relationship")

- a personal right to occupy a home, use a car or use chattels
- a lump sum payment or ownership of property
- secured by a charge on the payer's assets
- varying or discharging an existing order, and
- backdated.[1]

Interim or final orders

The court has the power to make "interim" or "final" decisions. Interim orders are made pending further orders of the court but can be made either for an indefinite period or a short fixed term. The power to make interim orders arises from s 80(1)(h) and 90SS(1)(h) of the FLA.

The term "final" is misleading. Orders for periodic maintenance can always be varied, by way of increase, decrease or conversion from a periodic order to a lump sum, or by the addition of a lump sum. They can also be discharged. A maintenance order can only be "final" in the sense that it is final until a successful application is made to vary or discharge the order.

Maintenance provisions in a financial agreement cannot be varied or discharged if the financial agreement is binding, not set aside and the requirements of s 90E (or s 90UH) and s 90F (or s 90UI) are met. (See ¶20-100).

Interim orders are discussed further at ¶14-045.

Definition of maintenance

"Maintenance" is not defined in the FLA, but it has a broad definition.[2]

It is not restricted to parties who are separated.[3] Maintenance is not necessarily restricted to meeting current needs. It can be used to replace capital.[4]

Purpose of maintenance

The primary purpose of maintenance is to adjust for any disparity between the incomes or earning capacities of parties based on their respective needs. It is usually for a relatively short period after separation, approximately two to three years. This period of time enables the recipient to retrain, enter the workforce and/or generally re-establish himself or herself.

Maintenance can be paid as compensation for economic disadvantage and may be required to be paid for a relatively long period if a sufficient adjustment cannot be made in the property settlement.[5]

It has been said by the Full Court of the Family Court that the "clean break concept of s 81 may have been taken to extremes in the past and had to be carefully considered in the light of changing economic and social circumstances and values".[6]

Examples

***Bevan & Bevan* (1995) FLC ¶92-600**

The Full Court, considering the wife's ongoing periodic spousal maintenance entitlements, noted that the wife received a comparatively meagre capital sum. It did not think that the law required her to deplete her capital when the much higher-earning husband could afford to pay spousal maintenance. He had an obligation to maintain his former spouse. The wife may have wanted to use some or all of the capital sum to purchase a home, and she should not be prevented from doing so.

The Full Court refused to make an order for lump sum spousal maintenance in addition to property orders. Due to the husband's state of health, an order for periodic spousal maintenance was more likely to do justice between the parties.

***Mitchell & Mitchell* (1995) FLC ¶92-601**

A property division of 90% in favour of the wife of an asset pool of about $300,000 did not disqualify the wife from spousal maintenance. The Full Court remitted the issue of spousal maintenance to the trial judge and made an order that the husband pay the wife the sum of $150 per week by way of interim maintenance.

***Rosati v Rosati* (1998) FLC ¶92-804**

The husband was aged 44. The wife was aged 34. They commenced cohabitation in 1986 and married in 1987. They separated in May 1995. The three children of the marriage, aged 8, 6 and 4, all lived with the wife and had various disabilities.

At the commencement of cohabitation, the husband was involved in a real estate agency business. The wife was working as a solicitor but resigned during her first pregnancy. The husband later bought out his partner's interest in the business. For a few years the wife worked two days per week in the husband's business, essentially as

a bookkeeper/office administrator. She worked from 10.30 am to 4.00 pm.

The net asset pool was $1.5m. The Full Court reduced the wife's share on contributions from 65% to 60%. There was no challenge to the 10% adjustment in the wife's favour for s 75(2) factors.

The effect of the property appeal was that the wife was entitled to net property of $751,932, a reduction of nearly $250,000 from the trial judge's orders. On the new figures the wife could not keep the house. After selling the house and paying her legal costs, she would be left with around $570,000. From this she needed to provide accommodation for herself and the children, and provide for her own support until the youngest child commenced school 21 months later.

The Full Court calculated that if the wife invested $550,000 with a return of 5% pa, her after-tax income would be $22,000 pa or $425 per week. She would be able to pay for reasonable rental accommodation and utilities for herself and the children until she returned to the workforce. She also required some additional financial assistance for her own daily living expenses.

Taking into account the parties' lifestyle during the marriage and the husband's current lifestyle, the Full Court concluded that during the 21-month period the wife's reasonable needs for her own support would exceed her reasonable capacity to support herself by about $600 per week.

The husband had been providing the wife, through a trust, with a package of benefits on an interim basis amounting to about $730 per week (excluding the lease payments on the motor vehicle).

The Full Court held that a proper level of contribution by the husband to the wife's support for the 21-month period was $500 per week.

***DJM v JLM* (1998) FLC ¶92-816**

The husband was aged 45 and the wife was aged 49. They married in 1980 and separated in 1994. There were five children of the marriage aged from about 5 to 17, four of whom lived with the wife. The wife left her employment as a teacher in the United States to come to Australia after the marriage. She had done some bookkeeping for the husband.

Before late 1996, the husband worked as a management consultant and earned an income of at least $200,000 a year. For the 12 months prior to the trial he had been a university lecturer and was paid $47,000 pa. He also had some private income and hoped to earn $80,000–$85,000 for the year. He had chosen to reduce his hours and income by changing employment. For child support purposes he was assessed on his higher earning capacity rather than his actual income.

The trial judge determined the property of the parties to be nearly $500,000 and that on contributions there should be a 50:50 split. He made a 30% adjustment in favour of the wife for s 75(2) factors. The wife claimed $750 per week spousal maintenance. The trial judge ordered $500 per week.

***Vautin v Vautin* (1998) FLC ¶92-827**

After an 18-year marriage, the parties divorced in 1991. The four children remained with the wife. Property and periodic maintenance orders were made. The wife later applied for a variation of the existing periodic maintenance order, lump sum maintenance and arrears.

The trial judge discharged the original maintenance order, ordered that the husband pay periodic spousal maintenance of $500 per week, and adjourned the application for lump sum spousal maintenance.

At the adjourned hearing, the wife sought lump sum spousal maintenance of $250,000 for various specific items including $50,000 for “the future vicissitudes of life”. Kay J rejected the claim for future vicissitudes of life, allowed $15,000 rather than $24,000 for a vehicle upgrade, and allowed all other aspects of her claim.

Both parties appealed. By a 2:1 majority, the Full Court increased the lump sum from $97,000 to $136,000. The husband was ordered to pay the wife’s costs.

The wife said that their standard of living prior to separation reflected the husband’s income of over $100,000 pa. At the time the property orders were made, there were very few assets save for the net equity in the home, which was retained by the wife. After the property orders were made, the oldest child died. This event continued to have a traumatic effect on the wife, and she was not capable of employment.

After the property orders were made, the husband’s financial position dramatically improved. His income, largely distributions from the family trust, was far greater. At the time of the trial he had savings of about $1.2m, shares worth $260,000 and other investments of about $500,000. He owned a yacht, flew an aeroplane for recreation and had a commercial pilot’s licence.

At the time of the trial, the wife’s major asset was the former matrimonial home with a net equity of less than $350,000. Her other assets were modest. Maintenance was her sole income. Her lifestyle was comparatively modest. The two youngest children were aged 18 and 20, living at home and still studying.

The Full Court allowed the wife the full $24,000 for the replacement of her vehicle. She was not required to exhaust her comparatively minor resources before she could seek lump sum maintenance.

The wife’s counsel relied upon the statement of Kay J that it was reasonable for the wife to live at a standard that somehow reflected the vast wealth that had come to the husband’s hands since the marriage broke down while the ongoing effects of the marriage affected the wife’s capacity to economically re-establish herself.

The Full Court rejected the argument that the claim for lump sum spousal maintenance was a property claim. The Full Court found that $30,000 was appropriate for a lump sum for “the vicissitudes of life”. It concluded that this was a very unusual case, and it was appropriate to do justice to meet the wife’s reasonable needs with a combination of periodic and lump sum maintenance orders.

Footnotes

1 *H and H* (1985) FLC ¶91-654; *JS and GP* [2006] FamCA 150.

2 *Branchflower & Branchflower* (1980) FLC ¶90-857 at p 75,446.

3 Nygh J in *Eliades & Eliades* (1981) FLC ¶91-022, *Stanford v Stanford* (2012) FLC ¶93-495.

4 *Tye & Tye (No 2)* (1976) FLC ¶90-048 at p 75,203; *Vautin* v *Vautin* (1998) FLC ¶92-827.

5 *Mitchell & Mitchell* (1995) FLC ¶92-601.

6 *Best & Best* (1993) FLC ¶92-418 at p 80,296.

¶14-005 Legislative provisions

Jurisdiction — "matrimonial cause" or "de facto financial cause"

A court with jurisdiction under the *Family Law Act 1975* (Cth) (FLA) has exclusive jurisdiction over "matrimonial cause[s]" (s 8(1)) and "de facto financial causes" (s 39A(5)).

Section 4(1) contains various definitions of the "causes". The provisions relevant to maintenance and enforcement of maintenance are:

> "(c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or
>
> (caa) proceedings between:
>
> (i) a party to a marriage; and
>
> (ii) the bankruptcy trustee of a bankrupt party to the marriage;
>
> with respect to the maintenance of the first mentioned party …
>
> (f) any other proceedings (including proceedings with respect to the enforcement of a decree or the service of process) in

relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (eb), including proceedings of such a kind pending at, or completed before, the commencement of this Act".

A "de facto financial cause" is defined in s 4(1). The clauses relevant to maintenance are:

> "(a) proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship; or
>
> (b) proceedings between:
>
> (i) a party to a de facto relationship; and
>
> (ii) the bankruptcy trustee of a bankrupt party to the de facto relationship;
>
> with respect to the maintenance of the first-mentioned party after the breakdown of the de facto relationship; or
>
> (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them …"

Unlike the "matrimonial causes", the "de facto financial causes" only apply after the breakdown of a de facto relationship. Maintenance orders cannot therefore be made in intact de facto relationships, although they can be made in intact marriages.

A "de facto relationship" is defined in s 4AA(1) as:

> "A person is in a ***de facto relationship*** with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family …; and
>
> (c) having regard to all the circumstances of their relationship,

> they have a relationship as a couple living together on a genuine domestic basis".

Section 4AA(2) has a list of factors to be considered by the court when working out if persons have a relationship as a couple.

De facto relationships include opposite-sex and same-sex relationships (s 4AA(5)(a)) and a de facto relationship can exist even if one of the persons is legally married to someone else or in another de facto relationship (s 4AA(5)(b)).

When can proceedings be instituted?

Each party to a marriage or de facto relationship is obliged by s 72 or s 90SF(1) of the FLA to maintain the other party according to their respective needs and abilities to pay.

Maintenance proceedings can be instituted:

- before divorce
- after divorce, but subject to the 12-month time limitation in s 44(3)
- even if the parties' marriage is void (s 71)
- during a marriage
- after the breakdown of a de facto relationship (s 90SE(1)) but subject to the 2-year time limitation in s 44(5), and
- after a financial agreement is set aside or found not to be binding, provided the application is made within 12 months (s 44(3B) or s 44(5)).

Maintenance proceedings cannot be instituted:

- after the death of one or both of the parties
- if a financial agreement covering maintenance is binding on the parties (s 90G and 90UJ)
- if, under the terms of an approved maintenance agreement under

s 87, the right of one or both parties to apply for maintenance has been surrendered. Section 87 maintenance agreements have not been able to be approved by the court since 27 December 2000

- during a de facto relationship (s 90SF(1)). See also “de facto financial cause” in s 4(1), or

- if the jurisdictional requirements of a de facto relationship under the FLA are not met (see Chapter 22).

Types of maintenance orders

The court’s powers in relation to maintenance are very wide. Sections 80(1) and 90SS(1) of the FLA confirm the ability of the court when dealing with applications under Pt VIII (Property, maintenance and maintenance agreements) and Pt VIIIAB (Financial matters relating to de facto relationships) to do certain things, including:

- order payment of a lump sum, whether in one amount or by instalments

- order payment of a weekly, monthly, yearly or other periodic sum

- order security for maintenance, and

- make a permanent order; an order pending the disposal of proceedings; or an order for a fixed term, for life, during joint lives, or until further order.

Interim orders are discussed at ¶14-045 and urgent orders at ¶14-050.

The major limitations are:

- leave may be required if the proceedings are commenced 12 months after a divorce is final (s 44(3)) or if brought within two years after the end of a de facto relationship (s 44(5)), and

- proceedings may be barred by a financial agreement dealing with maintenance, which is binding under s 90G or s 90UJ.

Leave is not required where “revival of an order previously made” is

sought. See *Atkins & Hunt* (2016) FLC ¶93-746

In *Kaiser & Kaiser* [2016] FCCA 1903, the court ordered that the wife's rent and utility bills be paid directly to the wife's landlord/real estate agent and the utility companies. Although the wife considered it insulting not to have control of her finances, the judge noted that the wife suffered from anxiety and had been distressed when her rent and utility payments had been in arrears. Requiring the husband to pay the sums direct would alleviate the wife's anxiety and allow her to concentrate on obtaining qualifications and employment.

¶14-010 Entitlement to maintenance

Introduction

A party is liable to maintain the other party to the extent that they are reasonably able to do so if that other party is unable to support themselves adequately. The three circumstances in which a need for maintenance in relation to married couples may arise are set out in s 72(1) of the *Family Law Act 1975* (Cth) (FLA). They are:

> "(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any adequate reason;
>
> having regard to any other relevant matter referred to in subsection 75(2)".

Section 90SF(1) is similar for de facto couples.

A bankrupt party can be liable for maintenance and satisfy that liability in whole or in part by the transfer of vested bankruptcy property (s 72(2)).

Under s 74 and 90SE(1) of the FLA, the court is able to "make such order as it considers proper for the provision of maintenance in accordance with this Part".

An order is not proper if it is either insufficient or excessive in the circumstances.[7]

The test of ability for self-support in s 72(1) and 90SF(1) is not whether one is in need but whether the applicant is in a position to finance themselves from their own resources. Can the applicant, by reason of their earning capacity, capital or other sources of income, look after themselves?[8]

If the applicant does not overcome the threshold issue and show a need for maintenance, the application should be dismissed rather than adjourned.[9]

Separation is not a pre-requisite if the parties are married (*Stanford* v *Stanford* (2012) FLC ¶93-518) but is a pre-requisite if the parties are in a de facto relationship. A "de facto financial cause" is defined in s 4(1) FLA to be "proceedings … after the breakdown of a de facto relationship". The matrimonial causes are broader and can encompass orders made in an intact marriage.

Maintenance as a step in a property claim

If maintenance is sought in addition to a property order, it is the final step in the process. Maintenance is only considered after the s 79 or s 90SM process is complete. It is not to be confused with the s 75(2) or s 90SF(3) component in the s 79 or s 90SM exercise.

Sections 77A, 87A, 90E and 90SH assume that the property process is identifiable from the assessment of maintenance.[10] The final stage requires the identification of pure maintenance lump sums. Sections 77A, 87A, 90E and 90SH are not relevant to the portion of the property entitlements which takes into account s 75(2) or s 90SF(3) factors. Section 77A is discussed further at ¶14-120.[11]

Steps in determining a maintenance claim

The process for assessing a maintenance claim is:[12]

1. a threshold finding under s 72(1) or s 90SF(1)
2. consideration of s 74 or s 90SE(1) and 75(2) or s 90SF(3)

3. the no fettering principle that pre-separation standard of living must automatically be awarded where the respondent's means permit, and

4. discretion exercised in accordance with s 74 or s 90SF(1).

The process is different for claims by a de facto party under Pt VIIIAB as there are jurisdictional requirements to be met as well. See ¶22-020 to ¶22-065.

The High Court in *Hall* v *Hall* (2016) FLC ¶93-709 outlined the legislative prerequisites for making a spousal maintenance order under Pt VIII. The High Court majority described s 72(1) as the "gateway" to the operation of spousal maintenance. It said, with the wording of the relevant sections of the Act omitted, (at [3]–[5]):

> "… the gateway to the operation of Pt VIII in relation to spousal maintenance is in s 72(1) …
>
> The liability of a party to a marriage to maintain the other party that is imposed by s 2(1) is crystalized by the making of an order under s 74(1) …
>
> A court exercising the power conferred by s 74(1) is obliged by s 75(1)) to take into account the matters referred to in s 75(2) and only those matters. Those matters are presented as a comprehensive check list …".

Footnotes

7 *Robinson & Willis* (1982) FLC ¶91-215 per Asche SJ at p 77,157.

8 *Eliades & Eliades* (1981) FLC ¶91-022 at p 76,232.

9 *Poulos & Poulos* (1984) FLC ¶91-515.

10 *Habib & Habib* (1988) FLC ¶91-931.

11 *Phillips* v *Phillips* (2002) FLC ¶93-104; [2002] FamCA 350; *Hickey & Hickey* (2003) FLC ¶93-143; [2003] FamCA 395.

12 *Bevan & Bevan* (1995) FLC ¶92-600 at pp 81,981–81,982.

¶14-015 Party to a marriage or de facto relationship

A "party to a marriage" in s 72(1) of the *Family Law Act 1975* (Cth) is defined broadly to include those who are divorced, widowed or where the marriage is otherwise terminated.

In s 71, "marriage" is defined to include a void marriage. Section 4(2) further enlarges the concept of "party to a marriage" to include a person who was a party to a marriage that has been terminated by divorce or annulled, in Australia or elsewhere, or terminated by the death of one of the parties.

A party to a de facto relationship seeking to make a maintenance application under s 90SE must, in accordance with s 90SF(1), meet the requirements of s 44(5) and (6) and s 90SB and s 90SD.

Sections 44(5) and (6) require that the application be made within two years of the end of the de facto relationship, unless leave is granted by the court.

Sections 90SB and 90SD set out other jurisdictional requirements. These are discussed at 22–040 to 22–060.

¶14-020 Maintain "adequately" in s 72(1) and 90SF(1)

The recipient of maintenance is entitled to be maintained "adequately". The word "adequately" imports a standard of living which is reasonable in the circumstances.[13]

The court is not required to automatically order sufficient maintenance to continue the pre-separation standard of living of the applicant where the respondent's means permit.[14]

The Full Court in *Brown & Brown* (2007) FLC ¶93-316 summarised the principles related to "adequate" as:

- "The word 'adequately' is not to be determined according to any fixed or absolute standard.
- The idea that 'adequate' means a subsistence level has been firmly rejected.
- Where possible, both spouses should continue to live after separation at the level which they previously enjoyed if this is reasonable, although the parties' standard of living may have to be lower if financial resources are insufficient to maintain that standard.
- In some circumstances it may be reasonable for the parties to live at a higher standard than previously enjoyed.
- It is not necessary for an applicant for maintenance to use up all capital in order to satisfy the requirement that he/she is unable to support himself/herself adequately.
- However, an applicant is not entitled to live at a level of considerable luxury or comfort merely because the other party is very wealthy".

The meaning of "a standard of living that in all the circumstances is reasonable" in s 75(2)(g) and 90SF(3)(g) overlaps with "adequately" in s 72(1) and 90SF(3)(g). Section 75(2)(g) is discussed at ¶14-240.

Footnotes

13 *Nutting & Nutting* (1978) FLC ¶90-410.

14 *Bevan & Bevan* (1995) FLC ¶92-600 at pp 81,980–81,982.

¶14-025 Unable to support self adequately

The income of the applicant is very important in assessing whether or not an applicant is unable to support themselves adequately under s 72(1) of the *Family Law Act 1975* (Cth).

The applicant must have a present inability to support themselves adequately.

The High Court had a rare opportunity to consider the law of spousal maintenance, and specifically whether a party was able to support themselves adequately, in *Hall & Hall* (2016) FLC ¶93-709.

The wife disclosed that she had an “interest” in the estate of her late father, the value of which was not known to her. Her father had died four years previously, having started the family business in which she had never had an active role. The business was run through a corporate structure controlled by her brothers. She did not have a copy of her father’s will and did not know the particulars of her father’s estate.

The trial judge found that the absence of information about the nature and extent of any interest of the wife in the estate of her late father meant that no such interest could be taken into account as a financial resource of the wife in determining the wife’s application for maintenance. The trial judge was satisfied on the evidence as to the wife’s need for maintenance and the husband’s ability to pay. The trial judge ordered that the husband pay to the wife the sum of $10,833 per month by way of spousal maintenance pending the final determination of the proceedings.

There were later proceedings regarding the terms of the will. In his will, the wife’s father expressed the “wish” that the wife should receive from the V Group a lump sum payment of $16,500,000 on the first to occur of a number of specified events. One of the specified events was that the wife and the husband divorced. The father also expressed a “wish” that the wife should receive from the V Group an annual payment of $150,000 until the date (if any) that the lump sum payment of $16,500,000 was made.

The husband attempted to discharge the maintenance application, relying on this new evidence, and appealed from the dismissal of his application.

Before the Full Court, the wife adduced further evidence, being a letter from one of her brothers explaining that neither the $150,000 nor the payment of $16,500,000 were to be paid to the wife and that as executor, the brother had no obligation to the wife in respect of these amounts. The letter re-emphasised the voluntary nature of the payments stated as wishes of the wife's father.

The Full Court found there was evidence that demonstrated that the wife was able to support herself adequately, as she would have received the payment of $150,000 pa from her brothers if she requested it. There was nothing in the evidence to suggest that any such request, if made, would have been denied. The Full Court considered that the fact that her brothers had provided her with luxury motor vehicles indicated that she had a good relationship with them.

The Full Court granted the husband leave to appeal, allowed the appeal and discharged the interim maintenance order retrospectively from the date the maintenance order was made — over one and a half years previously.

The wife appealed to the High Court.

Noting that the brothers had received the benefit of their father's testamentary largesse, the High Court majority said (at [46]) that:

> "… the brothers were at least under a moral obligation to honour their father's wish that the wife receive the payments from the Group, to which he had referred in the Will. The Group undoubtedly had the wherewithal to make the payments, and there was no evidence to suggest amorality or personal animus on the part of any of the three brothers which might in turn suggest that they might not fulfil that moral obligation".

The finding that the wife would have received the payment if she asked for it was relevant under both s 75(2)(b) and s 75(2)(o).

The emphasis by the High Court on the "moral obligation" of the wife's brothers was curious, given the criticism expressed by the High Court

majority in *Stanford* v *Stanford* (2012) FLC ¶93-518 (at [52]) about the Full Court of the Family Court's reference to "moral" claims in property settlement proceedings.

It is difficult to reconcile the attitude of the High Court to moral claims in *Hall* with those expressed in *Stanford*. Although the High Court was dealing with a property claim under s 79 in *Stanford*, and in *Hall*, it was dealing with whether a maintenance order ought to have been discharged, the wording of the relevant legislative provisions in both cases made reference to it being "just" and there was a pathway for the court to follow in each case which did not include "moral" obligations of the parties or third parties.

Although Gordon J delivered a strong dissenting judgment, the definition of "financial resource", at least in the context of an application for maintenance, appears to be broader than previously accepted.

Examples

***Stacy & Stacy* (1977) FLC ¶90-324**

The court refused to find that the wife had a partial incapacity to work so as to enable her to cease full-time work and be confident of obtaining maintenance. She had to make the application for spousal maintenance when the need arose.

***Finnis v Finnis* (1978) FLC ¶90-437**

The wife's contract was due to expire at the end of the year. In assessing the wife's needs (and property entitlements), the trial judge took into account the submission that she was not likely to have employment after the end of her contract because of serious health problems.

***Murkin & Murkin* (1980) FLC ¶90-806**

Nygh J considered the distinction between inability to support one's self and need. He said the issue was not whether the wife was receiving sufficient funds, but whether she was able to support herself adequately; that is, whether she could generate funds from her own resources or earning capacity to supply her own needs. The threshold test in s 72 (now s 72(1)) is the ability to support one's self, not one's needs. A person whose needs are met by a voluntary payment or social security is unable to support themselves. Need and ability to support one's self are not identical.

***Taguchi & Taguchi* (1987) FLC ¶91-836**

The wife appealed against the dismissal of her application for maintenance. The Full Court held that the trial judge was entitled to find that the wife was capable of finding employment if she chose to do so. The wife chose not to seek regular employment as she was an artist. She was therefore not entitled to spousal maintenance.

***Daggett & Thorne* [2009] FMCAfam 1294**

The court made an interim spousal maintenance order for the husband to pay the mortgage, rates and various other expenses although the wife earned $40,000 pa. The husband received an annual package of about $300,000.

***Macknair & Macknair* [2015] FamCAFC 106**

The wife argued that the judge erred in including a loan owed by the husband to his brother. Her appeal failed on that ground. The appeal was against an interim order that the husband pay the wife $720 per week by way of spousal maintenance. After separation, the husband borrowed $7,000 from his brother. It was an interest-free loan repayable at $1,000 per month. The trial judge followed the Full Court in *Freestone & Freestone* [2013] FamCAFC 190 as to whether, under s 72(1) FLA, the husband was "reasonably able" to pay maintenance. The meaning of the words "reasonably able" in s 72(1) were explained by Ellis J (with whom the other members of the Full Court agreed) in *Curnow & Curnow* (unreported, Full Court of the Family Court of Australia, 28 April 1997) and adopted in *Freestone* and *MacKnair*:

> "In my judgment, a party is only liable to maintain the other party to the extent that the first-mentioned party is reasonably able to do so. In determining whether a party is reasonably able to support or contribute to the support of another party, one should have regard to the income of the first-mentioned party and then the **unavoidable, non-discretionary expenses** of that party, including his or her **reasonable living expenses**. After that exercise, one can consider the amount, if any, from which the first party may be able to contribute to the maintenance of the other party" [at 35].

The wife did not challenge the husband's brother as to the existence or purpose of the loan. In the circumstances, the Full Court considered that the primary judge was entitled to accept the existence of the loan as a reasonable expense of the husband.

Also in ¶14-040

***Gatsby & Gatsby (No 2)* [2012] FamCA 667**

The wife was 56 years of age and had not been in paid employment for three years when the husband's company terminated her services as a secretary. She qualified for Newstart Allowance, which carried with it a supervised obligation to seek paid employment. The wife received counselling assistance for depression, anger and other issues. There was no challenge to the nature or quantum of her outgoings which left her with a fortnightly shortfall of $567.10. Justice Loughnan noted (at [80]):

> "if any significant element of her behaviour to the husband directly and her conduct and presentation in the course of these proceedings was repeated at a job interview or potential workplace, it is unlikely that a potential employer would select her".

Despite factors suggesting that the wife was unable to support herself and was unlikely to find work, in the absence of evidence of the attempts the wife had made to obtain employment and evidence about her mental health issues, Loughnan J said the wife had not satisfied him that she was unable to support herself.

***Anison & Anison* [2018] FamCA 113**

The wife had outstanding legal costs of about $200,000. She was to receive cash of $233,550 pursuant to a property settlement order (in addition to the property of

$154,866 she already held). Justice Hogan ignored the wife's indebtedness for legal costs in determining the wife's ability to support herself adequately. Justice Hogan considered that if she took into account the indebtedness, the husband would in reality be defraying the wife's legal expenses. The wife's application for indefinite spousal maintenance was refused.

¶14-030 Relevance of income-tested pension, allowance or benefit

Sections 75(3) and 90SF(4) of the *Family Law Act 1975* (Cth) expressly require the court to disregard any entitlement of the party whose maintenance is under consideration to an income-tested pension, allowance or benefit.

A perhaps unintended consequence of the *National Disability Insurance Scheme* (NDIS) is that as it is not income-tested, a maintenance payer can argue that the receipt of the NDIS by the payee can be used to reduce the level of maintenance otherwise payable. See *Hand & Bodilly* [2019] FamCA 1; *Zubcic & Zubcic* [2018] FamCA 129 (in relation to child maintenance).

¶14-035 Capacity to pay

The respondent's capacity to pay is not assessed merely on income, but also on property, financial resources and earning capacity. Capacity to pay is assessed by determining the respondent's surplus after paying their reasonable commitments.

The respondent's capacity to pay is more generously interpreted in the respondent's favour in a spousal maintenance application than in a child support or child maintenance application. For example, in *DJM v JLM*,[15] the husband had a higher earning capacity than his current income. The Full Court assessed his child support liability based on his earning capacity, but found that he had no capacity to pay spousal maintenance based on his income.

The Full Court in *Maroney & Maroney* [2009] FamCAFC 45 (at [56]) held:

"[t]he 'capacity' to meet an order for interim spousal maintenance is not confined to income. Once a party, such as the wife in this case, establishes an entitlement to interim spousal maintenance, and such entitlement is quantified in accordance with that spouse's reasonable needs, an order may be made notwithstanding that the liable spouse could only satisfy the order out of capital or borrowings against capital assets".

Examples

***Jonas & May* [2010] FamCA 551**

A de facto husband in receipt of a Centrelink Newstart allowance was ordered to pay spousal maintenance of $400 per week. Cronin J found that he had the capacity to pay maintenance. The husband operated a company worth $1.2m, owned real estate, paid rent of $3,780 per calendar month and was able to borrow funds relatively easily.

***Carman & Carman* [2017] FamCA 99**

The wife's claim to vary a periodic maintenance order failed because the husband lacked capacity to pay. Justice Loughnan found that the wife's circumstances had changed so as to justify a variation of the maintenance order. One of the children of the marriage had been diagnosed with a serious medical condition and her health had significantly deteriorated. The wife was working three days per week when the maintenance order was made at the time the final property orders were made. She was no longer able to do so. The maintenance order required the husband to pay half the mortgage payments for a period of 18 months.

The wife sought that the husband pay $2,500 per week indefinitely. Although the wife's position was very weak and the husband had a good income, more than two years after the property settlement he had substantial debts and no significant assets. He paid 48% of his after-tax income on child support. His average weekly income was $3,986 and he paid $617 in the form of periodic payments and $673 in educational and other payments.

The wife's s 79A application also failed, as she could not establish that either she or the child would suffer hardship if the property order was not varied to enable her a longer period of time to refinance the mortgage, as there was no evidence that she would be able to refinance the mortgage later.

***Elei & Dodt* (2018) FLC ¶93-841**

Justice Ryan sitting as the Full Court ordered that the husband pay $800 per week until 22 December 2017 and $1,350 per week thereafter, together with private health insurance cover. She found that the husband had capacity to pay, based on the following:

- He had not made proper disclosure of his financial circumstances.
- He had incurred and paid $180,000 in legal fees in a case primarily concerned with spousal maintenance. While he was entitled to do so – spending the better part of $180,000 in resisting a claim for interim spousal maintenance could not be

ignored in determining his capacity to pay. This provided further evidence that his financial circumstances were not as constrained as he would have the court believe.

- The source of funds used to pay $180,000 was not explained to the extent of $73,000.
- Prima facie it was impossible for him to have paid any of his legal costs from income, as his weekly expenses (excluding legal costs) exceeded his weekly income by $2,500.
- He had been able to borrow $70,000 from a company with which he was engaged in property development and $20,000 from his mother's estate to pay legal costs.

***Labonte & Labonte and Anor* [2018] FamCA 755**

The court took into account, in determining the husband's capacity to pay, his interest in an unsold real estate development, discretionary payments made, including $800,000 loaned to a friend, and debts he was owed by the friend and various entities, one of which was a trust. His father was the appointor of the trust and the sole shareholder of the trustee, and the husband was a beneficiary of the trust and director of the trustee. The real relevance of the trust in terms of the husband's capacity to pay was the ability to call on the loan.

***Brewer & Brewer* [2018] FamCA 5**

The husband had resigned from his employment, purportedly for medical reasons. The court found that his medical condition did not justify his resignation and assessed his ability to pay maintenance on his earning capacity.

Footnotes

15 *DJM* v *JLM* (1998) FLC ¶92-816.

¶14-040 Distinguishing between expenses of a party and child

It is important to distinguish between the expenses of the party seeking maintenance and the child or children in the care of that party (*Stein & Stein* (2000) FLC ¶93-004).

The courts accept that a "strict line between costs referable to the custodial parent and those referable to the children cannot always be drawn with clarity" (*Redman & Redman* (1987) FLC ¶91-805 at p

76,081). However, the Full Court in *Stein & Stein* (2000) FLC ¶93-004 said (at [56]):

> "In this case, the wife's duty to maintain her own children was only a duty to make an equitable contribution towards their support. The extent of that equitable contribution had not been evaluated by the trial Judge but could probably be said to have been non-existent having regard to the vast amount of wealth available to the husband. On that analysis, even if it was appropriate for the trial Judge to have taken into account the commitments of the wife necessary to enable the wife to support her children, it could not be said that the expenditure of monies on the children by the wife over and above the monies she would be able to obtain by way of appropriate assessment of child support could be seen as necessary expenditure by the wife. It certainly could not be seen as an element of her self-support".

The Full Court in *Drysdale & Drysdale* [2011] FamCAFC 85 distinguished *Stein* as that involved a final order for spousal maintenance and said (at [39]) that it was not persuaded that "in the context of an interim spousal maintenance application, the failure to differentiate between the expenses of the claimant and those of the children of the marriage is necessarily fatal to a successful spousal maintenance claim". The husband unsuccessfully sought leave to appeal.

The capacity to pay spousal maintenance can only be considered once any application for departure from a child support assessment is considered (*Masoud & Masoud* (2016) FLC ¶93-689 at [167]).

¶14-050 Matters to be taken into account — s 75(2) and 90SF(3)

A long list of matters which the court can consider in determining what maintenance order should be made is set out in s 75(2) and 90SF(3) of the *Family Law Act 1975* (Cth) (FLA). Sections 75(1) and 90SF(2) require the court to take into account only those matters. The matters in s 75(2) and 90SF(3) affect the quantum of the order. They may

even affect whether an order is made at all.

Example

***Berta & Berta* (1988) FLC ¶91-916**

The husband was found not to have the ability to support himself adequately. However, his claim for spousal maintenance was rejected as he had "resources" within s 75(2)(b) which could be utilised to meet his needs. He had spent his personal injury claim to improve his capital position, thus creating his own "incapacity of self-support".

A major problem with s 75(2) and 90SF(3) is they provide no guidance as to whether any of the matters should be given higher priority than others. Sections 75(2) and 90SF(3) are relevant to s 79(4) and 90SM(4), and maintenance applications. Section 79(4)(e) requires that, in s 79 applications, the matters in s 75(2) be taken into account "so far as they are relevant". Section 90SM(4)(e) refers to the s 90SF(3) factors for de facto couples. Sections 75(2) and 90SF(3) are considered in the context of s 79 and 90SM applications at ¶14-030. The court has made it clear in relation to s 75(2) that:

- it is not doubling up to take s 75(2) factors into account in a property settlement and then again in relation to maintenance[16]

- the proper approach is first to determine what factors should be taken into account pursuant to s 75(2), without considering the amount (if any) that should be ordered. After all the factors have been determined, it is then appropriate to determine what weight should be given to each of them, including the financial circumstances of the respondent, and make an assessment[17]

- determining, then separating the percentage adjustment called for by each of a series of factors favouring one party, and then arriving at the overall adjustment by adding up the components, has at least the potential for double counting[18]

- although the court is given "a wide discretion" to make "such order as it thinks proper" under s 74, this discretion is limited by the requirement under s 75(1) to only consider the matters set out in s 75(2).[19]

Footnotes

Footnotes

16 *Jacobson & Jacobson* (1989) FLC ¶92-003.

17 *Beck & Beck (No 2)* (1983) FLC ¶91-318.

18 *Tomasetti & Tomasetti* (2000) FLC ¶93-023.

19 *Plut & Plut* (1987) FLC ¶91-834.

¶14-060 By reason of having the care or control of a child in s 72(1) and 90SF(1)(b)

One of the grounds that an applicant for maintenance may rely upon to show inability to support themselves adequately under s 72 or s 90SF(1) of the *Family Law Act 1975* (Cth) (FLA) is that they have the care or control of a child of the marriage (or the de facto relationship) who has not attained the age of 18 years. The phrase "care or control of a child of the marriage" also arises in s 75(2)(c) and 90SF(3)(b) (in relation to de facto relationships) as a factor which can affect the question of maintenance once eligibility has been determined. Much of the following discussion is also applicable to s 75(2)(c) and 90SF(3)(b).

Child of the marriage in s 72(1) or of the de facto relationship in s 90SF(3)

The child must be a "child of the marriage" or a "child of the de facto relationship". The definition of "child of a marriage" in s 4(1) includes a child who is, under s 60F(1) or (2), a child of a marriage, but does not include a child who has, under s 60F(3), ceased to be a child of a marriage.

Section 60F(1) defines "child of a marriage" to include:

> "(a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) a child of the husband and wife born before the marriage;

(c) a child who is, under subsection 60H(1) or section 60HB, the child of the husband and wife."

The child cannot be the natural child of only one of the parties unless the child was adopted by the other.

Section 60F(2) extends the definition of "a child of a marriage" to a child of:

"(a) a marriage that has been terminated by divorce or annulled (in Australia or elsewhere); or

(b) a marriage that has been terminated by the death of one party to the marriage."

Section 60H(1) refers to children born as a result of certain artificial conception procedures.

Section 60H is similarly worded to s 60F(1), but covers children of de facto couples.

The child must be under 18 years of age at the time of the hearing.[20]

A "child of a de facto relationship" is a child of both of the parties to the de facto relationship (s 90RB).

Care or control

The phrase "care or control" is not defined in the FLA. Under common law, "care and control" meant that part of "custody" which was concerned with the day-to-day upbringing of a child rather than long-term decision making.[21] As the term "care or control" is not defined in the FLA, the common law meaning presumably applies. Care and control does not require a court order.

Effect of care and control of child of the marriage

The inference from s 72(1) and 90SF(1) is that the care or control of a child under the age of 18 years may be relied upon as a factor inhibiting earning capacity. Depending on the applicant's skills and

experience and the number and ages of the children, the applicant may or may not have a partial earning capacity or a full earning capacity.

It may, however, be argued that an applicant's capacity for employment is not restricted by having the care or control of a child. This may be due to the age of the child, or that suitable child care arrangements can be made during working hours. In some circumstances, the skills, experience or work history of the applicant will be extremely relevant. For example, the applicant may have worked part-time or full-time while being the primary carer of the children. The applicant will generally be expected to continue to work the same or similar hours to those they worked during the relationship.

The effect of the care of a child of the marriage on earning capacity is discussed further at ¶14-200.

Footnotes

20 *Rainbird & Rainbird* (1977) FLC ¶90-256.

21 *McEnearney & McEnearney* (1980) FLC ¶90-866; *Chandler & Chandler* (1981) FLC ¶91-008.

¶14-065 Interim maintenance

The court has the power to make "interim" or "final" maintenance orders. Interim orders are made pending further order of the court but can be made either for an indefinite period or for a short fixed term. The power to make interim orders arises for married couples from s 80(1)(h) of the *Family Law Act 1975* (Cth) and for de facto relationships from s 90SS(1)(h).

An application for an interim maintenance order is quite different from an application for an urgent maintenance order. Urgent maintenance orders are discussed at ¶14-050. An ordinary application for

maintenance (even if the order is to be limited in duration) requires a hearing of the evidence including the relevant matters in s 75(2) or s 90SF(3). An application for interim maintenance can only be heard after each party has had the opportunity to adduce evidence. The normal procedures for the filing of affidavits by both parties and the filing of financial statements must be observed.[22]

Interim maintenance orders can be made:

- until a lump sum payment of property is paid[23]
- without a full hearing of all aspects of the case[24]
- for a fixed period but reserving liberty to the applicant to apply for the order to continue,[25]

  and

- until a recipient of a lump sum or transfer of property has time to liquidate assets and invest the proceeds.[26]

In *Hall* v *Hall* (2016) FLC 93-709, the High Court considered the approach to be taken in determining an application for interim spousal maintenance. The High Court majority set out the process for a final order first in para 3–5, which are quoted in ¶14-010 above (omitting the contents of the sections of the Act).

The majority went on to distinguish the process for making an interim order from the process for making an urgent order (at [8]):

> "Unlike a court exercising the power to make an urgent order conferred by s 77, a court exercising the power to make an interim order under s 74(1) must be satisfied of the threshold requirement in s 72(1) and must have regard to any matter referred to in s 75(2) that is relevant. No doubt, on an application for an interim order '[t]he evidence need not be so extensive and the findings not so precise' as on an application for a final order. But there is nothing to displace the applicability to an exercise of the power conferred by s 74(1) of the ordinary standard of proof in a civil proceeding now set out in s 140 of the *Evidence Act 1995*

(Cth). A court determining an application for an interim order under s 74(1) cannot make such an order without finding, on the balance of probabilities on the evidence before it, that the threshold requirement in s 72(1) is met having regard to any relevant matter referred to in s 75(2)".

A major limitation with an interim hearing is that disputed issues of fact cannot be resolved (*Edgar & Strofield* (2016) FLC ¶93-711 at [15]). There may, however, be cases where the court allows oral evidence and makes determinations of fact in spousal maintenance hearings. Oral evidence is more likely to be heard in interim spousal maintenance hearings as a matter of practice than any other type of interim hearing, but this is dependent upon court resources.

An interim spousal maintenance entitlement may be satisfied from capital. See in *Maroney & Maroney* [2009] FamCAFC 45 discussed at ¶14-035.

Maroney was followed in *Merrill & Burt (No 2)* [2017] FamCA 267, where the court accepted that the wife, being the respondent to the maintenance claim of the husband, was only able to satisfy the maintenance claim from the net proceeds of sale of a real property. This sum was about $227,470 and had dwindled through the making of various orders for lump sum payments to the parties and was subject to further claims. Justice Berman considered it to be reasonable for the husband to receive spousal maintenance for 20 weeks at $1,024 per week, being a total of $20,480, which after deducting the balance of previous lump sums he had received of $3,500, left $16,980 payable to him. The husband sought that the maintenance be payable from November 2016. Berman J back-dated it to the date of receipt by the husband of the last lump sum on the basis that maintenance was not payable from the wife's income but only from the dwindling sale proceeds and it was reasonable for the wife to not concede the maintenance application until the various further claims in respect of the lump sum were crystallised at the conclusion of the evidence.

Footnotes

22 *Ashton and Ashton* (1982) FLC ¶91-285.

23 *Davidson & Davidson* (1991) FLC ¶92-197; *Turnbull & Turnbull* (1991) FLC ¶92-258.

24 *H & H* (1985) FLC ¶91-654.

25 *Kauiers & Kauiers* (1986) FLC ¶91-708.

26 *Petterson & Petterson* (1979) FLC ¶90-717.

¶14-070 Urgent maintenance

Introduction

The court has power under s 77 and 90SG of the *Family Law Act 1975* (Cth) (FLA) to order urgent maintenance without the detailed enquiry required by an ordinary application for maintenance under s 74 and 90SE(1). In practice, this rarely occurs. Section 77 provides:

> "Where, in proceedings with respect to the maintenance of a party to a marriage, it appears to the court that the party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the court considers reasonable".

Section 90SG is similarly worded for de facto couples.

An order under s 77 or s 90SG can be made without detailed affidavit and/or financial material being filed by the parties. If the court has the benefit of detailed particulars of the parties' financial circumstances on affidavit, it is inappropriate to use s 77 or s 90SG. The order is made under s 72(1) or s 90SF(1) instead.[27]

Examples

***Malcolm & Malcolm* (1977) FLC ¶90-220**

The wife lived in the matrimonial home rent-free, had a part-time job and savings of $6,000. Watson SJ held that she was not in immediate need of financial assistance and the Magistrate who made the s 77 order was in a position to have made a final order instead.

***Redman & Redman* (1987) FLC ¶91-805**

The Full Court allowed a husband's appeal from interim maintenance orders. The wife had presented evidence of household expenses and had not separated her expenses from the children's expenses. The trial judge ordered spousal maintenance, which covered both the needs of the wife and the children. The husband conceded that a global order could have been made under s 77. The Full Court acknowledged that it was sometimes difficult to draw a strict line between expenses of a parent and expenses of children. However, if it was possible to do so, separate allocations of maintenance should be made. There was sufficient evidence to enable the Full Court to make separate maintenance orders for the wife and the children.

***Hayson & Hayson* (1987) FLC ¶91-819**

The "narrow 'stop gap' application" of s 77 was illustrated by the wife renting a more expensive property to be closer to the children and to be better able to accommodate them overnight. The Full Court overturned the s 77 order. The taking of the lease, particularly without discussion with the husband, who had been making otherwise adequate voluntary payments of maintenance, was not an "immediate need" to justify urgent maintenance.

***Grimshaw-Grieves & Grieves* [2011] FMCAfam 125**

The fact that the applicant had funds at her disposal of $17,300 militated against her claim that she was in immediate need of financial assistance. The Federal Magistrate found that in the relatively near future she might be able to demonstrate a claim for a need for ongoing maintenance and obtain an interim order. The procedure for an interim order is very different from the procedure for obtaining an urgent order. It would be dealt with in a more conventional way.

Overseas maintenance orders

The *Family Law Act 1975* and the Family Law Regulations 1984 provide for the registration and enforcement in Australia of maintenance orders that are made overseas. Different proceedings and law apply depending on whether the overseas jurisdiction is New Zealand, a reciprocating jurisdiction, a party to the Convention on the Receiving Abroad of Maintenance or not within any of these categories.

The Child Support (Registration and Collection) Regulations 2018 deal

with the enforcement of child support overseas and the enforcement in Australia of both spousal and child maintenance obligations which arose in New Zealand and reciprocal jurisdictions.

An example of an Australian court varying an overseas order occurred in *Vakil & Vakil* (1997) FLC ¶92-743. The parties had been separated for five or six years at the time of the appeal. They had resided together for less than one month. The Full Court had regard (at p 84,028) to “the practical difficulties existing for the husband in attempting to obtain information as to the wife’s current status and employment as a basis for an application for variation on the ground of changed circumstances”.

In *Newbeld & Newbeld* [2007] FamCA 1483, the wife registered in Australia a spousal maintenance order made by the Superior Court of Arizona. Two years later, the Child Support Registrar commenced proceedings in the Federal Magistrates Court to enforce the spousal maintenance order and recover arrears and late payment penalties owing under the order.

The husband sought the discharge of the spousal maintenance order and all arrears, and to stay the orders of the Superior Court of Arizona.

Rimmer FM suspended the Arizona order until further order of the court and dismissed all applications of the husband and the wife including the husband’s application for discharge of arrears.

The husband appealed. His appeal was allowed and the matter was remitted for rehearing. At the rehearing, Stock FM was not satisfied that the arrears owing under the Arizona order should be discharged on the basis that the husband had no present capacity to meet these arrears. Stock FM did not stay the enforcement proceedings against the husband. The husband appealed again, relying on *Vakil*.

May J, hearing the second appeal, distinguished the facts from those in *Vakil* where findings of fact made by the Indian court were demonstrably incorrect: the wife withheld evidence from the Indian court and her evidence was false. May J found that the husband had failed to successfully challenge the findings of fact by the trial judge. In

particular, he failed to establish that he did not have the capacity to pay the ordered maintenance for the relevant period.

In *Border & Border (No 3)* [2008] FamCA 830, Watts J, hearing an appeal from a judicial registrar, found that the husband should pay the sum of $4,480 per week to meet the needs of the wife and child. The wife, in her financial statement, apportioned her expenses as a total of the overall expenses of herself and the child as 75%/25%. Watts J, somewhat arbitrarily but pragmatically, apportioned the sum payable by the husband in the same proportions being $3,360 per week for spousal maintenance and $1,120 per week for child support.

The effect of the exchange rate on the amount of maintenance enforceable in Australia is discussed in *May & May* (1987) FLC ¶91-841.

Footnotes

27 *Baber & Baber* (1980) FLC ¶90-901.

¶14-075 Secured maintenance orders

Sections 80(1) and 90SS(1) of the *Family Law Act 1975* (Cth) (FLA) set out the general powers of the court. The court, in exercising its powers under Pt VIII or VIIIAB of the FLA, may, under s 80(1)(c) and 90SS(1)(d), inter alia, “order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs”.

This provision enables a court to require that an order for payment of a sum of money be secured. It can apply whether the order is for periodic or lump sum maintenance, alteration of property interests, or pursuant to any other provision of Pt VIII. The power enables the court to add a further obligation for the securing of the order for payment. The party liable to pay is required to give security for the due performance of the order.

The obvious advantage to a recipient is that the security may make

enforcement of the order easier in the event of default and reduce the probability of default occurring at all.

The powers under s 80(1)(c) and 90SS(1)(d) may be used at any time. The order for security does not necessarily have to be made when the original orders are made. For example, the security may be ordered upon default or ordered upon an application to vary the original maintenance order.[28]

Orders for security should not be made ex parte except in exceptional circumstances.[29]

Examples

***Chernischoff & Chernischoff* (1980) FLC ¶90-848**

An order was made for the husband's interest in real estate to be transferred to the wife to be held by her as trustee for the arrears of maintenance, costs which had been ordered and also for further maintenance giving her a power to sell the property to achieve those aims.

***Harris & Harris* (1978) FLC ¶90-454**

Tonge J ordered security because there was either an unwillingness or incapacity on the part of the husband to meet the need of the wife for financial assistance. The husband's wish to travel overseas created a further need for security.

Footnotes

28 *Molier & Van Wyk* (1980) FLC ¶90-911.

29 *Smith & Smith* (1994) FLC ¶92-494; *Porker & Porker* (1979) FLC ¶90-604.

¶14-080 Procedure

The procedure for issuing maintenance proceedings varies. It depends on which court the application is filed in and whether the application is filed before, after or contemporaneously with related proceedings.

There are three possible situations:

- the proceedings are issued at the same time as proceedings for a property settlement

- the proceedings are issued when an associated matter is pending. Usually this will be a property matter in which a financial statement has already been filed. An updated financial statement may be required, particularly if the detailed expense page was not completed previously, or

- the proceedings are filed when property proceedings are neither pending nor filed at the same time. This type of application cannot be filed in the Family Court but must be filed in the Federal Circuit Court instead.

¶14-085 Varying orders

Sections 83 and 90SI of the *Family Law Act 1975* (Cth) (FLA) deal with the discharge, suspension, revival or variation of spousal maintenance orders.

Specifically, s 83(1) empowers the court to modify an order by:

> "(c) discharge the order if there is any just cause for so doing;
>
> (d) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;
>
> (e) revive wholly or in part an order suspended under paragraph (d); or
>
> (f) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner."

A court has power to modify a spousal maintenance order if it was the court that made the order, or the order has been registered in that

court in accordance with the Rules of Court (s 83(1)(a) and (b)). The Family Court of Australia Practice Direction No 7 of 2001 (which has since been revoked) required that applications solely for variation of spousal maintenance must be brought in the Federal Circuit Court regardless of where the earlier order was made. There is a note to Div 4.2.4 *Spousal or de facto maintenance* of Ch 4 of the Family Law Rules 2004 that:

> "Applications should not be made under this Division unless an associated matter is pending in the Court or filing with the Federal Magistrates Court is not available. Under section 33B of the *Family Law Act 1975*, the Family Court may transfer the proceedings to the Federal Magistrates Court without notice to the parties".

The amount of spousal maintenance can only be increased or decreased on the limited grounds set out in s 83(2) or s 90SI(3). To discharge, suspend or revive an order, s 83(2) and 90SI(3) do not need to be met.

The court must be satisfied that one of the following grounds exists:

> "(a) that, since the order was made or last varied—
>
> (i) the circumstances of a person for whose benefit the order was made have so changed;
>
> (ii) the circumstances of the person liable to make payments under the order have so changed; or
>
> (iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative — the circumstances of the estate are such;
>
> as to justify its so doing;
>
> (b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing;
>
> (ba) in a case where the order was made by consent — that the amount ordered to be paid is not proper or adequate;

(c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false".

Section 83(1) and (2) are discretionary provisions. Even if there has been a change in circumstances, the section does not mandate a variation of the order in question (*Vailes & Vailes* [2010] FMCAfam 391 at [10]–[11]).

Sections 83(4) and 90SI(4) require the court to consider changes in the Consumer Price Index (CPI) when satisfying itself that the cost of living has changed under s 83(2)(b) and 90SI(3)(b). However, a change in the cost of living is not a ground for variation "unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living" (s 83(5)).

An order decreasing the amount of a periodic sum or discharging an order may be made retrospective to such date as the court thinks appropriate (s 83(6) and 90SI(3)(b)). If a retrospective order is made, any overpayment is recoverable (s 83(6A) and 90SI(8)).

If an order is discharged under s 83(1)(c) it cannot be revived. A fresh application must be made which may require an application for leave under s 44(4) or 44(6). (*Skinner & Skinner* (1977) FLC ¶90-237; *Lusby & Lusby* (1977) FLC ¶90-311).

In *Malone & Malone* [2011] FamCAFC 136, the Full Court found that there was no "just cause" for discharging the maintenance order for the period 1992 to 2008 (it was discharged by consent after that). The husband had sat on his rights (if any) and given the passage of time there was no evidence that the order was not proper in 1992. There was also strength in the wife's submission that as there were periods when the husband was not paying child support, justice and equity required that he continue to pay spousal maintenance of $200 per week. No costs order was made, given the husband's poor financial circumstances – even though there was no merit in the husband's appeal.

Application of s 83 and 90SI

Important points to note regarding s 83 and 90SI are:

1. On any application for variation under s 83 (or s 90SI), s 72 (or s 90SF(1)) is still applicable. The applicant must establish that he or she is unable to support himself or herself adequately. The need of the applicant for maintenance must again be tested (*Astbury and Astbury* (1978) FLC ¶90-494).

2. "[T]he conditions or matters listed in s 83(2) (and s 90SI(3)) are clearly in the alternative". In *Caska* v *Caska* (1998) FLC ¶92-826 the Full Court found (at p 85,412) that s 83(2)(ba) (being that the amount ordered to be paid in the previous order "is not proper or adequate") is an additional and optional ground. It may be relied on when seeking a variation of a maintenance order made by consent. It is not a prerequisite for the variation of all orders.

3. An order for lump sum maintenance may be made as a variation of an existing order for periodic payments, eg *Warnock & Warnock* (1979) FLC ¶90-726, *Fowler & Fowler* (1980) FLC ¶90-808 and *Vautin* v *Vautin* (1998) FLC ¶92-827.

4. A "cause" for the discharge of a maintenance order will be a "just cause" only if having regard to the other provisions of the FLA, particularly those relating to maintenance, it can be said that it is "right" or "proper" that the order should be discharged (per Ryan J at [103] *Segan & Brachrich* [2011] FamCA 722).

The High Court majority in *Hall* v *Hall* (2016) FLC ¶93-709 said that the power to discharge the order "if there is just cause for so doing" under s 83(1)(c) imported a need for the court to be satisfied of circumstances which justify the court considering the threshold requirement again (*Astbury & Astbury* (1978) FLC ¶90-494). The court must find "just cause" on the basis of the wording of the Act and the court is specifically required to have regard to s 72 and s 75. In an application for discharge of the order, the threshold requirement of s 72(1) can be re-opened.

For the court to be able to modify an order under s 83, there must be "in force an order". In *Atkins & Hunt* (2016) FLC ¶93-746, the wife appealed against the dismissal of her application to vary a spousal

maintenance order under s 83 and the decision, if there was no order "in force", that she could not make an oral application to amend her application to apply under s 74 for a fresh order. The order which the wife sought to vary was an interim maintenance order that the husband pay specific sums to the wife. As part of the final orders for settlement of property, the trial judge ordered that "all existing orders" for spousal maintenance be "discharged upon completion of the sale" of the former matrimonial home. The wife filed an application to vary the interim order seeking that the husband pay her $3,306 per week. Her application was filed before the "completion of the sale" had occurred. Murphy J (with whom Bryant CJ and May J agreed) rejected the wife's argument that the order had "ceased to have effect" under s 82 by the time of the hearing before the trial judge, but nevertheless was an order "in force" at that time. There was no basis for an order varying the order unless there was an amount payable which could be increased or decreased.

However, the Full Court found that the trial judge erred in finding that the wife was unable to amend her initiating application to seek a maintenance order under s 74. Section 44(3) permitted an application for maintenance to be made by the wife as she sought the "revival … of an order previously made in proceedings with respect to the maintenance of a party". The reference by the trial judge to "the finality principle" as a matter relevant to the exercise of his discretion whether to permit amendment was misconceived.

It is not clear whether a lump sum can be varied. The Full Court in *Anast & Anastopoulos* (1982) FLC ¶91-201 assumed that a lump sum order was capable of subsequent variation. However, it is difficult to see how it can be varied. Once lump sum maintenance has been paid and the order satisfied, it cannot be said that "there is in force an order … with respect to maintenance". In *Candlish & Pratt* (1980) FLC ¶90-819, a lump sum maintenance provision in a s 86 agreement was intended by the parties to be in lieu of periodic maintenance for 4½ years. The wife needed support for less than this period. She entered a de facto relationship 17 months after signing the deed, married four months later, and shortly afterwards had a child. The husband sought orders under s 79. The Full Court did not vary the lump sum but

allowed the husband a credit of $5,000 on the $9,000 maintenance payout as part of the s 79 orders.

Examples

***Dixon & Dixon* (1985) FLC ¶91-652**

This is an example of the circumstances in which an order will be discharged. The trial judge held that an interim order that the husband make all loan payments secured over the matrimonial home should be discharged as there was "just cause" within s 83(1)(c) for doing so. The reasons were:

- the financial circumstances of the parties had not been investigated
- there had not been a proper hearing, and
- the order, although expressed to be "until further order", was intended by the trial judge only to operate until the O 24 Conference (now Conciliation Conference).

***Brady & Brady* (1978) FLC ¶90-513**

This is an example of a variation application. Bulley J decreased the ex-wife's maintenance and made a lump sum maintenance order. There had been changes in the CPI and the husband produced documentary evidence of his surplus of income over expenses. Bulley J was satisfied that since the original order was made, "the circumstances of the person liable to make payments under the order have so changed" (s 83(2)(a)(ii)). It was the wife's application for an increase in spousal maintenance, but considering s 75(2)(f) led Bulley J to make orders which maximised the wife's entitlements to social security benefits. This case would not be decided in the same way today because of the effect of s 75(3).

Change in cost of living

Maintenance orders can only be varied if the court is satisfied on one of four grounds set out in s 83 or s 90SI of the FLA. One of the grounds, contained in s 83(2)(b) or s 90SI(3)(b), is that since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing.[30] Under s 90SI(3)(b) and 83, the circumstances specifically include "the person entering into a stable and continuing de facto relationship".

The court, in satisfying itself as to s 83(2)(b) or s 90SI(4), "shall have regard to any changes that have occurred in the CPI published by the Australian Statistician". See the Wolters Kluwer's *Australian Family Law Handbook — Office Volume 1* at ¶35-100.

Section 83(2)(b) or s 90SI(4) must be read subject to s 83(5) or s 90SI(5). Section 83(5) provides that:

> "The court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living".

Footnotes

30 *Brady & Brady* (1978) FLC ¶90-513.

¶14-090 Ending orders

A maintenance order ceases:

- at a fixed predetermined time: for example, the order can provide that it ends after the expiration of a two-year period after the making of the order or upon the recipient commencing full-time paid employment

- when the order is discharged (s 83(1)(c) or s 90SI(1)(c) of the *Family Law Act 1975* (Cth) (FLA)). A useful overview of the law relating to discharge of maintenance orders was given by Scarlett FM in *Turnbull & Turnbull* (2006) FLC ¶93-307

- when one of the parties to the marriage dies (s 82(1)–(3) or s 90SI(1)–(3)). Certain orders made before the commencement of s 38 of the *Family Law Amendment Act 1983* on 25 November 1983 are an exception, and

- when a party remarries unless a court otherwise orders due to "special circumstances" (s 82(4) or s 90SJ(2)).

The fact that a maintenance order ceases to have effect does not prevent the recovery of any arrears. Section 82(8) specifically protects

the recovery of arrears which arose prior to the death or remarriage of the recipient.

An indefinite order is rare. An example of one arose in *Wollacott & Wollacott* [2014] FamCA 5.

Ending order upon remarriage

Section 82(4) provides that:

> "An order with respect to the maintenance of a party to a marriage ceases to have effect upon the remarriage of the party unless in special circumstances a court having jurisdiction … otherwise orders".

This provision reflects the ordinary expectations of parties and the community that a maintenance order will cease upon the remarriage of the recipient.

The two surprising aspects of this section are:

1. the court can order that maintenance continue despite the remarriage, and

2. commencing a de facto relationship does not give rise to the automatic discharge of the order. It is, however, a matter to be considered under s 90SI(3)(b).

Section 90SJ(2) is similarly worded for de facto couples, however, neither s 82(4) nor s 90SJ(2) refer to orders being terminated by the commencement of a de facto relationship.

Sections 82(4) and 90SJ(2) appear to operate automatically upon the remarriage of the party receiving maintenance. No further steps such as a court order are required to bring the order to an end.

Sections 82(4) and 90SJ(2) operate regardless of the terms of the order itself. It brings to an end an order for maintenance even if it is stated to continue in the event of a remarriage.

A recipient who remarries must inform the payer of the date of the remarriage without delay (s 82(6) and 90SJ(3)). Any money paid in respect of a period after the remarriage may be recovered in a court

having jurisdiction under the FLA (s 82(7) or s 90SJ(4)).

Effect of death

Death brings pending maintenance applications to an end.[31]

Maintenance proceedings cannot be continued after death.[32] A maintenance order ceases upon the death of the recipient (s 82(1) or s 90SJ(1)). Most maintenance orders cease upon the death of the payer.

The exception is orders made before 25 November 1983, which are expressed to continue for a period beyond the death of a person liable to make payments under the order (s 82(3)). There are two categories of orders within the exception:

- if the order is expressed to continue in force throughout the life of the beneficiary of the order, and
- if the order is expressed to continue for a period that has not expired at the date of death of the person liable to make the payments.

Regardless of the terms of maintenance orders made after 25 November 1983, they cease to have effect upon the death of the party ordered to pay.

Strategies to continue maintenance after the payer's death

There are two possible ways for maintenance to continue after the payer's death:

- secured maintenance orders, and
- financial agreements.

If an order for periodic maintenance is secured pursuant to s 80(1)(c) or s 90SS(1)(d), no problems will arise on death. The order for maintenance itself will not be effective. The security, however, if properly established, will operate independently of the order. Either periodic maintenance will continue or a lump sum will become payable.

In most states and territories, a former spouse or partner, especially one in whose favour there was an operative order for periodic maintenance at the date of death, can claim against the estate under testator's family maintenance legislation. The former spouse or partner will have no priority and will be in competition with other family members and nominated beneficiaries under the deceased's will. Security for the order may, therefore, give a material advantage to the beneficiaries of the order over the protection afforded by state family provision or testator's family maintenance legislation.

Unlike a maintenance order, maintenance provisions in a financial agreement do not cease upon the death of the payer unless this is expressly provided for in the financial agreement.

Footnotes

31 *Schmidt & Schmidt* (1980) FLC ¶90-873.

32 *Sims & Sims* (1981) FLC ¶91-072; but see *Pertsoulis & Pertsoulis* (1979) FLC ¶90-613.

¶14-100 Sections 81 and 90ST — clean break philosophy

Introduction

Section 81 of the *Family Law Act 1975* (Cth) (FLA) provides:

> "In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

Section 90ST is similarly worded for de facto couples.

Sections 81 and 90ST encourage the court to make orders about

maintenance and property of a kind which are less likely to require subsequent variation. They reflect a “clean break” philosophy. The priority, which the court should give these sections in relation to other sections such as s 74 or s 90SE(1), and s 75(2) or s 90SF(3), is an ongoing matter of debate.

In *Bevan & Bevan* (1995) FLC ¶92-600 the Full Court said (at p 81,980):

> “We have considered s 81 in making this order but we feel that the legislative policy which it contains must give way to the requirement of s 74, that the court is to make such order as it considers proper, once the threshold tests of s 72 are overcome”.

The making of a maintenance order does not of itself exhaust the power to make further maintenance orders. Section 80(2) of the FLA provides that an “order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage, or of any other order under Pt VIII, in relation to the maintenance of a party to a marriage does not prevent the court from making a subsequent order in relation to the maintenance of the party”. Section 90SS(2) is similarly worded with respect to de facto relationships.

There are numerous situations where it is not practicable to effect a clean break under s 81 or s 90ST. These include situations where:

- periodic maintenance is necessary as the parties do not have sufficient property to divide to satisfy the maintenance needs of one of the parties.

- periodic maintenance is preferable because the circumstances of one of the parties may change. Under s 83 or s 90SI, periodic maintenance orders are variable when circumstances change. A lump sum maintenance order appears not to be variable.

- s 79(4)(d) and 90SF(4)(d) specifically direct the court to take into account “the effect of any proposed order upon the earning capacity of either party”. Making a periodic maintenance order rather than a lump sum maintenance order may enable the payer to keep the capital assets of a business intact. In practice, this

section does not appear to carry much weight in court.[33] It is more likely to be a factor in negotiated settlements

- the question of maintenance may be left open if it is unclear how much, if any, maintenance each party will need in the future.[34] It may be impracticable to determine the financial relationships between the parties although the court will almost always do so.

- there is no power to terminate the court's maintenance jurisdiction by court order.

Examples

***Anast & Anastopoulos* (1982) FLC ¶91-201**

The trial judge ordered $35,000 as lump sum maintenance in addition to a property settlement. On appeal, the Full Court said that even if the sum of $35,000 could be categorised as a lump sum maintenance order, an order operating for 25 years gave little protection to the husband if there was an early improvement in the wife's position. High inflation meant the order might fail to provide adequately for the future needs of the wife who has already established a continuing need. The wife had limited working experience. She was aged 50 and had the care of the two children. Her financial future was by no means sure, and when a maintenance obligation over a long period is converted into a lump sum, it is difficult to make appropriate allowance for the vicissitudes of life and the changing factors which affect both parties.

The Full Court ordered that the full amount of the payment be described as property, and that the wife still be able to apply for lump sum and/or periodic spousal maintenance.

***Gatsby & Gatsby* [2011] FamCA 1042**

There was a notation to the orders that the parties intended that the orders "be made in full and final settlement in relation to all financial matters, including but not limited to, weekly spousal maintenance payments and lump sum payments".

Collier J dismissed the husband's argument that the notation could be used to interpret the orders so as to find they contained some provision for spousal maintenance, when the orders were entirely silent in that regard. The effect of s 77A was that the orders did not make provision for the maintenance of the wife.

***Vault & Isle* [2012] FamCAFC 93**

The parties had property and spousal maintenance orders made in 2004 after separating in 2003. They were not divorced. The spousal maintenance payments provided that the husband make fortnightly payments to the wife until they reached a total of $28,000. On that basis, his obligations expired within a year. The trial judge found that there was no order in place so the order could not be varied.

Thackray J, sitting as the Full Court, found that it was an appealable error for the trial judge not to consider s 80(2) of the FLA. He also found that the wife was under no

obligation to explain her delay in issuing proceedings and that the trial judge incorrectly emphasised the clean break principle having regard to *Bevan & Bevan* (1995) FLC ¶92-600. He remitted the matter for rehearing.

Sections 81 and 90ST of the FLA are often given great weight by courts in deciding what order is appropriate.[35]

Section 81 can be used to justify lump sum maintenance rather than periodic maintenance.

Example

***Bignold & Bignold* (1979) FLC ¶90-620**

After a 37-year marriage, the wife was awarded $110,000 from an asset pool of $265,000. The husband had a superannuation pension of nearly $19,000 pa. The $110,000 was ordered to be paid over nearly two years with the final $55,000 to carry interest at 10% for 18 months. The trial judge considered making orders that the wife receive a combination of lump sum and periodic maintenance. He rejected this approach as the same result would be achieved and he wanted to bring to an end the financial relationship between the parties to avoid further litigation.

There is, however, no requirement that periodic maintenance have a predetermined “end date” or sunset clause.[36]

A court may be reluctant to put an end date on an order for spousal maintenance for, as in *Bucknell & Bucknell* [2009] FamCAFC 177 (at [55]):

> “A court making a spousal maintenance order often has a choice between, on the one hand, leaving the order to operate for an indefinite period, knowing that s 83 of the Act provides for variation if circumstances so change that variation is justified or, on the other hand, fixing a date of cessation, which often involves a prediction, albeit on the balance of probabilities, about future events.”[37]

The uncertainties in *Bucknell* which prevented the court from setting an end date were that:

> “… the wife was some years away from completing her university

course, where that completion was not necessarily a certainty, when the child in her primary care would at the time of anticipated completion still only be in early years of schooling, and where availability of employment was not assured, we are not satisfied that matters affecting the period for which spousal maintenance ought be paid were so predictable that the only option reasonably open was to fix a date for cessation."

Footnotes

33 Farming cases such as *Lee Steere & Lee Steere* (1985) FLC ¶91-626.

34 *Yates & Yates (No 1)* (1982) FLC ¶91-227 at p 77,239.

35 *Cortesi & Cortesi* (1977) FLC ¶90-264; *Dench & Dench* (1978) FLC ¶90-469; *Bevan & Bevan* (1995) FLC ¶92-600; *Best & Best* (1993) FLC ¶92-418; *DJM* v *JLM* (1998) FLC ¶92-816; [1998] FamCA 97.

36 *AM & KAO* [2006] FamCA 734.

37 *Bucknell & Bucknell* [2009] FamCAFC 177 at 55.

¶14-110 Lump sum maintenance

In dealing with an application for maintenance pursuant to s 72 or s 90SF(1) of the *Family Law Act 1975* (Cth) (FLA), the court has all the powers under s 80(1) and 90SS(1). Sections 80(1)(a) and 90SF(1)(a) give power to "order payment of a lump sum, whether in one amount or by instalments". A lump sum maintenance order does not prevent the making of a later maintenance order (s 80(2) and 90SS(3)).

Sections 81 and 90ST have led the courts to prefer lump sum payments of maintenance rather than orders for periodic maintenance

(see s 81 and 90ST; ¶14-100).

The court must distinguish between the s 75(2) or s 90SF(3) component of a s 79 or s 90SM order and a maintenance claim.[38] Lump sum maintenance is not a separate head of power. The court must first determine that there is a claim for maintenance. Only then can it determine whether it is appropriate to order periodic or lump sum maintenance. Orders for lump sum maintenance must only be made cautiously.[39]

It may be appropriate to compound all or part of the periodical payments in the form of a lump sum. Sections 81 and 90ST seem to require that this be done where practicable. Examples of situations where a lump sum order may be appropriate include those where payments have been irregular or where there have been difficulties with enforcement and those where the period of dependency is expected to be of short duration.

Examples

***Plut & Plut* (1987) FLC ¶91-834**

The Full Court considered appeals by both parties from orders for a property settlement (which required that the wife transfer her interest in the former matrimonial home to the husband) and lump sum spousal maintenance. The parties had separated under the one roof 45 days after their marriage. The husband's assets were worth in excess of $310,000. Without a spousal maintenance claim the wife would have not had a successful financial claim against the husband. The trial judge ascertained the wife's weekly expenses and then worked out the amount required to pay this weekly sum for six years, ie until the wife turned 60. A rate of 3% (*Todorovic* v *Waller* (1982) 2 ANZ Ins Cas ¶60-545; (1981) 150 CLR 402) was used.

***Bolton & Bolton* (1992) FLC ¶92-309**

The wife had a limited life expectancy. Cohen J considered that, although the wife had never claimed spousal maintenance, the husband would endeavour to avoid any obligation to pay periodic maintenance.

An appropriate sum was $50 per week, amounting to about $5,000 over the two years the wife was likely to survive. A lump sum order was appropriate. The money was currently available and the wife's need to be finished with litigation arising out of the marriage was a powerful consideration.

***Brown & Brown* (2007) FLC ¶93-316**

The husband appealed against an order that he pay the wife $3.75m as lump sum spousal maintenance. They had divorced almost 10 years previously. The wife sought and obtained leave to institute spousal maintenance proceedings out of time. At trial, the

husband's case was that if an order for spousal maintenance was made, it should be for periodic payments of $1,000 per week.

The trial judge considered it proper to make a lump sum order for reasons which included the husband's absence overseas for four years, his refusal to comply with orders and his disposal of his only known assets in Australia after the proceedings commenced.

The Full Court was unable to ascertain how the trial judge had calculated the lump sum. It considered a period of 25 years an appropriate term. On the 3% tables, 25 years at $2,200 per week was $2,028,840. The Full Court ordered that the wife receive a lump sum of $2.25m.

***Hand & Bodilly* [2013] FamCAFC 98**

The Full Court upheld the trial judge's decision that the husband pay periodic spousal maintenance of $3,323 per week backdated for nine months, lump sum maintenance of $120,000 and the wife's costs of $331,188.25.

The wife had multiple sclerosis at the time of the parties' marriage. In 2000 the husband had agreed to pay $500 per week not indexed. At that time the wife was working part-time. Since March 2007 her medical condition had progressively deteriorated.

The lump sum for maintenance primarily related to renovation costs to the house as the wife was wheelchair-bound. The husband had an annual salary package of $1.7m and was wealthy.

The costs order (which was not quite indemnity costs) was justified on the basis of the conduct of the husband including giving misleading evidence, his failure to make concessions early in the proceedings, his failure to properly disclose his financial position and his vastly superior financial circumstances.

***Milankov & Milankov* (2002) FLC ¶93-095**

The husband appealed against the making of a retrospective order which had the effect of requiring the husband to pay a lump sum of $31,100 to the wife. This was for periodic maintenance over a period of almost three years. The trial judge specifically rejected the wife's claim for lump sum spousal maintenance. The husband argued that an order with retrospective effect could not be made, unless it could be established that the liable spouse was presently reasonably able to pay the arrears.

On appeal, Kay J rejected this argument. The trial judge found that at the time the maintenance obligation arose, namely upon the breakdown of the marriage, the husband had the capacity to pay and the wife had the need. In those circumstances, the fact that the husband chose not to pay but to spend his money elsewhere did not, in her Honour's view, relieve him from the potential of an order being made at a later time, even though at that later time he may no longer have the means and ability to meet the order. Justice Kay saw no error in the trial judge's approach.

***Rankin & Rankin* (2017) FLC 93-766**

The husband's appeal against an order for capitalised spousal maintenance of $65,000 was successful. The trial judge failed to take into account the husband's increased child support obligation, the expenses associated with the children's school and the husband's debts including the debt owed to his lawyers.

Footnotes

Footnotes

38 *Fickling & Fickling* (1996) FLC ¶92-664; *Clauson & Clauson* (1995) FLC ¶92-595.

39 *Clauson & Clauson* (1995) FLC ¶92-595 at p 81,908.

¶14-120 Sections 77A or s 90SH

Sections 77A and 90SH of the *Family Law Act 1975* (Cth) (FLA) apply to court ordered property settlements with a maintenance component. Similar provisions are:

- s 66R (formerly s 66L), which applies to child maintenance
- s 87A, which applies to s 87 agreements
- s 90E, which applies to financial agreements, and
- s 90UI which applies to Pt VIIIAB financial agreements.

Section 77A provides:

> "(1) Where:
>
> (a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a marriage, is made by consent or varies an earlier order), and the order has the effect of requiring:
>
> (i) payment of a lump sum, whether in one amount or by instalments; or
>
> (ii) the transfer or settlement of property; and
>
> (b) the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the

maintenance of a party to a marriage;

the court shall:

(c) express the order to be an order to which this section applies; and

(d) specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.

(2) Where:

(a) a court makes an order of a kind referred to in paragraph (1)(a); and

(b) the order:

(i) is not expressed to be an order to which this section applies; or

(ii) is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant marriage."

The requirements of s 77A and 90SH are:

- there must be a court order
- the order has the effect of requiring the payment of a lump sum or lump sums, or the transfer or settlement of property
- the purpose or one of the purposes of the payment, transfer or settlement is to make provision for the maintenance of a party to the marriage, and
- if the order satisfies the above three criteria:

– it must be expressed as one to which s 77A or s 90SH applies

– it must specify the portion of the payment, or the value of the portion of property, which is maintenance.

If the order is of the type which requires specification of the portion of the payment, that is the value of the portion of property which is maintenance, but does not do so, it “shall be taken” not to be a maintenance provision. The precise effect of this part of the section remains unclear.[40]

Section 77A has been held to be ambiguous and obscure.[41]

Footnotes

40 *Caska* v *Caska* (1998) FLC ¶92-826; [1998] FamCA 118; *Gatsby & Gatsby (No 2)* [2012] FamCA 667..

41 Gee J in *Penza & Penza* (1988) FLC ¶91-949; *Dein & Dein* (1989) FLC ¶92-014.

SECTION 75(2) OR 90SF(3) FACTORS

¶14-130 Introduction

There is a considerable degree of overlap in the s 75(2) and 90SF(3) factors in the *Family Law Act 1975* (Cth). It is important not to double-count by, say, adding 5% for age and state of health under s 75(2)(a) or s 90SF(3)(a) and a further 5% for the impact those factors have on earning capacity under s 75(2)(b) or s 90SF(3)(b). This type of mathematical approach to s 75(2) has, in any event, been expressly rejected by the Full Court of the Family Court in *Tomasetti & Tomasetti* (2000) FLC ¶93-023 (at p 87,391).

¶14-140 Age and state of health — s 75(2)(a) and 90SF(3)(a)

Introduction

Sections 75(2)(a) and 90SF(3)(a) of the *Family Law Act 1975* (Cth) (FLA) require the court to consider "the age and state of health of each of the parties". There is overlap with s 75(2)(b) and 90SF(3)(b) which includes "the physical and mental capacity of each of them for appropriate gainful employment". Sections 75(2)(b) and 90SF(3)(b) are discussed at ¶14-150.

Age

Age is referred to in s 75(2)(a) and 90SF(3)(a). It is usually related to income and/or earning capacity under s 75(2)(b) or s 90SF(3)(b).

If the parties are of similar ages, the factor is often of little or no relevance.[42]

Example

***Zubcic & Zubcic* (1995) FLC ¶92-609**

The husband was aged 60, about 17 years older than the wife. He had been seriously disabled in an industrial accident. The trial judge found that s 75(2)(a) favoured the

husband in a substantial way.

Generally, age is a significant factor for a female applicant in her 50s or 60s with limited or no work skills, who was primarily a homemaker and parent during the marriage.

Examples

***Richardson & Richardson* (1979) FLC ¶90-603**

At the time of the hearing, the husband was 62 and the wife 39. The husband's age made his high present income a factor of less importance as he was quite near retirement. His superannuation and retirement entitlements were, however, of much greater significance, as he was close to receiving them. The trial judge ordered periodic and lump sum maintenance in favour of the wife.

***Atwill & Atwill* (1981) FLC ¶91-107**

The wife sought leave to institute proceedings for periodic and lump sum spousal maintenance pursuant to s 44(3). Nygh J considered whether the wife was able to satisfy the threshold requirements of s 72 (now s 72(1)). The husband conceded his ability to pay. The wife was 57 years old and worked part-time as a shop assistant three days per week.

There was no direct evidence of other attempts to obtain employment or her qualifications. There was evidence as to her age, but no evidence as to her state of health or her physical capacity to undertake employment. Nygh J considered there ought to have been additional evidence about lack of training for employment, reduced health and other factors. However, he took judicial notice that age 60 was, at that time, the normal age of retirement for women and that it may be difficult for women approaching that age to retain or obtain full-time employment.

Health

The distinction between "physical and mental capacity" in s 75(2)(b) or s 90SF(3)(b) and "health" in s 75(2)(a) or s 90SF(3)(a) is unclear. There is obviously a considerable degree of overlap. Sections 75(2)(b) and 90SF(3)(b), on their face, could easily encompass health and perhaps all of s 75(2)(a) and 90SF(3)(a).

Health problems also relate to s 75(2)(d) and 90SF(3)(d). The costs of reasonable medical treatment (after rebates from Medicare and/or private health insurance) are necessary commitments within s 75(2)(d) and 90SF(3)(d). Health insurance premiums may also be a necessary commitment.

Example

***Tye & Tye (No 2)* (1976) FLC ¶90-048**

The 23-year-old wife was so shocked by the sudden end to the marriage that it exacerbated a pre-existing illness, making her unable to work and nearly causing a breakdown. The trial judge ordered periodic maintenance to cover the period for which she expected to be unable to work with a further period to obtain employment. He also ordered a lump sum which the Full Court accepted was justified on any of a number of grounds including to replenish capital the wife had spent on medical expenses.

A partial earning capacity does not disqualify the applicant.[43]

Example

***Hunt & Hunt* (2001) FLC ¶93-064**

The wife claimed that the pain, stiffness and swelling of various parts of her body prevented her from seeking employment. In support of her application for spousal maintenance, the wife relied on a medical report on affidavit from her general practitioner.

The husband requested that the wife attend a specified rheumatologist, but the wife declined to do so. The husband was successful in obtaining an order that she do so.

Life Expectancy

Useful cases to refer to in relation to life expectancy include *Lawrie & Lawrie* (1981) FLC ¶91-102, *T & D* [2006] FamCA 1248, *Miklic & Miklic* [2010] FamCA 741 and *Justina & Justina* [2014] FamCA 284.

Example

***Fontana & Fontana* (2016) FLC ¶93-688**

The husband, aged 44, had serious health problems — particularly renal failure and diabetes. He had income protection insurance, which was paying him $150,000 pa. The wife was aged 43 and had an annual net income in excess of $200,000.

The trial judge divided the non-superannuation assets on the basis of contributions as to 52.5%/48.5% in favour of the wife and gave a further 4.5% to the wife for s 75(2) factors. He said the wife was entitled to 55% of the superannuation on the basis of contributions, and gave no s 75(2) adjustment on the superannuation. The 4.5% s 75(2) adjustment was $77,700 and created a difference in the value of the assets received by the parties of $155,400. The husband challenged this.

The Full Court allowed the appeal because the trial judge was in error in making a finding that the husband's needs were likely to subsist for a shorter time than the wife's

needs in circumstances where he had explicitly found that he could make no conclusive finding in relation to the husband's life expectancy.

Footnotes

42 *Kessey & Kessey* (1994) FLC ¶92-495; *Gyopar & Gyopar* (1986) FLC ¶91-769.

43 *Kajewski & Kajewski* (1978) FLC ¶90-472.

¶14-150 Income, property and financial resources, and physical and mental capacity for appropriate gainful employment — s 75(2)(b) and 90SF(3)(b)

Sections 75(2)(b) and 90SF(3)(b) of the *Family Law Act 1975* (Cth) require the court to take into account "the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment".

Sections 75(2)(b) and 90SF(3)(b) are also closely linked with s 75(2)(a) and 90SF(3)(a) (age and state of health) and the terms of any s 79 and 90SM orders. Sections 75(2)(a) and 90SF(3)(a) are discussed at ¶14-140, s 75(2)(n) and 90SF(3)(n) are discussed at ¶14-310.

¶14-160 Income

Income is relevant to a maintenance application in two ways — first, in establishing the capacity of each of the parties to support themselves under s 72(1) or s 90SF(1) of the *Family Law Act 1975* (Cth) (FLA), and then under s 75(2)(b) or s 90SF(2)(b) in considering the quantum of the order. Section 75(2)(b) or s 90SF(2)(b) also refers to "property", "financial resources" and "the physical and mental capacity of each of them for appropriate gainful employment".

The term "income" is actual income presently received. There may be

substantial evidentiary problems in ascertaining or proving “actual” or “real” income, particularly if the respondent is self-employed.

Sections 72(1) and 90SF(1) direct that a party is entitled to maintenance if and only if they are unable to support themselves adequately. The standard of living that is appropriate under s 75(2)(g) or s 90SF(3)(g) is also relevant.

The respondent’s income is relevant first under s 72(1) or s 90SF(1) to establish that they have the capacity to pay maintenance. It is then relevant under s 75(2)(b) or s 90SF(3)(b) in assessing the quantum of maintenance. However, the respondent’s income may not accurately reflect the respondent’s financial resources or capacity for gainful employment.

Ideally, maintenance is met from income rather than property and financial resources. It can be difficult to base maintenance on earning capacity rather than actual income. Despite the preference for maintenance to be based on income, orders can be made which require a respondent to use property or financial resources to pay maintenance.[44] The courts have been more prepared to do this in relation to child support than in relation to maintenance.[45]

Example

***Lawler & Oliver (No. 2)* [2016] FamCA 517**

The husband had lost part of his income as a result of his term ending as an elected official. However, he agreed that he was able to apply a greater amount of time to his business. It was therefore a reasonable expectation that the husband’s income would increase. His ability to pay was justified on the basis of his past income and the expectation that he was able to increase his income from his business.

Property

Property, along with the incomes, financial resources and the earning capacity of the party must be considered under s 75(2)(b) or s 90SF(3)(b) of the FLA.

The term “property” has been given a wide meaning. It is defined in s 4(1) of the FLA as:

> “(a) 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; or
>
> (b) in relation to the parties to a de facto relationship 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.”

This meaning is extended in certain circumstances to include:

- vested bankruptcy property of a bankrupt party (s 72(2), 79(1) or s 90SM(1)), and
- debts (s 90AD(1)).

Questions to be asked about each party’s property include:

- If the property is accommodation, is it necessary for the party’s reasonable needs?
- Is the property capable of realisation?
- Is the property income-producing or can it be rendered income-producing by reinvestment?
- If it is not income-producing, is it reasonable that it be retained or should it be sold and the proceeds invested elsewhere? Examples might include a luxury motor vehicle or substantial boat. If items of such a nature are owned by the respondent they may suggest an appropriate standard of living for the applicant.
- Is it reasonable for part of the property of one of the parties to be used as a capital fund for the applicant’s support? That is, should the applicant use their property to meet their maintenance needs or should the respondent provide a lump sum to meet the applicant’s maintenance needs?

An applicant is not required to use up all of their property to support themselves.[46]

However, it is not correct that the capital of an applicant for spousal maintenance must always be “entirely disregarded”. The Full Court in *Fewster & Drake* (2016) FLC ¶93-745 said (at [106]):

> “Rather, the point is that the possible need to retain the capital and not use it for day to day support is a relevant consideration to take into account”.

A spouse beneficiary’s right to due administration of a discretionary trust and to due consideration as a beneficiary is property and can be valued.[47]

Footnotes

44 *Plut & Plut* (1987) FLC ¶91-834.

45 *DJM* v *JLM* (1998) FLC ¶92-816.

46 *Bevan & Bevan* (1995) FLC ¶92-600; *Mitchell & Mitchell* (1995) FLC ¶92-601.

47 *Kennon* v *Spry* (2008) FLC ¶93-388.

¶14-170 Financial resources

The ”financial resources“ of each of the parties is required to be considered under s 75(2)(b) or s 90SF(3)(b) of the *Family Law Act 1975* (Cth) (FLA), along with the parties’ incomes, property and earning capacity.

The term “financial resources” is not defined in the FLA. As superannuation was formerly considered a financial resource, but is now “treated as property” (s 90MC), the phrase now has only a limited

meaning, covering, for example:

- expectations of an inheritance in limited circumstances,[48] and
- an interest in a trust over which the party does not exercise control.[49]

The High Court considered the meaning of “financial resource” in *Hall & Hall* (2016) FLC ¶93-709. The wife appealed against a finding that she could obtain a voluntary payment by asking for it. The wife’s father had died four years prior. His will contained a “wish” that the wife receive annual payments of $150,000 from a group of companies controlled by her brothers. The evidence was that she was unaware of the contents of the will until this clause was revealed in the family law proceedings and she had never asked for the voluntary payment or been offered it.

The majority of the High Court upheld the finding that the wife’s ability to obtain the voluntary payment was a financial resource. It said (at [55]–[56]):

> “Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.
>
> Here, on the Full Court’s finding of fact, the annual payment from the Group was a financial resource of the wife so as to be a matter within s 75(2)(b). The payment was available to her if she asked for it. The availability of the payment was the subject of specific provision in the father’s will. The making of the payment was at least a moral obligation of the wife’s brothers, who were in any case well-disposed towards her”.

Gordon J, dissenting, held that the inference that she would have received the payment if she asked for it was not open on the evidence.

Gordon J said (at [91]):

> "Consistent with authority, the 'financial resources of each of the parties' … are not confined to the present legal entitlements of the parties and extend to include 'a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency'. However, it cannot be said that the father's wish (for an annual payment to the wife, which had not been effected by the brother or the V Group in the more than four years since the father's death) was a source of financial support which, if the wife requested, the wife could reasonably expect would be available to her to supply a financial need".

He considered that the wife not only had no right to a payment, but the wife asking for a payment was not more "pressing and persuasive" than her late father's formally worded wish. The brothers were unwilling to even provide the will to the wife, so there was no basis to infer that the wife's request would tip the balance.

Examples

***Campbell & Campbell* (1988) FLC ¶91-960**

The wife had a significant additional financial resource in the form of her reasonable expectation of future financial assistance and, ultimately, a substantial inheritance from her parents. The husband had a very much smaller expectation from the estate of his mother. Until his mother's death, there was an expectation that he would be required to assist her financially.

***Tomasetti & Tomasetti* (2000) FLC ¶93-023**

The Full Court considered that it was open to the trial judge to find that the husband's income indemnity insurance provided security for the husband if he became ill before he was eligible for his superannuation.

***Kaiser & Kaiser* [2016] FCCA 1903**

The husband received an annual gift of $50,000 from his mother. There was written evidence of the nature of the payment. The husband's evidence was that he expected to continue to receive the gifts. He also conceded that his mother had paid about $133,000 to his lawyers for his legal fees. Small J was not prepared to find that the gifts were a financial resource of the husband.

Prospects of remarriage

For a court considering periodic maintenance, the prospect of remarriage is not a significant factor because the FLA makes provision

for the maintenance order of a party to cease upon remarriage unless the court otherwise orders (s 82(4) or s 90SJ(2)) in special circumstances. The prospect of remarriage as a financial resource, however, may be important when considering lump sum maintenance.

Examples

***Steinmetz & Steinmetz* (1980) FLC ¶90-801 and *Steinmetz and Steinmetz (No 2)* (1981) FLC ¶91-079**

The husband declined to give the wife a Jewish get. Without a get the wife was not free to marry within the orthodox Jewish faith. The court held that the wife's capacity to remarry was affected and so, therefore, was her ability to obtain other support. The refusal amounted to a limitation of the wife's financial resources, justifying a larger amount of lump sum maintenance.

***James & James* (1984) FLC ¶91-537**

The wife was likely to remarry in the future. Since separation, she had had several relationships of varying duration. She had made a booking to hold a wedding reception in April of the following year in anticipation of her marriage. She claimed that the intended marriage would not proceed as she wanted more time to think things over and consider the desirability of marriage. She admitted that she had not cancelled the wedding reception booking.

Her evidence about her intentions to marry was held to be quite unsatisfactory. If the court considered that somebody else was likely to provide for her in the future, a lump sum order was not fair to her former husband. Periodic maintenance up to her remarriage might have been appropriate but was not sought.

Property of a third party

There are circumstances in which the property of a third party can be considered a financial resource of a party to the marriage, and the extent to which that party can control the property in question is relevant.[50] It is not necessary that there be full legal control before a third party's property can be taken into account.[51]

The assets of a family company and trust were held to be a financial resource of the husband in *Kelly & Kelly (No 2)*. There was an express finding of fact that the husband had de facto control over the assets and income of the company and trust. Those assets represented a reserve, which the husband could draw upon. In *Yates & Yates (No 1)*[52] the husband was found not to have control over the assets and income of the companies. The children held the shares, which had

most rights to income and capital. The husband could not infringe those rights. The Full Court in *Yates & Yates (No 2)*[53] upheld the distinction between the two cases.

Whether the property of a third party (such as a family company or trust) will be regarded as a "financial resource" of a party depends on control. It will largely depend on whether the party has ultimate control over the disposition of the assets concerned and/or the income from the assets.[54]

Footnotes

48 *White and Tulloch* v *White* (1995) FLC ¶92-640; *Campbell & Campbell* (1988) FLC ¶91-960.

49 *Kelly & Kelly (No 2)* (1981) FLC ¶91-108; Fogarty J in *Crapp & Crapp* (1979) FLC ¶90-615; *Mee & Ferguson* (1986) FLC ¶91-716. See also *Kennon* v *Spry* (2008) FLC ¶93-388.

50 *Kelly & Kelly (No 2)* (1981) FLC ¶91-108 at p 76,803.

51 Ibid.

52 *Yates & Yates (No 1)* (1982) FLC ¶91-227.

53 *Yates & Yates (No 2)* (1982) FLC ¶91-228.

54 *Re Dovey*; *Ex parte Ross* (1979) FLC ¶90-616.

¶14-180 Physical and mental capacity … for appropriate gainful employment

Sections 75(2)(b) and 90SF(3)(b) of the *Family Law Act 1975* (Cth)

(FLA) require the court to consider in relation to each of the parties their "physical and mental capacity … for appropriate gainful employment". The court must also consider their incomes, property and financial resources.

Physical health is usually relatively easy to assess. The methods of assessing a party's mental health are less objective. The methods of assessing the effect of mental health on work performance and ability to obtain and keep a job are also less objective.

There is overlap between this part of s 75(2)(b) or s 90SF(3)(b) and "physical and mental health" in s 75(2)(a) or s 90SF(3)(a). Section 75(2)(b) or s 90SF(3)(b), however, requires the court to consider "appropriate gainful employment" given the party's physical and mental capacity. Physical and mental health in s 75(2)(a) or s 90SF(3)(a) is discussed at ¶14-140.

Physical and mental capacity of the applicant for employment

The court is required to take into account the capacity of the applicant for employment whether or not it is being exercised.

Examples

***Dench & Dench* (1978) FLC ¶90-469**

The applicant wished to further her education but had a health condition, which had some limiting effect upon her earning capacity. She had, however, been in steady employment for a number of years. Her application for maintenance was refused as she had a capacity for employment.

***Tye & Tye (No 2)* (1976) FLC ¶90-048**

The 23-year-old wife fell ill from the shock of the break-up of a three-year marriage. She had other physical problems, which combined to bring her close to a complete nervous breakdown. She was off work for two months. A loading was included in the lump sum maintenance order to cover the possibility that the incapacity could last longer than anticipated. She was also entitled to recover the capital used up during the illness.

The following generalisations can be made:

- a young applicant without children is expected to seek paid employment[55]

- it is reasonable for an applicant, particularly one who either lacks skills or has been out of the workforce for a while, to defer paid employment for a defined period of time while undertaking training,[56] and

- a parent with pre-school age or young school-age children is not expected generally to seek full-time paid employment and may not be expected to seek any paid employment, particularly if they lack skills and experience for employment sufficient to be worthwhile given child care costs will be incurred.[57]

The effect of the care of a child of the marriage is discussed in more detail in relation to s 75(2)(c) or s 90SF(3)(c) at ¶14-200.

Examples

***Finnis v Finnis* (1978) FLC ¶90-437**

The applicant was in actual employment as a tutor in the area of tertiary education, but due to her quite extraordinarily bad medical history, the trial judge found that the probabilities were that she would be unable to engage in any gainful occupation after her tutorship expired at the end of the year. Her health problems during the marriage included poliomyelitis, encephalitis, recurrent cysts resulting in two surgical interventions, epilepsy, and recurrent peripheral neuritis.

***Stacy & Stacy* (1977) FLC ¶90-324**

The wife sought a finding that she had only a partial earning capacity. She was in full-time employment but wanted to be confident that she would be eligible for maintenance if she reduced her working hours. The court held that she could only seek that finding once she ceased full-time employment.

Footnotes

55 *Lyall & Lyall* (1977) FLC ¶90-223; *Taguchi & Taguchi* (1987) FLC ¶91-836.

56 *Family Law Act 1975* s 75(2)(h); see ¶14-250.

57 *Family Law Act 1975* s 75(2)(l); *Rouse & Rouse* (1981) FLC ¶91-073.

¶14-190 Physical and mental capacity of the respondent for employment

The respondent's physical and mental health is relevant if it relates to capacity for employment.

A deliberate decision by the respondent not to exercise earning capacity is particularly relevant if it was done to impact upon the applicant's claim for maintenance. Proving this motive may be difficult. In practical terms, making an order for maintenance based upon the respondent's earning capacity rather than actual earnings may cause problems. The enforcement of the order may be very difficult unless the respondent has property against which the order can be enforced.

A respondent may try to avoid a maintenance obligation by reducing their income without sufficient cause. The reasons for the change in income must be examined, and whether any training or skills could be used to increase the respondent's income.

Examples

***DJM v JLM* (1998) FLC ¶92-816**

The husband voluntarily reduced his income. He was assessed on his earning capacity for child support, but on his actual income for spousal maintenance. His reasons for reducing his income were judged more harshly in the child support application than in the spousal maintenance application.

***Scott & Scott* (1994) FLC ¶92-457**

The husband had been unemployed for about three years. He had no assets, income nor financial resources, and was fully dependent upon his de facto wife for support. He worked about seven hours a day as a writer but earned no income and nothing had been published. The husband appealed against a Magistrate's order to increase the child maintenance from $30 to $100 per week. He sought that the order be discharged. The phrase "earning capacity" in s 66E(1) was at issue. The Full Court found that there was no evidence that the husband gave up employment to become a writer. He became unemployed and then became a writer. The appeal was successful and the matter was remitted for re-trial.

***Stojanovic & Stojanovic* (1990) FLC ¶92-134**

The husband had not worked for four years. He had been a bricklayer until he ceased work due to back problems. In the meantime he had spent two years as a full-time

student and gained a higher school certificate. He was enrolled in a course to become an architectural draughtsman and expected to start earning an income in three years. Kay J found that he had an earning capacity of at least average weekly earnings in a clerical capacity, and so he was assessed to pay child maintenance on that capacity.

***Patterson & Patterson* (1979) FLC ¶90-705**

The applicant was employed part-time as a teacher working in the same school as her husband. The husband began to reside with another woman. The court held that the wife was entitled to regard that work as not being appropriate gainful employment. The court held she was entitled to say that the work at that school, although gainful employment, was not appropriate employment.

The court made an order for the maintenance of the wife for a relatively short period of three months. This period was considered sufficient for her to find alternative employment. She was not, however, entitled to refuse the husband's offer to assist her to find alternative employment.

***Taguchi & Taguchi* (1987) FLC ¶91-836**

The Full Court upheld the dismissal of the wife's claim for maintenance on the basis that she was not prepared to sacrifice her employment as a professional artist. She admitted in evidence that there were jobs advertised in the newspaper which she was qualified to perform. The Full Court agreed with the trial judge that many people pursue artistic bents at great economic sacrifice to themselves, and sometimes to others as well. However, the wife was not able to pursue her undoubted artistic interests at the expense of her husband.

***Shaw & Shaw* (1989) FLC ¶92-030**

The trial judge appeared to base his decision on evidence that the wife could have obtained employment in the United States at a salary of $35,000 pa. The Full Court rejected this approach. On the evidence, the wife had never been employed at a salary anything like $35,000 pa. The highest income she had earned since the marriage was about $24,000 pa. It was unrealistic to expect the wife to go overseas to obtain employment. She had no current employment and no immediate prospects. Her earning capacity was fixed at $25,000 pa.

The wife's property entitlements were increased on the basis of s 75(2) factors from 35%–40% to 60%.

***Horsley & Horsley* (1991) FLC ¶92-205**

The husband was a medical practitioner. His earning capacity was over $225,000 pa. The Full Court considered the wife's earning capacity as a nurse was inhibited by the requirement to care for the children who, even if they both attended boarding school, were at home for 17 weeks of the year and required the wife's attention at weekends.

***Zubcic & Zubcic* (1995) FLC ¶92-609**

The husband enjoyed a considerable capital superiority over the wife but had no relevant capacity for gainful employment. The wife had been out of the workforce for over 20 years. She had no marketable skills and her grasp of English was less than adequate. She was motivated to work, and endeavoured to do so during the marriage, only to have her plans vetoed by a somewhat domineering husband. The trial judge found that the wife had a capacity to undertake unskilled employment, but her prospects of obtaining employment were extremely limited.

***N v N* (1997) FLC ¶92-782**

An order for periodic spousal maintenance was made in favour of the wife who did not have the physical and mental capacity for employment. She was aged 44, had no work skills (except as a prostitute, and 15 years as a hairdresser) and had difficulty speaking and reading English. She would be competing against other unskilled people for jobs, who would have a language advantage. Mullane J was not prepared to find that the wife had an earning capacity as a sex worker, given the financial circumstances of the parties, particularly the husband's income, and that it was contrary to the values of most Australians and the Australian community.

***Gamage & Gamage* [2017] FamCA 742**

The three children aged 13, 10 and 7 were in the primary care of the wife. The husband had them one night each week on alternating Fridays and Saturdays. The husband argued that the wife had not satisfied the gateway requirement set out in s 72(1) because, having regard to her qualifications and prior work experience, the court could not be satisfied that she was sufficiently exploring her earning capacity. He argued that the fact that on the days she worked her hours were longer than school hours, indicated that she was working part time for reasons other than a desire to have more time available to care for the children. Justice McClelland disagreed, saying (at [63]):

> "It is quite reasonable for a working mother to work less than a full working week as a result of child caring responsibilities, even though on some of the days worked the wife's hours of work extend beyond school hours. In that respect, it is one thing to make before and after school arrangements for the children on a few days of the week as opposed to making those arrangements every day of the working week".

Comparison of the financial positions of the parties

Having ascertained the financial position of each of the parties, the court will usually make some comparison between them. This can be a complex task. The question of comparison only arises if the applicant's reasonable needs exceed their available income, and the respondent's available income exceeds their reasonable needs.

Examples

***Napthali & Napthali* (1989) FLC ¶92-021**

The Full Court considered inter alia an appeal against the dismissal of a claim for spousal maintenance. The wife was aged 35 and the husband 37. The two children, aged 13 and 10, lived with the wife. The wife had not finished the second year of secondary school. She was found to be a very simple person who was barely literate. Until the birth of the first child she worked in a factory. She received a small income from cleaning. She had not taken steps to find additional work as she could only do factory work and felt the children needed her at home. There was a significant disparity in the earning capacity of the parties. The husband half-owned a successful company. The Full Court found that the trial judge's discretion miscarried, and ordered $150 per

week and the mortgage payments by way of urgent maintenance under s 77 until the matter could be reheard.

***Borriello v Borriello* (1989) FLC ¶92-049**

The Full Court considered an appeal against an order that 70% of the former matrimonial home be transferred to the wife by way of settlement of property, and 30% by way of lump sum spousal maintenance. The husband was aged 54. The Full Court upheld the order, finding that the trial judge found considerable disparity in the parties' earning capacity. The wife was approaching 61, was in indifferent health, was not likely to have an earning capacity in the future and was in receipt of an age pension. The husband was comparatively young and employed as a coal miner. The husband claimed that he had a net income of $350 per week, but his Honour found that his earning capacity was at least $100 per week greater than his disclosed income.

***Best & Best* (1993) FLC ¶92-418**

The wife did not seriously pursue her application for lump sum spousal maintenance. The Full Court, however, said that in cases where there were minimal assets, but on the one side significant needs and on the other a significant future earning capacity, the power to order lump sum maintenance, which may be met by annual payments over a period of years against that income or savings from it, may be an appropriate course. It may be a mistake to conclude that where there are few assets they should be divided and that that is the end of the matter other than for periodic maintenance.

The "clean break" concept may have been taken to extremes in the past and required careful reconsideration in the light of changing economic and social circumstances and values. The court referred to *Moge's* case ((1992) 43 RFL (3d.) 345).

***Rosati v Rosati* (1998) FLC ¶92-804**

The wife, although a qualified solicitor with valuable experience, was unemployed, and in receipt of money paid by the husband and/or the business entities pursuant to orders of the court and a disability pension relating to the child. It was appropriate for her to devote her full-time care to the children, at least for the next two years; but thereafter she should obtain part-time employment.

The husband had an ongoing business and a tax-effective structure through which to operate it. His health difficulties did not prevent him from continuing it. The husband gave evidence that he wished to sell the business and become employed at a much lower income; but the trial judge did not accept that his health problems necessitated that course.

The Full Court confirmed the above findings and gave the wife an equal division of the net assets totalling $1.5m and $500 per week spousal maintenance for 32 months backdated to the trial judge's decision.

¶14-200 Care or control of a child of the marriage or de facto relationship and under 18 years — s 75(2)(c) or s 90SF(3)(c)

The issue of the care of a child arises twice in a maintenance application. First, it arises under s 72(1) or s 90SF(1) of the *Family Law Act 1975* (Cth) (FLA). It may explain why the applicant is unable to support himself or herself adequately. This is discussed at ¶14-010–¶14-040. The issue arises again under s 75(2)(c) or s 90SF(3)(c) as a factor which can affect the quantum of maintenance.

Section 75(2)(c) of the FLA requires the court to take into account "whether either party has the care or control of a child of the marriage who has not attained the age of 18 years". Section 90SF(3)(c) is similarly worded in relation to de facto relationships.

There is also some overlap with s 75(2)(e) and 90SF(3)(e), being the responsibilities of either party to support any other person. It could be argued that care or control of a child of the marriage or de facto relationship is a factor of more weight than having care or control of other children or any other person. An absolute conclusion as to the weight to be given to each section cannot, however, be drawn from the FLA.

Examples

***Lusby & Lusby* (1977) FLC ¶90-311**

The Full Court upheld an appeal by the wife against the discharge of a spousal maintenance order. It was reasonable for the wife to work three night shifts per week rather than five night shifts per week. Her earning capacity was limited by her responsibilities to care for the 16-year-old child of the marriage. She did not want to leave the child at home alone at night more than was strictly necessary. The Full Court did, however, reduce the amount of the maintenance order.

***Richardson & Richardson* (1979) FLC ¶90-603**

The court considered that the child, being aged four, together with the wife's limited skills, made more work unlikely and not necessarily appropriate, even if it was available.

***Kauiers & Kauiers* (1986) FLC ¶91-708**

The Full Court upheld the trial judge's finding that the wife's incapacity to support herself was only temporary. One of the grounds the wife relied on was that she was sometimes required, due to the handicap of one of the children of the marriage, to attend school to clean him after he had soiled his clothing. The Full Court said that the trial judge had erred in not putting a time limit on the maintenance, so that the onus was on the wife to either find employment or apply for an extension. The Full Court ordered that maintenance cease after six months.

***Horsley & Horsley* (1991) FLC ¶92-205**

One child was already at boarding school and it was proposed that the second child start there in a year. Despite this, the Full Court found that the wife's earning capacity as a nurse was further inhibited by the requirement to care for the children who, even though they both attended boarding school, were home for 17 weeks of the year and required the wife's attention at weekends.

¶14-210 Necessary commitments — s 75(2)(d) or s 90SF(3)(d)

Meaning of necessary commitments

Sections 75(2)(d) and 90SF(3)(d) of the *Family Law Act 1975* (Cth) (FLA) direct the court's attention to:

> "commitments of each of the parties that are necessary to enable the party to support:
>
> (i) himself or herself; and
>
> (ii) a child or another person that the party has a duty to maintain …".

The term "duty to maintain" refers to a legal duty. It must be imposed rather than voluntarily assumed. The most common examples of people whom a party can have a duty to support are legally married parties and children.

A legal duty to support one's own biological and adopted children including children conceived as a result of artificial conception procedures is confirmed by the *Child Support (Assessment) Act 1989*. It is both a duty under s 75(2)(d) or s 90SF(3)(d) and a responsibility under s 75(2)(e) or s 90SF(3)(e) of the FLA.

The court will need to be persuaded that the person whom the party says they have a duty to maintain lacks the capacity to support themselves. The meaning of the term "duty to maintain" is discussed further at ¶14-220 in the context of "responsibilities" to support others under s 75(2)(e) or s 90SF(3)(e).

The potentially narrow meaning of "commitments … necessary" must be read subject to s 75(2)(g) or s 90SF(3)(g). The standard of living

prescribed by s 75(2)(g) is a standard of living that is in all the circumstances reasonable. Sections 75(2)(g) and 90SF(3)(g) are discussed in more detail at ¶14-240.

Assessing the necessary commitments of a party is a two-stage process:

1. Having regard to a standard of living that is reasonable, is the item of expenditure a necessary commitment?

2. What amount is necessary to meet that particular commitment?

For example, a party can claim clothing and food as “necessary commitments” regardless of the standard of living. The level of expenditure which is reasonable will depend upon the standard of living that is reasonable. Entertainment may not be considered to be a necessary commitment. A claim by a party to cover the expenses of attending the opera and ballet, movies and dining out, could be rejected whatever the previous standard of living of the parties. However, it has been widely accepted that some entertainment expenditure is a necessary commitment for both parties.[58] The Full Court has accepted holidays and even cigarettes as necessary commitments for the applicant.[59] By contrast, gifts, donations and gardening were rejected.[60] There is no absolute rule. It depends upon what is reasonable for the particular family concerned.

The respondent’s commitments may differ from those of the applicant because of the respondent’s employment. There may be expenses referable to earning their income, such as travel expenses and clothing. A respondent in full-time employment needs some recreation or other benefits to maintain lifestyle and morale.[61] Over time, the commitments which society generally considers necessary will change. For example, a television was not considered necessary 40 years ago but now it is a standard item. Mobile telephones are usually considered necessary although at one time they were probably only necessary in particular circumstances (eg tradespeople or those with an aged parent).

A major difficulty is that expenses are generally household expenses.

It can be difficult or impossible to divide expenses such as food and electricity between members of a household.

In *Strahan & Strahan* [2013] FamCAFC 203, the Full Court upheld the distinction in *Mee & Ferguson* between expenses and needs, saying [at 104]:

> "It is in that context (as well as the broader context of an interim application pending trial) that her Honour made findings in respect of the reasonable needs of the wife. It is common ground on this appeal that no distinction had been made by the applicant (or indeed the respondent) between what was said to be 'expenses' and what was said to be 'needs'. It is the latter to which the relevant sections (ss 72–77 and 80) of the Act are directed. The two concepts, and the amounts referable to them, can be different and almost always are (see, for example, *Mee & Ferguson* [1986] FamCA 3; (1986) FLC ¶91-716)".

Can replenishing capital be a necessary commitment?

The replenishing of depleted capital can be used to support the quantum of an order under s 72(1) or s 90SF(1).[62]

Example

***Vautin v Vautin* (1998) FLC ¶92-827**

The Full Court allowed the wife a lump sum of $136,000, of which $30,000 was for "the future vicissitudes of life". If establishing a capital fund for the future over and above expected weekly commitments is a necessary commitment, this suggests that so is replenishment of capital.

Necessary commitments for the support of a child or another person

In order to be relevant under s 75(2)(d)(ii) or s 90SF(3)(d)(ii) of the FLA, a commitment must be necessary to enable that party to support "a child or another person that the party has a duty to maintain".

The word "duty" is significant. A mere social, customary or moral obligation is not sufficient. For example, an obligation to assist an elderly relative, which arises from a social or moral compulsion, is not

relevant unless there is a duty to maintain that elderly relative. A child born from a party's relationship with another is within s 75(2)(d) or s 90SF(3)(d), as is a person with whom a party is legally married. The capacity of the other spouse to support themselves is relevant. It cannot automatically be assumed that support of that party is within the phrase "commitments … necessary".

The relationship between this part of s 75(2)(d) or s 90SF(3)(d), and s 75(2)(e) and 90SF(3)(e) is not entirely clear. Section 75(2)(e) or s 90SF(3)(e) requires that the court take into account "the responsibilities of either party to support any other person". A commitment necessary to enable the party to support another person that the party has a duty to maintain is far more limited and restricted than a mere responsibility to support another person.[63]

However, both provisions are included as matters to be considered. No indication is given in the legislation that special weight is given to one rather than the other. Any commitment necessary to support another person that the party has a duty to maintain under s 75(2)(d) or s 90SF(3)(d) necessarily also falls within the category of "responsibilities" of s 75(2)(e) or s 90SF(3)(e). Sections 75(2)(e) and 90SF(3)(e) are discussed at ¶14-220 and following. The meaning of "duty" is also considered.

Examples

***Gerges & Gerges* (1991) FLC ¶92-204**

The payer claimed that he had a moral obligation to support his parents and siblings in Egypt. Kay J rejected this claim saying that a person may have a duty to support another person, even if that duty is not a legal obligation, but a mere moral obligation or an obligation which one ought or is bound to comply with. The support of elderly parents, siblings or foster children in an appropriate case can come within the definition of persons whom a party has a duty to maintain. This case was concerned with s 117(2) of the *Child Support (Assessment) Act 1989* which is similarly worded to s 75(2)(d)(ii).

***Vick & Hartcher* (1991) FLC ¶92-262**

The Full Court agreed with the trial judge that moral duties to support other relatives could not take priority over the duty to provide proper support for a party's own children. It rejected the view that "duty to maintain" could extend beyond a legal duty to a moral obligation.

***Dow-Sainter & Dow-Sainter* (1980) FLC ¶90-890**

The Full Court's preference was for the wife to remain in the former matrimonial home.

She suffered from multiple sclerosis. The house was appropriate to her needs because it did not have stairs and was accessible to shops and transport. The house was transferred to her by way of property settlement and lump sum spousal maintenance.

***Baber & Baber* (1980) FLC ¶90-901**

The husband argued that the wife had a reasonable capability to reduce her expenditure on renting a three-bedroom home by entering into a sharing arrangement. The children of the marriage resided with the husband but the wife had their care and control each weekend. Lambert J said that, as the wife had the children's care and control each weekend, he was not prepared to find that her reluctance to share her home with another person or persons was in any way irresponsible.

***W v W* (1997) FLC ¶92-723**

The Full Court concluded that the trial judge's drastic reduction of the wife's expenses from $841 per week to $262 per week was against the evidence. It assessed her living expenses at $20,000 pa or about $385 per week. The Full Court referred to her health, and said that the trial judge's dismissal of her claim for cigarettes was unjustified. The court had difficulty understanding the allowance of only $5 per week for entertainment, the substantial reduction in telephone expenses because of the periods that she spent in hospital, and the complete disallowance of her claim for the cost of holidays.

Periodic spousal maintenance was not ordered by the trial judge because the husband had only an excess income of $9 per week after meeting his expenses. The Full Court found that the husband had no capacity to pay spousal maintenance but increased the wife's property entitlements.

***DJM v JLM* (1998) FLC ¶92-816**

The Full Court considered that many of the sums claimed either could not be classified as "necessary" (gifts, donations and gardening), or were capable of being cut back (food and household supplies, cleaning, telephone and entertainment). The husband could still afford to meet his obligations for his own support and that of all of the children, and pay $150 per week towards the maintenance of the wife. This sum could be increased as the children ceased to be dependent or as the husband's earnings increased.

Footnotes

58 *DJM* v *JLM* (1998) FLC ¶92-816; [1998] FamCA 97.

59 *W* v *W* (1997) FLC ¶92-723.

60 *DJM* v *JLM* (1998) FLC ¶92-816; [1998] FamCA 97.

61 *Brady & Brady* (1978) FLC ¶90-513.

62 *Tye & Tye (No 2)* (1976) FLC ¶90-048; *Malcolm &*

Malcolm (1977) FLC ¶90-220.

63 *Vick & Hartcher* (1991) FLC ¶92-262.

¶14-220 Responsibilities to support another person — s 75(2)(e) and 90SF(3)(e)

Sections 75(2)(e) and 90SF(3)(e) of the *Family Law Act 1975* (Cth) require that the court take into account "the responsibilities of either party to support any other person".

The terms of s 75(2)(e) and 90SF(3)(e) overlap with s 75(2)(d) and 90SF(3)(d), and s 75(2)(m) and 90SF(3)(m). Sections 75(2)(d) and 90SF(3)(d) refer inter alia to "commitments … necessary to enable the party to support … another person that the party has a duty to maintain". Section 75(2)(m) or s 90SF(3)(m) refers to "the financial circumstances relating to the cohabitation" of the party with another person. Sections 75(2)(d) and 90SF(3)(d) are discussed at ¶14-210. Sections 75(2)(e) and 90SF(3)(e) are far broader. Sections 75(2)(m) and 90SF(3)(m) are discussed at ¶14-300.

To be within s 75(2)(e) or s 90SF(3)(e), unlike s 75(2)(d) or s 90SF(3)(d), the responsibilities do not need to be legally imposed. A court will assess the reasonableness of the responsibility and the appropriateness of the degree of the responsibility. The types of responsibilities most frequently encountered are to elderly relatives, children or a second wife. A responsibility to a charity or organisation is not included.

There is no automatic assumption that a responsibility to a spouse or partner is higher than a responsibility to any other persons such as a second spouse or children of a second relationship.[64]

In practice, the household in which the respondent actually lives always has first call on the respondent's resources. That household is the nearest to the source of the funds and some of its expenses will

be inextricably linked with those of the respondent. Their demands will seem more pressing to the respondent. While a court tries to balance the needs of both families, the reality is that the second family has a practical advantage.

The responsibility of the applicant to support another person may be considered differently from the responsibility of the respondent to support another person. If the applicant's responsibility to support another person means that the applicant is less able to support themselves, any maintenance order effectively imposes upon the respondent the responsibility for the support of that other person. The extent to which it does this is relevant to whether a maintenance order should be made.

Example

***Penza & Penza* (1988) FLC ¶91-949**

The wife had children from a second relationship. The father of these children was not paying child support. He could afford to do so but was married to someone else, and the wife would not proceed against him. These children were ignored for the purposes of working out the wife's outgoings and therefore her needs under s 75(2) in a s 79 application.

A respondent's children all have an equal claim upon the respondent for support whether or not they live with the respondent. A complication arises if a party alleges that their maintenance obligations are reduced due to responsibilities towards children to whom there is no biological or adoptive connection. Usually, this arises when a male respondent alleges that he has a responsibility to support the children of his current de facto or legal wife.

The court may, in certain circumstances, find that a party has a responsibility to support children of the household who are not children of that party.

Example

***Mee & Ferguson* (1986) FLC ¶91-716**

The Full Court in a child maintenance case was considering the relevance of the wife's current husband. It found that he assumed, and had the capacity to assume, the

financial responsibility for the support of the stepchildren to the extent that the father was financially unable to do so and at the higher standard of living associated with their being part of his household.

The trial judge concluded that he was a significant financial resource of the wife. The Full Court, however, concluded that although the legislation was obscure, one should look primarily to the financial circumstances of the parents themselves. To the extent that their resources are sufficient to meet the reasonable financial needs of the children, resort ought not to be had to the step-parent.

The court is prepared to conclude that a responsibility to support a party's parents can be taken into account as a responsibility, but such a finding will depend upon the particular circumstances of the case.[65]

Footnotes

64 *Soblusky & Soblusky* (1976) FLC ¶90-124; *Axtell and Axtell* (1982) FLC ¶91-208.

65 *W & W* (1980) FLC ¶90-872; *Aroney & Aroney* (1979) FLC ¶90-709.

¶14-230 Pensions and superannuation benefits — s 75(2)(f) and 90SF(3)(f)

Sections 75(2)(f) and 90SF(3)(f) of the *Family Law Act 1975* (Cth) (FLA) require that the court take into account in maintenance proceedings (subject to s 75(3) and 90SF(4)) the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a state or territory or of another country, or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia

and the rate of any such pension, allowance or benefit being paid to

either party.

Section 75(3) (and, similarly, s 90SF(4)) provides:

> "In exercising its jurisdiction under s 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit".

Regulation 12A of the Family Law Regulations 1984 prescribes a wide range of pensions, allowances and benefits for the purposes of s 4(1) FLA. For further details, see Wolters Kluwer's *Australian Social Security Guide*.

Sections 75(2)(f) and 90SF(3)(f) are specifically subject to s 75(3) and 90SF(4). Sections 75(3) and 90SF(4) only apply when the court is exercising its jurisdiction to make orders for maintenance. When the court is exercising its property jurisdiction, s 75(2)(f) and 90SF(3)(f) apply without being affected by s 75(3) or s 90SF(4).

The legislative aim of s 75(3) and 90SF(4) appears to be to protect public expense by increasing the frequency and quantum of orders for maintenance.

Since 28 December 2002, a superannuation interest is treated as property. Section 90MC provides:

> "A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of ***matrimonial cause*** in section 4".

Paragraph (ca) of the definition of "matrimonial cause" does not apply to maintenance proceedings. These proceedings are covered by para (c) which means that there is less risk in maintenance proceedings of there being a doubling up of the relevance of separation, that is, under s 75(2)(b) or s 90SF(3)(b), and s 75(2)(f) or s 90SF(3)(f).

Superannuation

Superannuation attracts more attention when courts are considering property applications than in maintenance applications.

In relation to maintenance, the existence of superannuation may show that the respondent does not need to save for their future. The

respondent can therefore afford to pay either periodic amounts or a lump sum without being deprived of the opportunity to provide for retirement. If the applicant has superannuation, there may be less need for the maintenance order to be sufficient to enable the applicant to provide for their future security.

¶14-240 Standard of living — s 75(2)(g) and 90SF(3)(g)

Complex problems arise in comparing standards of living. A mere comparison of the income levels of two people is only a crude comparison. Comparing standards of living usually entails considering many diverse elements such as:

- the quality and sufficiency of food available
- the adequacy and quality of clothing
- the sufficiency and comfort of accommodation
- the number of working hours and the amount of leisure time
- the availability and adequacy of health care
- the ability to have holidays and engage in recreation and the nature of those activities, and
- those many vague elements thought to comprise a quality of life.

Comparisons of standards of living under s 75(2)(g) or s 90SF(3)(g) of the *Family Law Act 1975* (Cth) therefore usually involve comparing:

- the standards of living of the applicant and the respondent, and
- the standard of living of the applicant before and after the separation of the parties.

Frequently, both parties must reduce their standards of living at least for a time after separation, although the primary income earner usually recovers their standard of living faster.[66] There is no fettering principle

that the applicant is entitled to the pre-separation standard of living if the respondent's means permit.[67]

The standard of living varies between families.[68]

Examples

***Gyopar & Gyopar* (1986) FLC ¶91-769**

A claim by a wife for urgent interim maintenance failed. The husband lived in a $1m home of 70 squares. A company in which he held an interest owned it, but it was security for sums exceeding the level of its value. He also supported the children. Treyvaud J concluded that the wife could not forever expect to live at the level of the lifestyle of the parties many years ago. This was not a case where a clearly wealthy and successful man, free from financial worries, sought to defeat the claims of a wife who was bereft of assets and who possessed no earning capacity. The husband was able to demonstrate his financial plight, supported his children unaided, and the wife virtually chose not to work. The former standard of living of the parties did not constitute an "adequate reason" for the wife being unable to support herself.

***Sapir v Sapir (No 2)* (1989) FLC ¶92-047**

The disparity in the parties' assets and the "lavish lifestyle" adopted because of the wife's substantial assets justified a lump sum that produced an income for the husband, which tapered to nothing over 12 years. The husband was not entitled to have his full $14,200 of entertainment expenses paid by the wife each year.

Footnotes

66 *Hope & Hope* (1977) FLC ¶90-294.

67 *Bevan & Bevan* (1995) FLC ¶92-600.

68 *Mitchell & Mitchell* (1995) FLC ¶92-601.

¶14-250 Increasing the earning capacity of the applicant — s 75(2)(h) and 90SF(3)(h)

Under s 75(2)(h) and 90SF(3)(h) of the *Family Law Act 1975* (Cth), a court is required to consider the extent to which the payment of

maintenance to the applicant would increase the earning capacity of the applicant in one of three specified ways, namely by:

- enabling the applicant to undertake a course of education or training
- enabling the applicant to establish a business, or
- otherwise enabling the applicant to obtain an adequate income.

Maintenance is seen under s 75(2)(h) and 90SF(3)(h) as having a rehabilitative purpose. It is a means of helping the applicant to become self-supporting.

If s 75(2)(h) or s 90SF(3)(h) is a significant factor, the order is usually a periodic order for a limited time or a small to moderate lump sum maintenance order.

Examples

***Ramsey & Ramsey* (1978) FLC ¶90-449**

The wife was awarded a lump sum of $7,500 for accommodation while she was retraining as a teacher.

***Patterson & Patterson* (1979) FLC ¶90-705**

The wife was awarded maintenance for three months to enable her to find work. The court accepted that it was unreasonable to expect her to continue to work at the school where the husband worked.

***Thomas & Thomas* (1981) FLC ¶91-018**

The wife was entitled to a car to enable her to attend university.

***Sapir v Sapir (No 2)* (1989) FLC ¶92-047**

The husband was awarded a tapering amount of maintenance while he adjusted his lifestyle and became more independent.

A course of education or training

A person who has been out of the workforce for a significant number of years, but is looking for work due to the parties' separation, often needs a course of training. This may be a short course such as computing, or a longer course such as a tertiary course leading to a

profession.

A lump sum provision may be possible if the length of time for which periodic maintenance will be payable can be calculated.[69] A lump sum maintenance provision can be made for a particular purpose, such as a car to travel for the purpose of education or training.[70]

If the duration of the course is uncertain, or its immediate impact upon the applicant's capacity to support himself or herself is uncertain, the court can make a periodic order for maintenance without a specific time limit.

Examples

***Bailey & Bailey* (1978) FLC ¶90-424**

The Full Court considered appeals by the parties regarding property, spousal maintenance and child maintenance. The Full Court agreed with the trial judge that the wife should receive support from her husband while completing her degree. Having regard to the parties' respective incomes, and to the wife's responsibilities towards the children, and to her desire to undertake further education to increase her earning capacity, she had established that she was unable to support herself adequately for the period covered by the order and that it was reasonable to require the husband to contribute to her maintenance.

***Bondelmonte & Bondelmonte* [2014] FamCAFC 29**

The husband's appeal against a spousal maintenance order was successful for reasons which included that the maintenance was ordered to enable the wife to undertake a course of education or training to increase her potential to find employment, when the wife's evidence was that she did not intend to retrain or look for work.

Establishment of a business

In considering whether a maintenance order should be made to enable the applicant to increase their earning capacity by establishing a business, the court will look at:

- whether there is a specific business in which the applicant seeks to be established, and
- whether there is a reasonable prospect of the applicant being able to make a success of the business and derive an income from it.

Example

***Lyons & Lyons* (1978) FLC ¶90-459**

The wife wanted $8,000 to invest into a small business with her mother. The proposition was ill-conceived and not researched. The court held the evidence was so nebulous that it only represented a pipe dream rather than evidence of an inability to support herself adequately.

Footnotes

69 *Ramsey & Ramsey* (1978) FLC ¶90-449.

70 *Thomas & Thomas* (1981) FLC ¶91-018.

¶14-260 Effect of proposed order on creditor — s 75(2)(ha) or s 90SF(3)(i)

Section 75(2)(ha) was introduced into the *Family Law Act 1975* (Cth) in 2005 when the Family Court was given jurisdiction to deal with the vested property of a bankrupt. The section requires the court to consider:

> "the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant … and".

Section 90SF(3)(i) is a similarly worded provision which applies to de facto relationships.

The cases which have considered s 75(2)(ha), have been primarily in property applications rather than maintenance applications. It has been given varying weight. As Le Poer Trench J said in *Lemnos & Lemnos* [2007] FamCA 1058 (at [59]):

> "Section 75(2)(ha) is only one of many sections the Court is required to consider under s 75(2) and is not given any special priority over the other factors".

¶14-270 Contribution to income, earning capacity, property and financial resources of respondent — s 75(2)(j) or s 90SF(3)(j)

Sections 75(2)(j) and 90SF(3)(j) of the *Family Law Act 1975* (Cth) (FLA) require the court to take into account "the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party".

Sections 75(2)(j) and 90SF(3)(j) are only relevant to applications for maintenance. They are of no relevance to applications under s 79 because the matters covered in s 75(2)(j) and 90SF(3)(j) are also covered in s 79(4)(a) and (b), and s 90SM(4)(a) and (b). For s 75(2)(j) or s 90SF(3)(j) to be relevant in an application under s 79 or s 90SM results in double counting of the contributions.

Contribution to income, earning capacity, property and financial resources

The contributions that presumably fall within the ambit of the FLA are:

- where the applicant supported the respondent while the respondent studied or trained, thereby increasing their actual income or earning capacity[71]

- where the applicant took responsibility for homemaking and parenting, thereby enabling the respondent to concentrate on employment, training or a business[72]

- where the applicant assisted in the respondent's business. Financial contributions to household expenses enabling the respondent to use their income to accrue assets are not within s 75(2)(j),[73] and

- financial contributions to household expenses enabling the respondent to use their income to accrue assets are not within s 75(2)(j).[74] It is not enough merely to contribute money to household expenses. To fall within s 75(2)(j) or s 90SF(3)(j), it

must be shown that a contribution has been made directly to the income, earning capacity, property and financial resources of the other party. The distinction seems difficult to justify. *Rowan* was decided in the early years of the FLA and may be decided differently now.

Footnotes

71 *Tye & Tye (No 2)* (1976) FLC ¶90-048.

72 *Hope & Hope* (1977) FLC ¶90-294; *Brady & Brady* (1978) FLC ¶90-513.

73 *Rowan & Rowan* (1977) FLC ¶90-310.

74 Ibid.

¶14-280 Duration of the marriage or de facto relationship and its effect — s 75(2)(k) or s 90SF(3)(k)

Section 75(2)(k) or s 90SF(3)(k) of the *Family Law Act 1975* (Cth) (FLA) requires the court to consider "the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration".

The duration of the marriage and the extent to which it has affected the earning capacity of the applicant may be considered as two separate factors. Alternatively, they could be classed as one factor so that the duration of the marriage is irrelevant unless it affected the earning capacity of the applicant.

Interpreting s 75(2)(k) and 90SF(3)(k) as two separate factors is supported by the joining of all of the paragraphs of s 75(2) and 90SF(3) by "and" prior to the last factor.

A further problem, which arises in the construction of s 75(2)(k) and

90SF(3)(k), is what the word “it” refers to. Does it refer to “the duration of the marriage” or to “the marriage”?[75]

Example

***Beck & Beck* (1982) FLC ¶91-235 and *Beck & Beck (No 2)* (1983) FLC ¶91-318**

The wife lost an entitlement to a life interest in the income from a farm owned by her first husband when she married the second husband. The second marriage lasted four years. The duration of the marriage was completely irrelevant because the wife’s entitlement was lost at the time of the marriage. Gibson J rejected the wife’s claim based on s 75(2)(k). The Full Court overruled this view.

The trial judge ordered that the wife receive a lump sum of $15,000 and that a $30 periodic maintenance order be discharged. The wife appealed seeking $100,000 by way of property settlement or lump sum maintenance. The Full Court increased the lump sum to $40,000 but did not specify which type of order it had made.

Sections 75(2)(k) and 90SF(3)(k) do not appear to cover a “lost opportunity” such as the loss of a life interest under a will; this can be taken into account under s 75(2)(o) or s 90SF(3)(r).[76]

It seems logical and reasonable that after a long marriage, maintenance is ordered more readily than after a short marriage. For example, there appears to be less justice in a marriage of two years’ duration, leading to the making of a maintenance order, which may last for 20 years, than after a marriage of 20 years’ duration. The burden placed upon the respondent by a lengthy maintenance order seems disproportionate in the case of a relatively short marriage.

The most common way in which a marriage may affect the earning capacity of the applicant is where the marriage is a long one, and the applicant:

- loses touch with the skills they had prior to the marriage, which might have permitted them to earn a living
- has no experience of new technologies
- had a job before the marriage, which no longer exists or is not readily available

- is not trained for certain types of jobs which are otherwise suitable, but did not exist at the time they were last in the workforce, and

- is older and less able to find employment.

The mere fact of the marriage, however, can have an effect upon earning capacity even when the marriage is quite short. A course of training may, for example, be abandoned because of the marriage. A course may have been given up upon the marriage, the birth of children, or for some other reason such as a move overseas or interstate to assist the other party's career. In such circumstances there may be a strong argument to take into account the reduction in earning capacity due to abandoning the course of study.[77]

Examples

***H & H (Child Maintenance)* (1981) FLC ¶91-083**

The husband was a medical practitioner five years older than the wife. They married when she was about 20 and they had seven children. They separated after 24 years of marriage. Section 75(2)(k) of the FLA was relevant because the wife's earning capacity was affected by her early marriage, the responsibilities and length of the marriage. The husband was able to build up and pursue his career without any limitations caused by the marriage.

***Lee Steere & Lee Steere* (1985) FLC ¶91-626**

After an eight-year marriage, there were three children aged 6, 7 and 9. As the wife was 28 years old at the time of the marriage, it was held that the marriage did disturb any lucrative career opportunities.

The Full Court concluded that the wife should have a lump sum sufficient for her to live for six or seven years without an order for periodic maintenance. The children were still quite young and it might be some years before the wife would become gainfully employed. The husband's proposal of two to three years was too short and that of the wife (14 years) far too long. The amount had to have regard to the wife's needs and other income and other assets, and the husband's resources.

***Best & Best* (1993) FLC ¶92-418**

The Full Court considered the husband's very high and continuing earning capacity as against the wife's lack of capacity. The husband acquired and developed his professional skills during the marriage and the wife lost professional skills which she had at the time of the marriage. It was held to be a particularly striking example of the "feminisation of poverty".

***Vakil v Vakil* (1997) FLC ¶92-743**

The Full Court said that it did not know the social and economic effects which such a short marriage and its dissolution may have upon an Indian woman of the wife's status

and background in that country. The court could not assume that those effects would be no greater than if the wife were living in Australia. The Indian court, which determined her maintenance claim, was presumably aware of those social and cultural issues, and took them into account.

***Kennon v Kennon* (1997) FLC ¶92-757**

The Full Court dismissed the parties' appeals against property orders. The majority, Fogarty and Lindenmayer JJ, held that there had been a significant diminution in the wife's income and probable earning capacity as a consequence of being out of her field of employment for most of the five years of the marriage. The trial judge made only a "modest adjustment". The Full Court said a significant adjustment was required. Her income fell from $45,000 to $36,000 pa over seven years.

The wife's property entitlements were increased on this and other grounds from $400,000 to $700,000.

***Zubcic & Zubcic* (1995) FLC ¶92-609**

The wife had been out of the workforce for over 20 years and had no relevant qualifications. The length of this marriage must have affected her income-earning capacity.

***DJM v JLM* (1998) FLC ¶92-816**

The Full Court upheld the trial judge's finding that the marriage had affected the wife's earning capacity. There were five children aged between 4 and 17. The 15-year-old lived with the husband but all the other children lived with the wife. At the time of the hearing the wife had been out of the workforce for almost 20 years. She had teaching qualifications from the United States. The trial judge concluded that the marriage had affected the wife's earning capacity and it was virtually impossible for her to have kept up her skills as a teacher during the marriage. She received 80% of the property and periodic spousal maintenance of $500 per week.

Footnotes

75 *Beck & Beck* (1982) FLC ¶91-235.

76 *Beck & Beck (No 2)* (1983) FLC ¶91-318.

77 *Richardson & Richardson* (1979) FLC ¶90-603 and *Bignold & Bignold* (1979) FLC ¶90-620.

¶14-290 Role as parent — s 75(2)(l) or s 90SF(3)(l)

The court is required by s 75(2)(l) or s 90SF(3)(l) of the *Family Law Act 1975* (Cth) to take into account the "need to protect a party who wishes to continue that party's role as a parent". Sections 75(2)(l) and 90SF(3)(l) in part overlap with s 75(2)(c) (and s 90SF(3)(c)) which require that a court, in considering a question of maintenance, should take into account "whether either party has the care or control of a child of the marriage who has not attained the age of 18 years". Sections 75(2)(c) and 90SF(3)(c) are discussed at ¶14-200.

Important points to note are:

- there is no requirement that a party make use of family members to help with childcare so that a party can work[78]
- a parent with the option of "paid work and childcare may instead choose to adopt the role of a full-time parent"[79]
- a party's role as a parent can affect their ability to seek work, the reasonableness of seeking work and the type of work available,[80] and
- if the children are at school it may be reasonable that the applicant seek part-time employment.[81]

The discussion of s 75(2)(c) "the care or control of a child of the marriage" at ¶14-200 is also relevant.

Footnotes

78 *Patterson & Patterson* (1979) FLC ¶90-705.

79 *Nixon & Nixon* (1992) FLC ¶92-308.

80 *Rouse & Rouse* (1981) FLC ¶91-073.

81 *Van Dongen* v *Van Dongen* (1976) FLC ¶90-071.

¶14-300 Financial circumstances relating to cohabitation with another person — s 75(2)(m) or s 90SF(3)(m)

Sections 75(2)(m) and 90SF(3)(m) of the *Family Law Act 1975* (Cth) (FLA) require the court to consider "if either party is cohabiting with another person — the financial circumstances relating to the cohabitation". This factor is more relevant to maintenance than s 79 and 90SM claims. Important points to note about s 75(2)(m) and 90SF(3)(m) are:

- the right to maintenance is entirely independent of the sexual relationships of the parties
- only the financial aspects of any cohabitation are considered,[82] and
- it only applies to cohabitation. It does not apply to a party who receives financial benefits from a person with whom they have a sexual relationship but is not cohabiting. These financial benefits would be relevant under s 75(2)(b) or s 90SF(3)(b) as relating to the income or financial resources of the party or under s 75(2)(d) or s 90SF(3)(d) as reducing their financial needs.

Section 82(4) provides that: "An order with respect to the maintenance of a party to a marriage ceases to have effect upon the re-marriage of the party unless in special circumstances a court … otherwise orders". Section 90SJ(2) is similarly worded with respect to the maintenance of a party to a de facto relationship.

Sections 82(4) and 90SJ(2) are discussed at ¶14-090. An order for maintenance cannot continue after the remarriage of the recipient unless a court makes a finding that there are "special circumstances" and orders the maintenance to continue.

The meaning of "cohabitation"

"Cohabitation" is not defined in the FLA. A determination of whether parties are cohabiting requires a consideration of factors such as dwelling under the same roof, sexual intercourse, mutual society and

protection, the recognition of the existence of the relationship by both parties in public and in private, and the nurture and support of the children of the relationship.[83]

The above factors are only a guide. Parties can:

- be separated under the one roof despite the fact that they still perform household duties for each other. This may be particularly understandable where the parties have children[84]
- still cohabit despite a physical separation such as one party being hospitalised for a lengthy period of time,[85] and
- still cohabit without there being a sexual relationship. The parties may be living in the same premises, provide help and assistance to each other, have an emotionally close bond and present themselves to the outside world as a couple.[86]

Important cases decided under Pt VIIIAB as to the meaning of cohabitation include:

- *Jonah & White* (2012) FLC ¶93-522
- *Ricci & Jones* [2011] FamCAFC 222.

It was uncertain whether s 75(2)(m) and 90SF(3)(m) are limited to heterosexual relationships. Section 75(2)(m) did not expressly include same-sex relationships. Since the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* it seems likely that same-sex relationships are included.

Even if a de facto relationship is established, it is not relevant of itself. The court is interested in the financial circumstances of the relationship.[87] However, the court can look at the financial arrangements which are appropriate in the circumstances.

Example

***F & F* (1982) FLC ¶91-214**

The wife resided in a de facto relationship. Her de facto, Mr T, was in the army and was

often away. He was at home most weekends and four out of five weeks of his annual leave. The de facto said that he made no financial contribution to the wife or her household. He said that this was because he was financially responsible for his estranged wife and children. Furthermore, he did not consider it necessary or appropriate to do so because of the absence of any “commitment” between himself and the wife. Fogarty J refused to make an order for maintenance. The wife and Mr T were entitled to make any personal or financial arrangements between them, which were suitable to both of them. That, however, did not mean that the wife could continue to impose upon her husband the responsibility for her support in those circumstances. The term “the financial circumstances relating to the cohabitation” was not confined to any actual financial arrangements between the relevant persons. It might also include financial arrangements, which would be appropriate in those circumstances. The court was entitled to take the potential into account.

A party in a new relationship must provide details of the financial position of their partner. Rule 13.05(1) of the Family Law Rules 2004 requires that the applicant and respondent “to a financial case” must each file a Financial Statement. Each party must make a full and frank disclosure of the party’s financial circumstances. The Financial Statement requires parties to provide the gross weekly income of each occupant of the party’s household.

Footnotes

82 *Ferguson & Ferguson* (1978) FLC ¶90-500.

83 *Todd & Todd (No 2)* (1976) FLC ¶90-008; *Pavey & Pavey* (1976) FLC ¶90-051.

84 *Pavey & Pavey* (1976) FLC ¶90-051.

85 *Jennings* v *Jennings* (1997) FLC ¶92-773; *Stanford v Stanford* (2011) FLC ¶93-483; *Sterling & Sterling* [2000] FamCA 1150.

86 *Dobbins* v *Gibbs* [2011] FMCAfam 35.

87 *Ferguson & Ferguson* (1978) FLC ¶90-500.

¶14-310 Terms of an order under s 79 or s 90SM — s 75(2)(n), 75(2)(naa), 90SF(3)(n) or s 90SF(3)(p)

Introduction

Section 75(2)(n) of the *Family Law Act 1975* (Cth) (FLA) requires a court, in considering the amount of maintenance to be ordered, to take into account:

> "the terms of any order made or proposed to be made under section 79 in relation to:
>
> (i) the property of the parties; or
>
> (ii) vested bankruptcy property in relation to a bankrupt party …".

Section 75(2)(naa) is similarly worded and requires the court to consider orders or declarations made or proposed to be made under Pt VIIIAB in relation to:

> "(i) a party to the marriage; or
>
> (ii) a person who is a party to a de facto relationship with a party to the marriage; or
>
> (iii) the property of a person covered by sub para (i) and of a person covered by subparagraph (ii), or of either of them, or
>
> (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii) …"

Sections 90SF(3)(n) and 90SF(3)(p) are similarly worded with respect to s 90SM orders.

The reference to "any order proposed to be made" seems to mean any order to be made contemporaneously with the determination of the maintenance application. A court considering an application for

maintenance cannot predict how a court may later deal with a s 79 or 90SM application. An order under s 79 or s 90SM is not "proposed to be made" if an application has merely been filed but not yet considered, or if it has only been foreshadowed. In any event, if a s 79 or s 90SM application was pending, likely or even possible, a periodic maintenance order could be varied at the time the s 79 or s 90SM order was made or a variation sought afterwards.

Sections 75(2)(n) and 90SF(3)(n) are, therefore, relevant only if:

- an order for property settlement has been made and the issue of maintenance has not yet been determined or has arisen since, or
- the court actually hears a maintenance application and the s 79 or s 90SM application together.

It is obvious that applications under s 79 or s 90SM and for maintenance involve issues which overlap. The purpose of s 75(2)(n) (and s 90SF(3)(n)) is similar to s 79(4)(f) (and s 90SM(4)(f) with respect to de facto relationships) which require the court to consider "any other order made under this Act affecting a party to the marriage or a child of the marriage". Both sections aim to prevent a duplication of remedy.

The property order may be sufficient so that the applicant has no need for maintenance.

Examples

***Clauson & Clauson* (1995) FLC ¶92-595**

The property orders meant that the wife had no entitlement to spousal maintenance. On appeal, the wife's share was increased to 50% of the $1.4m net asset pool. The Full Court had regard to the dimension of the property order and said it was not legitimate to make an order for spousal maintenance, either periodic or lump sum. After deducting the home, motor vehicle, furniture and horses as representing accommodation and day-to-day living for the wife and children, the wife was left with a capital sum of approximately $300,000. That calculation did take into account legal costs because no estimate was given.

The possession of such a capital sum and the investment opportunities would normally prevent the wife from demonstrating that she was "unable to support herself … adequately".

***Petterson & Petterson* (1979) FLC ¶90-717**

After ordering that the wife receive 13/16 of the net proceeds of the sale of the house, Connor J ordered that the husband pay her maintenance of $60 per week until one year after the house was sold. This would give her sufficient time to buy a smaller house and invest the balance of her assets to produce income.

***Matthews & Matthews* (1980) FLC ¶90-887**

The wife was given 60% of the $250,000 asset pool. To provide sufficient time for her to make decisions and arrange investments the husband was ordered to pay her $4,000 by way of lump sum maintenance to cover a two-year transitional period.

***Anast & Anastopoulos* (1982) FLC ¶91-201**

The Full Court was critical of the trial judge for confusing the "maintenance component" of a s 79 order with lump sum maintenance. The trial judge gave the wife 25% of the assets as a property settlement, being $78,250 with a further $35,000 as a maintenance component. The Full Court let the total payment stand at $113,250 but labelled it a property order, leaving the wife the right to apply for a lump sum or periodic spousal maintenance.

***Bevan & Bevan* (1995) FLC ¶92-600**

The Full Court continued the spousal maintenance order made by the trial judge until the distribution of the proceeds of the sale of the former matrimonial home. After that event it reduced the maintenance from $175 to $50 per week. The wife received $180,000 of the $280,000 equity in the former matrimonial home. The husband's income was $602.70 per week. He paid $75 per week child maintenance for the two children he fathered to the next-door neighbour. The wife had an income of $224 per week and weekly expenses of at least $409 per week.

***Rosati v Rosati* (1998) FLC ¶92-804**

The Full Court considered an appeal against a 65:35 division of assets in the wife's favour and the dismissal of the wife's spousal maintenance claim. The Full Court found that the asset pool was about $1.5m, slightly smaller than the trial judge had found. The Full Court ordered that the wife receive 50% of the asset pool, so she received a smaller share of a smaller asset pool. The husband's income was over $2,000 per week. The Full Court ordered spousal maintenance of $500 per week.

The trial judge properly took into account the terms of the property orders which he proposed to make. He considered that it would be open to the wife to sell the former matrimonial home, obtain alternative less expensive housing, and thus provide herself with a substantial capital sum for investment as a source of income for her own support. He concluded that she should be able to return to employment after two years and so she was capable of supporting herself adequately, in the meantime, from her significant available capital.

The wife's needs and resources had to be balanced against the husband's resources and capacity, to arrive at a proper result.

By investing, say, $550,000 of the net proceeds of sale of the former matrimonial home in a secure investment returning a modest 5% pa, that would return to her an after-tax income of about $22,000 pa or $425 per week. That was considered by the Court to be sufficient to provide quite reasonable rental accommodation, including utilities, for herself and the children on a temporary basis until she was able to return to the workforce, and finance the purchase of a residential property for herself, if she wished

so to do. In the meantime, she required some financial assistance to meet her own day-to-day living expenses.

¶14-320 Child support provided or to be provided — s 75(2)(na) or s 90SF(3)(q)

Section 75(2)(na) of the *Family Law Act 1975* (Cth) (FLA) requires the court to take into account "any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage". Section 90SF(3)(q) is similarly worded with respect to de facto relationships.

Although ongoing child support at an appropriate level is a relevant factor, the Full Court in *Clauson & Clauson*[88] said (at p 81,911):

> "But the other s 75(2) factors are significant. In addition, it should not be forgotten that the payment of child support in no way compensates the custodial parent for the loss of career opportunity, lack of employment mobility and the restriction on an independent lifestyle which the obligation to care for children usually entails".

Example

***D & D* [2003] FMCAfam 74**

The husband's non-payment of child support despite administrative assessments, and his ability to minimise the assessments because he worked as a self-employed plumber, were relevant. The Federal Magistrates Court gave the wife a 30% loading for s 75(2) factors. She had the primary care of three young children, each with special needs, a lower income and earning capacity, and was likely to continue to receive little or no child support.

Footnotes

88 *Clauson & Clauson* (1995) FLC ¶92-595.

¶14-330 Any other fact or circumstance — s 75(2)(o) or s 90SF(3)(r)

Introduction

Sections 75(2) and 90SF(3) of the *Family Law Act 1975* (Cth) (FLA) list the factors which a court can take into account when considering a maintenance application. The paragraphs which specify particular matters are discussed in detail at ¶14-140–¶14-320 and ¶14-340. Sections 75(2)(o) and 90SF(3)(r) cover all other issues and factual circumstances which are appropriate to include. The court is required to take into account under s 75(2)(o) and 90SF(3)(r) "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account". Some of the types of facts or circumstances, which have already been considered, are discussed below. Whether this subsection includes any aspects of the conduct of the parties is discussed below.

Sections 75(2)(o) and 90SF(3)(r) are not true "catch-all" clauses. The *ejusdem generis* rule is applied to narrow the interpretation of s 75(2)(o) and 90SF(3)(r) to only cover matters similar to those already listed. They must be of a "broadly financial nature".[89] Subject to matters having financial relevance, s 75(2)(o) and 90SF(3)(r) are fairly wide. The court can have regard to any fact or circumstance which, in its opinion, the justice of the case requires to be taken into account.

Conduct (including domestic violence)

As indicated in the "Property Orders" chapter (see Chapter 18), domestic violence can be relevant to Pt VIII and VIIIAB proceedings.[90] The issue is mainly raised in property proceedings. There is, however, an argument that violence is relevant in applications for maintenance as well, either by considering the violence as part of assessing the needs and earning capacity of the party whose maintenance is under consideration or under s 75(2)(o) or s 90SF(3)(r).

A claim for maintenance may not be made because of the threat (express or implied) of future violence.

The Full Court has interpreted s 75(2)(o) widely. It is undesirable to

fetter the court's discretion by artificially restricting the scope of that discretion.[91] Facts or circumstances within s 75(2)(o) or s 90SF(3)(r) do not include facts or circumstances relating to the marital history as such of the parties but relate only as to facts or circumstances of a broadly financial nature.

Likely future changes in financial position

Sections 75(2)(b) and 90SF(3)(b) deal with the present income, property and financial resources of each of the parties, and their present capacity for appropriate gainful employment. If one of the parties is likely to have additional property within the foreseeable future, that may be a fact or circumstance to properly be taken into account under s 75(2)(o) or s 90SF(3)(r).

For example, if, at the hearing of an application for maintenance, it were clear that the applicant was to inherit substantial property from a deceased relative but probate had not yet been granted, then a periodic rather than lump sum maintenance order would be likely. Similarly, if, at the time of the hearing it seemed that the respondent was about to receive, within the foreseeable future, a substantial promotion in his employment, it may be appropriate for the court to take that into account.

In an application for periodic maintenance, a court has to consider whether to make an order of limited duration or an ongoing order which can be varied or discharged under s 83 or s 90SI at a later stage.

A respondent's likely change in financial circumstances is not usually a relevant factor in a maintenance application. If the respondent's financial circumstances change, either party can apply to vary the order.

Loss of rights upon remarriage or divorce

As a consequence of a marriage, a party may lose a pension associated with an earlier marriage or a right to expect some particular pension in the future. Rights or entitlements may also be lost upon divorce. Examples are:

- a provision in the will of a first spouse or partner giving a party an income until death or remarriage

- an existing maintenance order or right to occupy property or other benefit under the provision of either a settlement or orders made on the termination by divorce of a prior marriage

- a regular entitlement under a trust, which ceased upon marriage or remarriage, and

- a pension payable to a party after the death of a previous spouse or partner, which ceases upon remarriage.

Examples

***Beck & Beck (No 2)* (1983) FLC ¶91-318**

The wife, upon remarriage, lost a life interest in a farm under her first husband's estate. The trial judge refused to find this a relevant factor under s 75(2)(o). The Full Court decided that the loss of a life interest in a farm was a relevant factor under s 75(2)(o). The Full Court increased the wife's property entitlement from $15,000 to $40,000.

***Hirst & Rosen* (1982) FLC ¶91-230**

The wife lost her entitlement to a pension upon her remarriage. She had, however, received a commuted lump sum of $21,000 when the pension terminated. Nygh J refused to take the loss of the pension into account. The wife had assets of approximately $458,000 and the husband had $60,000 of assets and an old age pension. This considerable disparity in assets is a possible reason for the distinction between *Beck & Beck (No 2)* and *Hirst & Rosen*. In another fact situation the result may have been quite different from that in *Hirst & Rosen*.

Money which is reasonably available but which is forgone

One party can be in circumstances which suggest that he or she should make a financial claim on another person. For a variety of reasons the person chooses not to do so. Examples are:

- a parent does not request a financial contribution from an adult child who continues to live in the home to allow the child to save for their future, and

- a respondent to a maintenance claim in a de facto relationship with a person who is able to contribute to their joint expenses but the

respondent does not ask for a contribution.

The potentiality or availability of such income is not income under s 75(2)(b) or s 90SF(3)(b). It might be a financial resource under s 75(2)(b) or s 90SF(3)(b). A failure to make a request for a reasonable contribution may be a circumstance to be taken into account under s 75(2)(o) or s 90SF(3)(r).[92]

Conduct affecting the applicant's capacity for work

Conduct affecting the earning capacity of the applicant might be relevant under s 75(2)(o) or s 90SF(3)(r). This may be conduct of either party.[93]

Example

***Barkley v Barkley* (1977) FLC ¶90-216**

The husband injured the wife's ear causing her to lose all hearing in it. She already had a 30% to 40% deficiency in the other ear. Carmichael J took her loss of hearing into account under s 75(2)(a) and (b). In relation to conduct he said that "the court should not look at the marital conduct of the parties in coming to a decision as to what property distribution is just and equitable between them. It does not follow that financial consequences of some conduct of one spouse to the other is not to be considered. Financial circumstances of the parties, their means and resources, capacities to earn, entitlements to Social Service benefits, are the matters to which the court has to look. When one party has stolen, or borrowed and squandered, the funds of the other party, the economic consequences of that conduct is surely a matter to be considered in adjusting their proprietary rights according to what is just and equitable. The conduct giving rise to the relevant economic consequence may be a crime, a tort, or simply a right to a claim to a civil debt. I cannot see that because a result very relevant to the means of a party arose from the conduct of the other party to the marriage that the result of that conduct is to be ignored because it can be said to fall under the label 'conduct of the parties'."

Footnotes

89 *Soblusky & Soblusky* (1976) FLC ¶90-124; *Ferguson & Ferguson* (1978) FLC ¶90-500.

90 *Kennon* v *Kennon* (1997) FLC ¶92-757.

91 *Soblusky & Soblusky* (1976) FLC ¶90-124.

92 *Patterson & Patterson* (1979) FLC ¶90-705.

93 *Ferguson & Ferguson* (1978) FLC ¶90-500.

¶14-340 Financial agreements — s 75(2)(p), 75(2)(q), 90SF(3)(s) or s 90SF(3)(t)

Terms of financial agreements

The *Family Law Amendment Act 2000* inserted s 75(2)(p) of the *Family Law Act 1975* (Cth) to be considered in determining the needs of the parties in a maintenance or property application. Sections 75(2)(q), 90SF(3)(s) and 90SF(3)(k) were inserted by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* and have similar intent. The court is required by s 75(2)(p), when exercising jurisdiction under s 74 or s 79, to take into account "the terms of any financial agreement that is binding on the parties".

The terms of a financial agreement are relevant under s 75(2)(p):

- in an application for maintenance where the agreement does not deal with maintenance rights in a manner which limits or restricts the rights of a party to apply for maintenance at all or at a particular time or in particular circumstances

- in an application for maintenance where the agreement specifically provides that maintenance rights are unaffected by the agreement

- in an application for a property settlement where the agreement makes provision for maintenance but does not adjust property interests (ie the s 75(2) or s 90SF(3) factors are still relevant under s 79(4)(e) (or s 90SM(4)(e))), and

- in an application for a property settlement where the financial agreement does not deal with all the property and resources of

the parties.

Sections 75(2)(q) and 90SF(3)(s) require the court to consider the terms of any Pt VIIIAB financial agreement that is binding on either or both of the parties to the de facto relationship.

Section 90SF(3)(t) applies to de facto relationships and requires the court to consider the terms of any financial agreement that is binding on a party to the de facto relationship.

BANKRUPTCY AND THIRD PARTIES

Editorial information

Written by Stephen Mullette

BANKRUPTCY: INTRODUCTION

¶15-000 The two worlds of family law and bankruptcy

The *Family Law Act 1975* (Cth) (FLA) has a significant role to play in the determination of the assets available to a bankrupt's creditors. What an unsecured creditor might have thought was a simple contractual debt can easily become entangled in a mess of contributions, adjustments and orders. Similarly, non-bankrupt parties can be confronted not only by a property dispute with a former spouse, but also the spouse's creditors and/or bankruptcy trustee.

On the other hand, the *Bankruptcy Act 1996* (Cth) can drastically affect the interests of parties to a relationship to an extent which they had previously not even contemplated. One or other of the parties may not even have knowledge of the financial distress of the other.

As one judge put it (*Combis, Trustee of the Property of Peter Jensen* v *Jensen* [2009] FCA 778 per Collier J):

> "The difficulties which can arise where family law issues and bankruptcy issues interact have been the subject of numerous attempts at legislative resolution. These difficulties have consistently flowed from uncertainty and hardship for either or both the creditors and non-bankrupt spouse arising from inconsistencies created between family law and bankruptcy law".

Since September 2005, there has been a closer interaction between family law and bankruptcy. They were previously kept apart in different courts. Their jurisdictions and philosophies are today far more intertwined.

In 2005, the government took steps to place bankruptcy and family

law (so far as they interact) into a single jurisdiction. It also gave broad powers to the Family Court to adjust the rights of third parties (such as creditors). It did this by enacting the *Bankruptcy and Family Law Legislation Amendment Act 2005* (BFLLA).

The Federal Circuit Court has concurrent jurisdiction with respect to bankruptcy law and family law.

In 2017, there were significant changes to the world of insolvency following the *Insolvency Law Reform Act 2016* (Cth) which has made major amendments to both the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth). Although not directly intended to affect the interaction of family law and bankruptcy, these amendments will undoubtedly alter the way that parties will need to interact with "external administrators" (a new generic term for administrators, liquidators and administrators of deeds of company arrangement of corporate entities) and trustees of "regulated debtors" (a new generic term to describe the various types of personal insolvency estates under control of trustees in bankruptcy).

In 2018, Government addressed jurisdictional issues related to family law and bankruptcy. The *Civil Law and Justice Legislation Amendment Act 2018* is discussed at ¶15-140.

¶15-010 Background to bankruptcy and family law clashes

Under the law as it stood prior to 18 September 2005 (before the commencement of the *Bankruptcy and Family Law Legislation Amendment Act 2005* (BFLLA)), a party could not commence family law proceedings for property settlement or spousal maintenance if the other spouse was bankrupt. This was because there was no longer any property of the bankrupt spouse to which a Family Court order could attach. The property of the bankrupt had vested in the trustee in bankruptcy.[1] In cases where, at the time of the parties' separation, one of the spouses was bankrupt, the non-bankrupt spouse had to bring any claim to the property of the bankrupt spouse in a court other than a Family Law Court.

This led, in some cases, to a race to obtain family law or sequestration orders, depending upon whether one was trying to preserve matrimonial assets for creditors or the non-bankrupt spouse. It also led to conflicts between the Federal Court and the Family Court over which court had jurisdiction and, in either court, over the proper treatment of the parties' contributions and the rights of creditors.

Under s 35A of the *Bankruptcy Act 1966* (Cth) (BA), the Federal Court can transfer proceedings to the Family Court. In considering an application for transfer under this section, the Federal Court must decide whether issues raised in family law proceedings regarding property, overlapped with bankruptcy proceedings in respect of one spouse's property. In *Re Sellen; Ex parte Shirlaw*, the court refused an application for transfer as the bankruptcy proceedings concerned:

> "property divisible amongst creditors. The proceedings between the wife and the husband will be concerned with the property which has not been divided amongst the husband's creditors. Thus the subject matter of each dispute is different and it is preferable that the issues be separately considered".[2]

In *Macks* v *Edge* [2006] FCA 1077, the Federal Court refused an application under s 35A of the BA to transfer proceedings commenced by a trustee in bankruptcy to the Family Court. The court was asked to consider a claim by the trustee to recover the husband's interest in real estate and a speedboat, transferred to the wife prior to his bankruptcy. The court considered the operation of the BFLLA, as well as the interaction of bankruptcy and family law prior to the BFLLA. Prior to the BFLLA, the court was satisfied that there was no basis for the transfer of the proceedings.[3]

The court considered, first, whether there was any basis for the trustee's claim against the wife to recover the properties under the BA. The court noted that if the trustee were successful this would increase the pool of vested property to which the wife could make claim. The court drew particular attention to the fact that while it could only deal with the BA claims of the trustee, the Family Court could deal with both the BA and *Family Law Act 1975* (Cth) claims. This was a "powerful" reason for ordering a transfer.

However, the BA claims of the trustee were ready for hearing and involved concise issues which would not take long. Further, if the trustee was not successful, there would be no need for the Family Court proceedings. On balance, the court was satisfied that the proceedings should not be transferred.

A similar outcome occurred at first instance in *Combis, Trustee of the Property of Peter Jensen (Bankrupt)* v *Jensen* [2009] FCA 778.[4] However, when a formal motion was filed for transfer, the court reconsidered this position and ordered the transfer of the proceedings, partly because the wife indicated that if the husband's trustee in bankruptcy was successful in overturning a transfer to the wife under the BA, the wife would file a property settlement application seeking to alter the interests of the trustee in vested bankruptcy property. The wife had commenced Family Court proceedings already, seeking declarations in relation to the financial agreement which the trustee was seeking to challenge, and this, together with the saving of costs, suggested that all matters should be dealt with together.[5]

It must be considered more likely now that proceedings will be transferred to the Family Court given the Family Court's concurrent jurisdiction in bankruptcy and family law. In *Tait* v *Merlo* [2007] FMCA 780, the respondent was alleged to owe money to solicitors who consequently filed a creditor's petition. Proceedings between the respondent and her husband were still before the Family Court when the creditor's petition was filed and the Family Court had ordered that the costs were not payable until the conclusion of those proceedings. McInnis FM ordered the creditor's petition be transferred to the Family Court:

> "On the material before me I find that it is more likely than not that the distribution from the property pool in the Family Court proceedings is likely to result in an amount paid to the Respondent Debtor of an amount in excess of the claim by the creditor in the current Petition. The Court does not have sufficient information to make a proper assessment of the claimed indebtedness to the Supporting Creditor. Even if I am incorrect in that assessment then in my view having regard to the complexity of the issue before the Family Court and the significant and

> extensive nature of the property together with issues concerning valuation and the like, it would be more appropriate for that matter to be determined by the Family Court and for this Creditors Petition to then be determined by that Court" (at [17]).

In *Sievers* v *Sievers* [2015] FCCA 3326, the court considered the transfer of a creditor's petition to the Family Court. The matter arose out of a costs order between the respondent son and applicant mother in the context of Family Court proceedings between the mother and her deceased husband in respect of whom the respondent son was the administrator. Judge Cameron noted that none of the matters in r 8.02(4) of the Federal Circuit Court Rules 2001 (the general jurisdiction to transfer proceedings) favoured the transfer. The court also considered s 39 of the *Federal Circuit Court Act 1999*, which also provides for the discretionary transfer of Federal Circuit Court proceedings to the Federal Court of Family Court. Cameron J found that a costs debt arising from a dispute over a deed was not sufficiently connected to the adjustment of property rights between the applicant and the estate of her late husband and also considered whether the estate, and the family company, owed a debt to the respondent. Cameron J held that (at [20]):

> "The controversies which make up those matters are separate and distinct, notwithstanding that they concern much the same property and both involve the applicant and the respondent. Consequently, I find that the criterion for transfer found in s 39(4)(b) of the Act is not satisfied".

Nevertheless, in *Sievers*, the court transferred the proceedings. On balance, "the administration of justice" favoured the transfer because "the proceedings in the Family Court are not resolved and it is likely that sequestration of the respondent's estate would have a material effect on the progress of those proceedings. I think it inappropriate that this Court should take a step which may have an adverse effect on proceedings in the Family Court when the Family Court would have, following transfer, jurisdiction to consider and decide the issue itself" (at [23]). His Honour went on to note that the debt was one aspect of a family dispute over property which was to be sold and that there was evidence missing which the Family Court was better placed

to decide.

Footnotes

1 *DCT* v *Swain* (1988) FLC ¶91-976 at pp 77,058–77,059; *Macks* v *Edge* [2006] FCA 1077 at pp 482ff.

2 *Re Sellen*; *Ex parte Shirlaw* (1989) FLC ¶92-034 at p 77,458 per Davies J.

3 At [24]–[26].

4 Per Collier J at [57].

5 In *Combis, Trustee of the Property of Peter Jensen (Bankrupt)* v *Jensen (No 2)* [2009] FCA 1383 (per Collier J).

¶15-020 Contributions: bankruptcy law versus family law

Under s 120 of the *Bankruptcy Act 1966* (Cth), a trustee may seek to recover property transferred for less than market value consideration (including to a non-bankrupt spouse). To defend such claims, the non-bankrupt spouse often outlines their financial and non-financial contributions, to establish an interest pursuant to a constructive trust.

In a number of cases at first instance, judges found that such contributions were valuable consideration especially if the non-bankrupt spouse had agreed not to make a claim for property settlement[6] or that the property was received pursuant to court orders.[7] However, the Full Court of the Federal Court in *Official Trustee in Bankruptcy v Lopatinsky*[8] said that financial and non-financial contributions to the marriage of a type referred to in s 79 of the *Family Law Act 1975* (Cth) (FLA) did not constitute valuable consideration in the sense required to defend a claim under the

Bankruptcy Act 1966 (Cth).

In other cases, both in the Family Court and the Federal Court, it was held at first instance that "forbearance to sue" is valuable consideration. In *Re Sabri, A; Ex parte Brien, RC*,[9] Chisholm J held that orders of the Family Court finalising financial arrangements between spouses were consideration, in the sense that such a compromise was akin to "forbearance to sue". The chose in action which the wife gave up (representing her potential family law property claim) was found to be of value.[10] At first instance, in *Lopatinsky v Official Trustee in Bankruptcy*,[11] Moore J found that the wife's promise not to sue her husband in the Family Court (ie not to make an application for property settlement) was valuable consideration.

On appeal, however, the Full Court in *Official Trustee in Bankruptcy v Lopatinsky*[12] found that "financial and non-financial contributions to the marriage in accordance with the criteria referred to in s 79 of the Family Law Act . . . cannot provide a basis for assessing the value of the consideration which was given".

Footnotes

6 *Lopatinsky* v *Official Trustee in Bankruptcy* (2002) FLC ¶93-119; [2002] FCA 861 (per Moore J).

7 *Mateo* v *Official Trustee in Bankruptcy* (2002) 117 FCR 179; [2002] FCA 344 (per Tamberlin J).

8 *Official Trustee in Bankruptcy* v *Lopatinsky* (2003) FLC ¶93-149 at p 78,481; [2003] FCAFC 109.

9 *Re Sabri, A*; *Ex parte Brien, RC* (1997) FLC ¶92-732.

10 It has been held that a release from an obligation to pay future maintenance may be valuable consideration ((1997) FLC ¶92-732 at pp 83,860–83,861).

11 *Lopatinsky* v *Official Trustee in Bankruptcy* (2002) FLC ¶93-119; [2002] FCA 861.

12 *Official Trustee in Bankruptcy* v *Lopatinsky* (2003) FLC ¶93-149; [2003] FCAFC 109.

¶15-030 Abuses of bankruptcy law and family law

In the interaction of bankruptcy and family law, there have always been concerns about potential abuses of the system in two areas:

- the "penniless partner" — who (innocently or otherwise) uses the provisions of the *Bankruptcy Act 1966* (Cth) (BA) to avoid the claims of his or her spouse in the Family Court, and perhaps other creditors as well, and

- the "discontented duo" — who use the provisions of the *Family Law Act 1975* (Cth) to avoid the claims of creditors by transferring assets between them, in the guise of a legitimate property settlement.

The "penniless partner"

The "penniless partner" is a term that can be used to describe a person who files for bankruptcy in the face of family law proceedings by the non-bankrupt spouse. Prior to the *Bankruptcy and Family Law Legislation Amendment Act 2005* (BFLLA), the property adjustment claims of the non-bankrupt spouse were defeated except insofar as he or she could point to some contractual or equitable claim recognisable under the BA.

Formerly, the only recourse available to the non-bankrupt person, suspicious that he or she had a falsely declared penniless partner, was to head off to a completely different jurisdiction, the Federal Court, and prove that there had been some abuse of process by applying to have the bankruptcy annulled. If successful, the non-

bankrupt spouse could then continue with any family law property or maintenance application.

Examples

***Rahme v Rahme & Ors*, unreported, Rowlands J, 1 July 2005**

A non-bankrupt spouse filed an application to annul the bankruptcy of her husband in the Federal Court under s 153B(1) of the BA, arguing that the debtor was not insolvent and his petition ought not to have been presented, then successfully applied (under s 35A) to have the annulment application transferred to the Family Court, to be heard with the Family Court proceedings. The only problem was that the Family Court proceedings were not heard for another 2½ years. As a result, the trustee in bankruptcy was unable to know, until a few months before the bankrupt was discharged from bankruptcy, whether or not he had been validly appointed. Ultimately, the annulment application was unsuccessful, and the bankrupt was found to have been justified in presenting a debtor's petition. However, this did not make it any easier for the trustee to take any active role in the administration of the bankrupt estate when the bankruptcy could have been annulled and his appointment terminated. A trustee with knowledge of a pending annulment application that could remove him or her from office would be loathe to realise assets and take other steps to administer a bankrupt estate for fear of being criticised and/or sued for any loss arising from premature actions.

***Zachary & Zachary & Ors* [2008] FMCfam 1209, 13 November 2008**

The wife sought and obtained orders against her husband and his trustee in bankruptcy preventing her husband from utilising procedures under the BA to either pay out his creditors or to reach an agreement with them, and on either basis to annul his bankruptcy. These orders were obtained on an interim basis. However, when the matter returned to court, Kemp FM found no reason to restrain the trustee any further, in particular as there was no jurisdiction to alter the bankrupt's property interests anyway (the matter not being covered by the *BFLLA*).

The "discontented duo"

The other flashpoint in the area of family law and bankruptcy occurs when creditors pursue a debtor and the assets of the debtor are found to have already been transferred to the bankrupt's spouse under the *Family Law Act 1975* (Cth) (FLA). This may be the first that creditors are aware of any suggestion of relational disharmony. Indeed, there may not be any unhappiness.

Two worlds: one pool

The "discontented duo" and the "penniless partner" are, of course, caricatures to highlight the problem of the interaction between family law and bankruptcy. There are any number of combinations or variations, with varying degrees of complicity and knowledge of the prejudice caused to creditors, or the family. It may even be that there is no dishonest purpose at all. It must be recognised that one of the

most significant strains on domestic relationships is that of financial distress. In the end, it may be simpler to acknowledge that in matters involving both bankruptcy and family law there are two legitimate competing claims: namely, those of:

- the non-bankrupt spouse or partner and children, and
- the bankrupt's creditors.

There are two competing claims over the one pool of assets. The needs of the non-bankrupt spouse or partner and children must be weighed against the rights of creditors to expect payment. At present, this usually occurs when the couple are truly discontent (ie when separation occurs). However, the High Court confirmed in *Stanford & Stanford* (2012) FLC ¶93-518 that legally married couples can, in certain circumstances, obtain property orders even if they are not separated by intention (see ¶13-015). Financial agreements can also be entered into during a relationship or marriage (see Chapter 20).

In addition, the decision of the High Court in *The Trustees of the Property of John Daniel Cummins, A Bankrupt v Cummins*[13] (see ¶15-170) has meant that married couples may find another temptation to take refuge in the Family Court.

Footnotes

13 *The Trustees of the Property of John Daniel Cummins, A Bankrupt* v *Cummins* [2006] HCA 6.

¶15-065 Personal property securities

Major reforms to the law of personal property securities, which came into effect — generally speaking — on 30 January 2012, were made by the *Personal Property Securities Act 2009* (Cth) (PPS Act) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) (amending Act).

In essence, the PPS Act established a single national law governing security interests in personal property (importantly including company charges), and a single national system of registration of security interests embodied in a public Personal Property Securities Register (PPS Register) maintained by the Australian Financial Security Authority (AFSA), which up until 15 August 2013 was known as the Insolvency and Trustee Service Australia (ITSA).

Tip

Practitioners now need to undertake PPS Register searches.

BANKRUPTCY PRINCIPLES

¶15-070 Outline

The first step for any trustee in bankruptcy is to determine the property that vests in him or her. This is where the provisions of the *Bankruptcy Act 1966* (Cth) (BA) and equitable principles will come into play. Once the property that vests in the trustee is established (known as "vested property"), then the *Family Law Act 1975* (Cth) principles will apply.

In Australia, "bankruptcy" is a general description of a system of laws governing individuals (as distinct from companies and other associations who are governed by various corporations and associations laws) who are unable to pay their debts. Such systems have been in existence since ancient times.[14] In general terms, such regimes provide for a debtor to be released from his or her debts after some form of external sanction — whether that be gaol, slavery or, in modern times, the forfeiture of most assets and the subjection of the bankrupt's affairs to external administration for a period of at least three years. The counterpart of the bankrupt's punishment is the orderly distribution of the bankrupt's assets among creditors, and protection of the bankrupt from persecution by one or more creditors.

Modern bankruptcy law in Australia is governed by the BA and the Bankruptcy Regulations 1996. In 2017, the *Insolvency Law Reform Act 2016* (Cth) (ILRA) amended the BA significantly to (among other purposes) align bankruptcy and corporate insolvency laws. The *Insolvency Law Reform Act 2016* (ILRA) has reorganised the BA and introduced the Insolvency Practice Schedule (Bankruptcy) as a separate schedule (Sch 2) to the BA, and also led to the introduction of the Insolvency Practice Rules (Bankruptcy) 2016 (Cth), subordinate legislation in aid of the BA and the Insolvency Practice Schedule.

The following is only a very brief reference to general principles. A more comprehensive treatment may be found in Wolters Kluwer *Australian Insolvency Management Practice*.

Under the BA, a person may become bankrupt:

- voluntarily, by filing a debtor's petition with the Official Receiver (s 55), or

- involuntarily, on an application by a creditor (a creditor's petition) to either the Federal Court or Federal Circuit Court (s 43).

There are also a number of alternatives to bankruptcy. These are only considered in general terms in this chapter, to the extent that they relate to family law. Briefly, the alternatives fall into two categories:

- pre-bankruptcy arrangements with creditors under:
  - Pt IX of the BA, known as debtor's agreements and which are more commonly used among low income, low creditor estates, having regard to the threshold limits imposed for such agreements, or

  - Pt X of the BA, known as Pt X agreements or personal insolvency agreements (PIAs). These are agreements reached with creditors in which creditors vote to accept an arrangement put forward by or on behalf of the debtor as an alternative to bankruptcy. The terms of the arrangement are infinitely variable and depend primarily upon what creditors will accept in lieu of the debtor's bankruptcy.

- post-bankruptcy arrangements approved by creditors under s 73 of the BA. If approved, such an arrangement has the effect of immediately annulling the bankruptcy (s 74 BA).

It is also possible for deceased estates to be administered externally under the provisions of Pt XI of the BA.

Footnotes

14 For example, The Code of Hammurabi (c1780BC) provided for debtors to be able to sell their family into slavery, and to obtain their release after three years.

¶15-080 Effect of bankruptcy

Upon a debtor's petition being accepted by the Official Receiver, or upon a sequestration order being made by the Federal Court or Federal Circuit Court, the property of the bankrupt vests in the trustee in bankruptcy (s 58 of the *Bankruptcy Act 1966* (Cth) (BA)). This includes property acquired after bankruptcy but before discharge (s 58(1)(b) BA). This property is, subject to certain exceptions, divisible among the bankrupt's creditors (s 116(1) BA). In addition, a bankrupt is required to make contributions from the bankrupt's income during bankruptcy (s 139P BA). In this way, a pool of assets is created for the benefit of the bankrupt's creditors. This pool may be expanded or reduced according to various other powers and provisions of the BA, and may also be affected by the rights of a non-bankrupt party under the *Family Law Act 1975* (Cth) (FLA).

In either voluntary or involuntary bankruptcy, the estate of the bankrupt will be administered by the trustee of a bankrupt's estate who will be:

- a registered trustee appointed pursuant to Pt VIII of the BA, if a consent from the trustee is obtained beforehand, or

- the Official Trustee in Bankruptcy, a corporation sole whose powers and functions are exercised by the Official Receiver (s 18 BA). The Official Trustee's responsibilities are administered by the Australian Financial Security Authority (AFSA), formerly known as the Insolvency Trustee Service of Australia (ITSA), a branch of the Commonwealth Attorney-General's Department.

The property of the bankrupt that vests in the trustee in bankruptcy under s 58 of the BA is defined by reference to the definitions of "property" and "the property of the bankrupt" set out in s 5(1). It is also important to have regard to s 116 BA, which sets out the "divisible property" which is available to be divided among the bankrupt's creditors. Section 116 BA prescribes that it is the bankrupt's property as at the "commencement of the bankruptcy" which will be divisible among the bankrupt's creditors.

The definition of "the property of the bankrupt" in s 5(1) of the BA is:

> "(i) the property divisible among the bankrupt's creditors; and
>
> (ii) any rights and powers in relation to that property that would have been exercisable if he or she had not become a bankrupt".

"Property" is defined in s 5(1) as:

> "real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property".

Section 116(1) BA defines "divisible property" as:

> "(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge;
>
> (b) the capacity to exercise, and to take proceedings for

exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge;

(c) property that is vested in the trustee of the bankrupt's estate by or under an order under section 139D or 139DA; and

(d) money that is paid to the trustee of the bankrupt's estate under an order under section 139E or 139EA . . ."

There has been a lengthy debate as to the precise extent that bankruptcy captures and vests in the trustee in bankruptcy certain rights of the bankrupt, such as choses in action, rights to bring family law actions, and appeal rights. It is clear from the above definitions that bankruptcy captures (subject to specific exclusions in s 116(2) BA) not only the property of the bankrupt but also some of the bankrupt's rights in respect of property. For family law purposes, the relevant principles include:

- The High Court has held that a bankrupt may no longer pursue proceedings to protect, enhance or add to property which has vested in his or her trustee in bankruptcy.[15]

- "Property" has been held not to include rights of appeal or to bring proceedings in respect of actions which are personal to the bankrupt and have no implications for the estate. These may include:
  - applications regarding licences personal to the bankrupt (eg driver's licence, pilot's licence)
  - applications regarding the bankrupt's employment — such as an application for an order for reinstatement (but not in relation to employee entitlements).

- A number of cases have held that the right to bring an action under s 79 of the FLA remains with the bankrupt and does not vest in a

trustee in bankruptcy. It is a right *in personam*. This means that a trustee in bankruptcy is unable to file a property settlement application against the non-bankrupt spouse. However, any proceeds recovered by an application conducted by the bankrupt will ordinarily belong to the trustee in bankruptcy, as after-acquired property (assuming the property is of the kind covered by s 116 BA).[16]

- However, the Full Court of the Family Court has held that a bankrupt does not have standing to appeal against property settlement orders.[17]

- Further, if the bankrupt has commenced property (or parenting) proceedings, the provisions of s 60(2) of the BA will prevent the proceedings from continuing unless the trustee makes an election.[18]

- Nothing in the *Bankruptcy and Family Law Legislation Amendment Act 2005* altered the trustee's inability to bring an application for property settlement under s 79 or s 90SM of the FLA. A trustee in bankruptcy therefore cannot be an applicant under the FLA for substantive property settlement orders, even though he or she may be sued as a respondent.

- Nevertheless, there is still a limited scope for a trustee in bankruptcy to be involved as an applicant in family law proceedings (ie under s 79A or s 90SN of the FLA to set aside s 79 and 90SM orders) (see for instance *Pacelli & Hopkinson & Anor* [2010] FMCAfam 1248 at [31]; see also *Trustee of the Bankrupt Estate of Hicks & Hicks* [2016] FamCA 462 per Stephenson J, at [46] (overturned on appeal but the Full Court accepting the standing of the Trustee to make the s 79A application); see *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* (2018) FLC ¶93-824.

Footnotes

15 *Cummings* v *Claremont Petroleum NL* [1996] HCA 19.

16 For example, *Page and Page (No 2)* (1982) FLC ¶91-241; *Reed and Reed; Grellman (Intervener)* (1990) FLC ¶92-105; *Audet* v *Audet; Official Trustee in Bankruptcy (Intervener)* (1995) FLC ¶92-607. See the very helpful discussion of these cases in Wolters Kluwer's *Australian Family Law and Practice* at ¶40-545. See also *Sloan & Sloan* [2018] FamCA 610.

17 *Reed and Reed; Grellman (Intervener)* (1990) FLC ¶92-105; *O'Neill and O'Neill* (1998) FLC ¶92-811; [1998] FamCA 67; *Guirguis* v *Guirguis* (1997) FLC ¶92-726.

18 *Sloan & Sloan* [2018] FamCA 610 per Gill J, contra, on this point, *Page & Page* [1982] FamCA; (1982) 8 Fam LR 316, per Frederico J. Gill J in *Sloan* distinguished *Page* on the basis that in *Page* the bankrupt's application was not on foot at the time of the decision so Frederico J's comments on s 60(2) were strictly obiter dicta. (See *Sloan* at [35]). Although s 60(4) exempts certain actions from the stay in s 60(2), property settlement proceedings are not included in the exception (see *Sloan* at [37]); Cf *Lincoln (deceased) v Moore* [2016] FamCA 547 & *Trent & Rowley* [2014] FamCA 447. Note: in *Sloan* Gill J referred to the "apparent and unwelcome effect that proceedings under Part VII of the *Family Law Act 1975* relating to children are also included" in the stay of legal proceedings (with the possible exemption under s 60(4) BA of injunctive proceedings which might amount to a "wrong done to the bankrupt . . . or a member of his family". According to Gill J (and with respect, entirely correctly "This effect of s 60 makes no sense and potentially undermines the well-being of children, without any corresponding benefit being conferred on creditors (if such benefit could be weighed against the welfare of a child)" (see *Sloan* at [40]).

¶15-090 Commencement of bankruptcy

Section 115 of the *Bankruptcy Act 1966* (Cth) (BA) sets out the regime for determining when a bankruptcy commences. This may be many months earlier than the actual date the person became bankrupt, and can have a significant effect on the property which may be available to the bankrupt's creditors.

In most cases, a bankruptcy based upon a creditor's petition will commence on the date of the earliest act of bankruptcy committed in the six months before the sequestration order was made. Given that a creditor's petition may be adjourned from time to time up to a maximum of two years,[19] it is at least conceivable that a bankruptcy may in fact "commence" 2½ years before the sequestration order is made.

An "act of bankruptcy" is committed in various ways, the most common being failure to comply with a bankruptcy notice, which gives a debtor 21 days to satisfy a judgment debt (s 40(1)(g)).

Footnotes

19 Section 52(4) of the BA provides that a creditor's petition lapses after 12 months from filing, unless this period is extended under s 52(5). The latter provision allows an extension of up to a further 12 months.

¶15-100 Contributions from income

During bankruptcy, a bankrupt is required to make contributions from income received which exceeds the relevant statutory thresholds. These amounts are regularly indexed and may be found on the website of the Australian Financial Security Authority (AFSA), until 15

August 2013 known as the Insolvency Trustee Service Australia (ITSA).[20] AFSA is the government agency responsible for regulation of the bankruptcy laws of Australia.

Section 139N of the *Bankruptcy Act 1966* (Cth) (BA) exempts, from the calculation of income which a bankrupt is required to contribute to their estate, such amounts as the bankrupt is liable to pay under a maintenance agreement or order under the *Family Law Act 1975* (Cth). There are various other provisions in the income contributions regime in the BA which can increase or decrease the income which a bankrupt is deemed to have earned during his or her bankruptcy. Detailed consideration of these provisions is beyond the scope of this work.

Footnotes

20 See www.afsa.gov.au.

¶15-105 Bankruptcy and child support

Bankruptcy operates in relation to child support assessments in a mixed way. Child support is a provable debt in bankruptcy but can survive bankruptcy. The outstanding child support assessment is not automatically discharged when the bankrupt is discharged, so it will be recoverable by the payee even after the bankruptcy has concluded (see *Segler* below and also *Selkirk and Caporn & Anor* (2016) FLC ¶98-071 at [87]–[88]). Further, if the bankrupt is an employer who is liable to remit child support payments to the Child Support Registrar from an employee's wages, that obligation has priority over all other debts of the bankrupt, including secured debts.

Section 82 of the *Bankruptcy Act 1966* (Cth) (BA) deals with provable debts. Section 82(1A) of the BA provides that "debts" include amounts payable under a maintenance agreement or order.

Section 5 of the BA defines "maintenance order" to include an

assessment made under the *Child Support (Assessment) Act 1989* (Cth).

Section 153(2)(c) of the BA provides that discharge from bankruptcy does not release the bankrupt from any liability under a maintenance order. However, s 153(2A) gives the court power to discharge liability for arrears subject to such terms and conditions as it thinks fit. That is, if there are unpaid child support amounts which have not been paid from the assets realised by the trustee in bankruptcy, the bankrupt may apply to the Federal Court or Federal Circuit Court for orders discharging his or her liability to pay these arrears.

Case study

***Segler v Child Support Registrar* [2009] FMCA 41**

The Federal Magistrates Court considered two preliminary questions in relation to an application to discharge a child support liability under s 153(2A) of the BA.

Mr Segler (a legal practitioner) was bankrupted on 19 September 2001 at which time he had child support arrears of about $26,000 together with late payment penalties of about $3,500. Mr Segler was discharged from bankruptcy on 20 September 2004. On 2 September 2005, the Child Support Registrar commenced enforcement proceedings in respect of an outstanding child support debt claim of over $100,000 as at 18 August 2005. Consent orders were made later that confirmed the debt at about $120,000. Mr Segler was ordered to pay $1,000 per month in respect of this debt but only made one payment. On 19 November 2007, Mr Segler applied to discharge the whole of his then child support liability of over $160,000. This was later amended to separate the pre-bankruptcy arrears and penalties, which Mr Segler sought to discharge under s 153(2A) of the BA. However, Mr Segler argued that the effect of s 153(2A) was to allow the court to discharge child support arrears regardless of when the debt was incurred, and that therefore the court could discharge the whole of his child support liability. After considering

the history of the legislative provisions relating to the payment of amounts under maintenance orders, the court was satisfied that the amendments which incorporated s 153(2A) and which altered s 82 of the BA were to overturn a number of previous court decisions. Those decisions had held that amounts outstanding under maintenance orders were not provable in bankruptcy unless entered as a judgment in favour of the maintenance creditor. However, because such a judgment was not a “final” judgment under the BA, it could not be used to support a bankruptcy notice. Therefore, according to Lucev FM, by considering s 40(1)(g), (3)(b) and (f), together with s 82(1) and (1A) alongside s 153(2A) and (1A), and the relevant definitions in s 5 of the BA, the court could be satisfied that the intention of parliament was to cause the provisions to operate so as to (at [79]):

- extend non-release liability from maintenance debts
- make provable in bankruptcy, maintenance debts the subject of maintenance orders or maintenance agreements before the date of bankruptcy, and
- limit the maintenance debt dischargeable to that provable in the bankruptcy, that is, the maintenance debt as at the date of bankruptcy.

The court was therefore satisfied that its power to discharge outstanding maintenance debts, such as the child support debt, “must be limited to debts provable in bankruptcy up until the date of sequestration” (at [81]).

In a separate issue, Mr Segler also questioned the evidence which the court was entitled to take into account when considering whether or not to grant a discharge of outstanding child support. He argued that the court was limited to considering his financial circumstances during bankruptcy: that is, his income, expenses, liabilities and assets while he was an undischarged bankrupt. However, after considering the authorities, Lucev FM held (at [96]) that it was “self-evident” that the applicant’s current

ability to pay the arrears must be considered, citing the decision in *Re Stewart*; *Ex parte Stewart* (1995) 60 FCR 68 at 79 per Cooper J. The court went further, however, and considered that there were other circumstances relevant to the exercise of the court's discretion being Mr Segler's (at [99]): "(a) income, expenses, liabilities and assets; and (b) conduct, prior to the date of his bankruptcy, during the period of his bankruptcy, and since his discharge from bankruptcy".

***Segler v Child Support Registrar* [2011] FMCA 96**

Having determined these preliminary matters, the application was heard but judgment on the substantive application was not delivered until almost two years later. Lucev FM noted (at [76]) that the matter involved the "difficult balancing of a variety of conflicting issues" relating to the financial circumstances of Mr Segler and his new wife. His Honour considered whether the former bankrupt should be released from his liabilities in relation to the arrears as at the date of sequestration of Mr Segler's estate of about $26,000. The late payment penalties which had accrued on this amount had been waived by the Child Support Registrar following Mr Segler's discharge from bankruptcy.

In Lucev FM's opinion, it was reasonable for the Child Support Registrar to argue that the bankrupt had demonstrated ". . . an intentional lack of compliance with his child support obligations, and an almost complete absence of good faith in relation to compliance with those obligations" (at [78]). Having regard to these matters, "the Court can only conclude that Mr Segler has failed to make any adjustment to his lifestyle so as to make proper provision for payment of child support" (at [79]).

Having chosen as, His Honour found, to live a lifestyle beyond his means, the case was one where "the public interest is not served" in discharging Mr Segler's child support liability. To do so would "encourage deliberate non-compliance with child support obligations, and disobedience to the law and court orders, particularly by those with sufficient resources to maintain such a course" (at [80]).

Note

In *Selkirk and Caporn & Anor* (2016) FLC ¶98-071, the orders pursuant to which Mr Segler was obliged to pay child support were found to be void (at [305]). However, there is no obvious basis to consider these findings as affecting the consideration of the interaction of bankruptcy and child support above.

Section 109(1) of the BA provides for the order of priority of payment of a bankrupt's debts. Section 109 operates subject to s 50 of the *Child Support (Registration and Collection) Act 1988* (Cth). This Act includes provisions which can require an employer to remit to the Child Support Registrar outstanding child support payments from the wages of an employee. If the employer becomes bankrupt, then s 50(1) of the *Child Support (Registration and Collection) Act 1988* (Cth) provides that the obligation to remit the employee's child support falls upon the trustee in bankruptcy. Section 50(2) provides that payment of this liability of the bankrupt employer "has priority over all other debts . . . whether preferential, secured or unsecured". This requires, for instance, the child support debt to be paid in preference to the mortgage of the employer's family home.

Section 50(3) allows the trustee in bankruptcy to be paid his or her remuneration in relation to the administration of the bankrupt estate, and the petitioning creditor to be paid any costs of obtaining the sequestration order against the bankrupt, before the amount is paid to the Child Support Registrar.

Applications by a bankrupt as a payer of child support pursuant to the obligations of the *Child Support Assessment Act 1989* (Cth) are not applications which necessarily come within the exception in s 60(4) *Bankruptcy Act 1966* (Cth) (legal actions which may be continued by a bankrupt after bankruptcy) but are nevertheless "action which are

personal to [the bankrupt]" (*Rowe* v *Official Trustee in Bankruptcy* [2014] FCCA 2819 per Jarrett J at [34]). It was relevant to the court in reaching this conclusion that child support debts "survive bankruptcy. They are debts which are not discharged upon [the bankrupt's] discharge from bankruptcy. They are debts for which [the bankrupt] will remain liable" (at [36]).

¶15-110 Reducing the pool of assets

Section 116(2) of the *Bankruptcy Act 1966* (Cth) (BA) sets out a number of significant exceptions to the property which vests in the trustee in bankruptcy. These include:

- certain household items
- tools of trade to a certain value
- principal means of transport to an indexed value
- superannuation up to the pension reasonable benefits limit subject to contributions made to superannuation on or after 28 July 2006 where the purpose of the transaction was to defeat creditors and so may be clawed back under s 128B and 128C of the BA following the *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007*
- proceeds (and some assets acquired with the proceeds) of certain insurance policies and damages claims, and
- property held by the bankrupt on trust.

¶15-120 Widening the pool of assets

Having established an initial pool of assets for the benefit of creditors, a trustee in bankruptcy has significant powers to expand this pool.

There are five major sources of power for a trustee in bankruptcy to widen the pool of assets.

1. Section 120 of the *Bankruptcy Act 1966* (Cth) (BA) provides that a transfer by a bankrupt for less than market value consideration is void against a trustee in bankruptcy.

- The section applies to transfers in the five years prior to the commencement of the bankruptcy (s 120(1) BA).

- It is a defence under that section if the transfer took place more than two years *before* the commencement of the bankruptcy (or four years if the transferee is a "related entity"), and the transferor proves that the bankrupt was solvent at the time of the transfer (s 120(3) BA).

- The bankrupt is presumed to have been insolvent where he or she has failed to keep proper business books and records (s 120(3A) BA).

Case study

***Bankruptcy Act 1966*, s 120**

H transfers to W an investment property registered in his sole name. No money is received for the transfer. Four years later, H fails to comply with a bankruptcy notice served on him by a creditor and is subsequently made bankrupt.

The transfer will be void against the trustee in bankruptcy who may immediately demand that the investment property be transferred to the trustee. W may defend the transfer on the basis that she can establish that H was solvent at the time he completed the transfer.

If the transfer was made pursuant to *Family Law Act 1975* (Cth) (FLA) orders, the outcome is different. The trustee in bankruptcy must apply under s 79A or s 90SN of the FLA to set aside the orders, in the Family Court or Federal Circuit Court.

2. Section 121 of the BA provides that transfers made with the intention of defeating creditors are void as against the trustee in bankruptcy.

- There is no time limit and any transfer occurring at any time prior to bankruptcy is potentially caught.
- Although it can be difficult to prove a bankrupt's intention, the bankrupt is presumed to have intended to defeat his or her creditors if the trustee in bankruptcy establishes he or she was insolvent at the time (s 121(2)).
- There is a presumption of insolvency where a bankrupt has failed to keep proper books and records (in respect of a business conducted by him or her) (s 121(4A)).

Case study

***Bankruptcy Act 1966*, s 121**

H transfers his investment property to W 10 years before being made bankrupt. H, a barrister, has failed to pay or lodge tax returns for several years prior to the transfer and the evidence indicates that he owed a considerable tax debt at the time of the transfer, which he was otherwise unable to pay. If the court is satisfied that H was insolvent at the time of the transfer, the trustee in bankruptcy will be entitled to recover the property from W.

Again, if the transfer was pursuant to FLA orders the trustee in bankruptcy must first apply to the Family Court or Federal Circuit Court under s 79A or s 90SN to set aside those orders.

3. Section 122 of the BA provides for a trustee in bankruptcy to recover payments made by a bankrupt to his or her creditors in the period (normally, approximately six months) prior to the

commencement of bankruptcy, where this has resulted in those creditors receiving more in respect of their debts than other creditors in the estate.

Case study

***Bankruptcy Act 1966*, s 122**

H transfers to W $10,000 in repayment of a loan made by W to H. There are no assets in the bankrupt estate and the bankrupt's other creditors will not receive a dividend.

The payment to W will be recoverable by the trustee in bankruptcy as it has given W a preference, priority or advantage over the general body of unsecured creditors.

4. The fourth major power of a trustee in bankruptcy to claw back assets for the benefit of creditors is found in Pt VI Div 4A of the BA — orders in relation to property of an entity controlled by a bankrupt or from which a bankrupt derived a benefit. Broadly, there are two types of arrangements covered by Div 4A.

- This division covers entities controlled by the bankrupt and whose value or assets are increased by the bankrupt while he or she receives a benefit. These provisions (s 139A) have been in place since 1987 and have not been successfully used in any reported decision.

- Amendments inserted in 2006 allow the trustee in bankruptcy to claim an interest in property acquired by a natural person (or whose interest is increased) as a result of direct or indirect financial contributions by the bankrupt, where the bankrupt derives a benefit from the property (s 139DA and 139EA).

Case study

***Bankruptcy Act 1966*, Pt VI Div 4A**

W purchases a holiday house in the name of H and pays all mortgage payments and outgoings in respect of the property. H and W holiday in the property from time to time. Three years later, the bankruptcy of W commences.

The trustee in bankruptcy may apply to a court exercising bankruptcy jurisdiction for orders in respect of the property, including that the property vests in the trustee. However, the court retains a discretion as to whether and what orders ought to be made.

5. Subdivision B of Div 4, of Pt VI (Sections 128A to 128N) of the BA enables a trustee in bankruptcy to avoid certain superannuation contributions made with the intention to defeating creditors. These provisions are substantially similar to s 121 BA and focus on the intention of the bankrupt, including a presumed intention arising from the bankrupt's insolvency at the time of the transfer (s 128B(2) and 128C(2) BA). In considering the intention of the bankrupt when making contributions to his or her superannuation, these provisions require a court to have regard to any pattern of superannuation contributions, and whether the maligned payments are "out of character" when considered in light of that pattern (s 128B(3) and 128C(3) BA).

BANKRUPTCY AND FAMILY LAW LEGISLATION AMENDMENT ACT 2005

¶15-130 General

The *Bankruptcy and Family Law Legislation Amendment Act 2005* (BFLLAA) commenced, as far as the interaction between family law

and bankruptcy, on 18 September 2005.[21]

The BFLLAA attempted to simplify the interaction of bankruptcy and family law. It gave jurisdiction to the Family Court in relation to the vested property of the bankrupt.[22]

It did not rectify a flaw in the government's earlier *Rich* amendments,[23] which only granted jurisdiction under the *Family Law Act 1975* (Cth) (FLA) to creditors or government bodies to set aside financial agreements. A registered trustee acting in the interests of all creditors was not entitled under the FLA to challenge a binding financial agreement. Nor does the Official Trustee (the government agency administering the majority of all bankrupt estates) have standing (see *Galanis* considered below in ¶15-140). This omission was attempted to be remedied in 2018 in the *Civil Law and Justice Legislation Amendment Act 2018* in which amendments were introduced to the BA (s 35) to grant jurisdiction in bankruptcy to the Family Court where a trustee seeks to set aside a financial agreement under s 90K(1) or (3) of the FLA (or s 90UM(1) or (6) in relation to financial agreement between de facto partners).

The amendments in the BFLLAA made it clear that the bankruptcy trustee is able and, in some cases, obliged to participate in Family Law Act proceedings if the interests of the bankrupt's creditors may be affected by the making of an order. They also made it clear that the power of a court exercising FLA jurisdiction to adjust property interests is in accordance with family law considerations, even though property has vested in the trustee in bankruptcy. The proper place for the expression of views as to the interests of creditors is in the FLA proceedings.

This was a significant departure from the existing law. Should a non-bankrupt spouse maintain a successful property or maintenance claim against the bankruptcy trustee, this may significantly reduce the assets which would otherwise be available to creditors. This leads to the strange result that if the bankrupt and spouse do not separate (and do not seek property orders as a non-separated legally married couple — see ¶13-015 and ¶15-158), the non-bankrupt's spouse may not be able to claim assets which, if the non-bankrupt spouse

commenced family law property or maintenance proceedings, would be available to be divided between the trustee in bankruptcy and the non-bankrupt spouse.

Footnotes

21 Schedule 2 came into effect on 18 March 2005. Schedule 2 amended the *Bankruptcy Act 1966* (Cth) (BA) and dealt with income contributions. Schedules 3, 4 and 5 came into effect on 15 April 2005. Schedule 3 amended the definition of "maintenance agreement" under the BA to exclude financial agreements from the definition. Schedule 4 dealt with financial agreements entered into after 15 April 2005 by making certain transfers of property pursuant to a financial agreement be treated as acts of bankruptcy. Schedule 5 dealt with creditors and other interested parties by allowing them to have standing in Family Court cases under the FLA including standing in s 106B applications and a right to seek to set aside orders under s 79A.

22 Section 35 of the *Bankruptcy Act 1966* (Cth) (BA): new matrimonial causes were inserted by the BFLLAA in the definition in s 4(1) of the *Family Law Act 1975* (Cth), being proceedings between a party to a marriage and the trustee in bankruptcy in respect of maintenance (para caa) and vested bankruptcy property (para cb).

23 *Family Law Amendment Act 2003*.

¶15-140 Financial agreements

The *Family Law Amendment Act 2000* which commenced on 27 December 2000 inserted a new Pt VIIIA into the *Family Law Act 1975*

(Cth) (FLA) headed “Financial agreements”. At that time, a financial agreement allowed spouses and intending spouses to transfer property without fear of challenge by a bankruptcy trustee. This was because financial agreements fell within the definition of “maintenance agreement” in s 5 of the *Bankruptcy Act 1966* (Cth) (BA) and were free from challenge by a trustee in bankruptcy as an undervalued transaction (under s 120 of the BA).

This led to the unusual situation in which Jodee Rich could transfer several millions of his personal assets to his wife, Maxine, following the collapse of One.Tel Limited, even though Maxine already possessed many more millions of her own assets. See *ASIC* v *Rich* (2003) FLC ¶93-171; [2003] FamCA 1114. ASIC was found not to have standing to set aside the financial agreement, since it was not a party to the marriage.

The *Family Law Amendment Act 2003* inserted a new paragraph (s 4(1)(eab)) into the definition of “matrimonial cause” in s 4(1) of the FLA, being “third party proceedings (as defined in s 4A) to set aside a financial agreement”. Section 4A says that these are proceedings to set aside a financial agreement on the ground specified in s 90K(1)(aa) between parties to a financial agreement (or either of them) and “a creditor” or “a government body acting in the interests of a creditor”. The Full Court in *Official Trustee in Bankruptcy & Galanis & Anor* (2017) FLC ¶93-760 noted (at [28]):

> “Thus the recovery procedures available to trustees in bankruptcy under Division 3 of Part VI of the *Bankruptcy Act*, which cannot be used against transfers made pursuant to maintenance agreements, now could be used against transfers made under financial agreements. Thus, financial agreements made under the Family Law Act were now vulnerable to attacks by trustees in bankruptcy (see the various iterations of section 123(6) of the *Bankruptcy Act*)”.

Strangely, given their role on behalf of creditors generally, the definition did not include trustees in bankruptcy, although a trustee in bankruptcy could have applied as an “interested person” as to the form of orders that the court should make in respect of a financial

agreement that has been set aside (s 90K(3)).

A further anomaly in the court's jurisdiction was identified in the decision in *Official Trustee in Bankruptcy & Galanis & Anor* [2014] FamCA 832 where it was held that the Family Court had no jurisdiction where a bankrupt had been discharged. It was only in 2018 that an amendment sought to address this issue. This is discussed further below.

Case study

***Official Trustee in Bankruptcy & Galanis & Anor* [2014] FamCA 832**

The jurisdiction of a trustee in bankruptcy to seek to set aside a financial agreement under Pt VIIIA FLA was considered in this decision where the facts were:

• 1999	Commencement of relationship
• 2002	Purchase of property — 40% husband, 60% wife as tenants in common (although according to the husband and wife, the whole of the purchase price was paid by the wife and the husband held his 40% on trust for the wife)
• 2006	Marriage
• 2008	Husband became bankrupt
• 2011	Husband discharged from bankruptcy
• 21 Oct 2011	Husband and wife separate
• 13 Feb 2013	Financial agreement between husband and wife providing, inter alia, for husband's interest in the property to be transferred to wife
• Mar 2013	Husband's interest transferred to wife

• 4 Jul 2013	Official Trustee commenced proceedings to set aside financial agreement and recover 40% of the proceeds of sale
• 12 Jul 2013	Contract by wife to sell property
• 13 Aug 2013	Consent orders allowing sale but retaining 40% proceeds
• 30 Jan 2014	Wife filed application querying standing of Official Trustee to bring proceedings

There are several features of this matter which are not explained in the judgment, including:

- How the bankrupt's interest in the property was able to be transferred to the wife. Normally, the trustee in bankruptcy will register a caveat upon his or her appointment in respect of the property of the bankrupt which vests in the trustee pursuant to s 58 BA.

- Why the trustee took the view that it was necessary to set aside the financial agreement. Under the BA, the bankrupt's interest in the property vested in the trustee in bankruptcy and the bankrupt had no title or authority to transfer any portion of that interest to the wife. It would therefore seem unnecessary for the Official Trustee to set aside the financial agreement, as opposed to seeking orders (in the Federal Court or Federal Circuit Court or possibly even the Supreme Court) that the transfer to the wife was of no effect as the bankrupt had no title to transfer. So much appears to have been accepted by the Full Court of the Family Court of Australia upon appeal — discussed below.

In any event, the Official Trustee **did** seek to set aside the financial agreement, and argued that the jurisdiction to do so arose from the definition of "matrimonial cause" in s 4(1)(cb) and (eab) FLA and the definition of "third party proceedings" in s 4A(1) FLA.

The judge noted that the Official Trustee had conceded that the only possible provision of s 4A(1) which could apply was s 4A(1)(b)(iii), namely that the Official Trustee was "a government body acting in the interests of a creditor". However, her Honour was not satisfied that evidence of the role of the Official Trustee was a "government body". Section 4A(2) FLA defines this term as either the Commonwealth, state or territory, or "an official or authority" thereof, however, in her Honour's judgment, "The Official Trustee is no more than a statutory trustee" (at [27]). Her Honour was comforted in this conclusion by the obvious anomaly which would arise if the Official Trustee were to have standing to challenge financial agreements, but private/registered trustees clearly could not. This is, with respect, completely correct and yet at the same time highlights the anomaly inherent in the legislation which allows creditors to challenge financial agreements, but not trustees (official or registered).

Importantly, the judge went on to consider whether the proceedings were otherwise a "matrimonial cause" under s 4(1)(cb) as proceedings between a party to the marriage and "the bankruptcy trustee of a bankrupt party to the marriage" with respect to vested bankruptcy property. In particular, the question arose whether the reference to "a bankrupt party" in s 4(1)(cb)(ii) could apply to the husband, who had been discharged from bankruptcy. Her Honour referred to the Explanatory Memorandum to the BFLLAA which referred to the purpose of the BFLLAA being to ensure that trustees can use the claw back provisions of the BA to recover property transferred prior to bankruptcy, noting that:

> "the emphasis appears to be on closing off the avenue, which may have previously existed, that allowed a debtor to alienate property using a financial agreement so as to make that property unavailable, to his or her trustee in bankruptcy, for the payment of creditors". (at [49])

Therefore, her Honour concluded that it must necessarily follow that the "bankrupt party" must be a person who "is currently a bankrupt and not a person who has been discharged from

bankruptcy", since following discharge from bankruptcy, the husband was released from all debts provable in bankruptcy under s 153 BA.

With respect to her Honour, this conclusion appears to misunderstand the effect of discharge from bankruptcy as it relates to the bankrupt's assets (as distinct from his or her liabilities). It is true that upon discharge, a bankrupt is no longer indebted to his creditors for the liabilities which existed prior to bankruptcy. However, those liabilities still exist and are still provable against the bankrupt estate. So too the bankrupt's estate remains vested in his or her trustee in bankruptcy for the benefit of creditors. For instance, s 152 BA says that it is an offence if a discharged bankrupt does not "even though discharged, give such assistance as the trustee reasonably requires in the realisation and distribution of such of his or her property as is vested in the trustee". Discharge does not re-vest that property in the bankrupt (*Daemar* v *Industrial Commission of New South Wales (No 2)* [1990] 22 NSWLR 178; *Cousins* v *HTW Valuers Cairns Pty Ltd* [2002] QSC 413 per Jones J at [3]).

The judge went on to refer (at [51]) to the very relevant references in the Explanatory Memorandum to the BFLLAA at [36] where it was noted:

> "Specifically, but not, in this instance, helpfully, in relation to clause (cb), the Explanatory Memorandum says at paragraph 36: Item 12 would insert a new paragraph (cb) in the definition of matrimonial cause to include proceedings between a party to a marriage and the bankruptcy trustee with respect to the vested bankruptcy property (defined in item 17) of the bankrupt spouse".

Once it is accepted that the "vested bankruptcy property" remains vested in the trustee after discharge of the bankrupt from bankruptcy, it seems clear that the intention of parliament was that the matrimonial clause in s 4(1)(cb) would not be limited to proceedings between a party to a marriage and a trustee in bankruptcy — but only while and for so long as the bankrupt

remains bankrupt.

Nevertheless, the judge disagreed and found that had parliament intended to give jurisdiction to proceedings involving a trustee of a discharged bankrupt "those words could have been included" [at 52]. Her Honour dismissed the Official Trustee's application and ordered costs in favour of the wife on the solicitor/client basis.

This judgment would have significant consequences for non-bankrupt spouses. Its effect was that the Family Court lacked jurisdiction to hear an application by a non-bankrupt spouse against the trustee in bankruptcy in respect of vested bankruptcy property where the bankrupt was (or subsequently became) discharged from bankruptcy.

This would seem to return the law in relation to such cases to that which existed prior to the BFLLAA, namely that the trustee would retain the vested bankruptcy property to the exclusion of the non-bankrupt spouse. Following this decision, careful consideration will need to be given to jurisdictional issues at an early stage.

An appeal from the decision was filed by the Official Trustee in Bankruptcy. In *Official Trustee in Bankruptcy & Galanis & Anor* [2015] FamCAFC 212, however, an application for expedition was refused even though Aldridge J accepted that "the appeal raises issues of general importance" (at [6]) and despite the Official Trustee's suggestion that (at [4]):

> "the use of the financial agreements by discharged bankrupt's (sic) to transfer unrealised vested property will increase the costs of administration of bankrupt estates, increase the numbers of court proceedings bankruptcy trustees become involved in to recover vested property and as a consequence there will be a potential loss of returns to creditors".

760

On appeal, the Full Family Court (Bryant CJ, Aldridge & Austin JJ) noted (at [9]) that in entering into the financial agreement the husband:

> "could only transfer to the wife whatever interest he in fact held in the property, which was, of course, subject to the wife's claims of a resulting trust in her favour and the vesting of whatever beneficial interests were held by the husband in the Official Trustee. If these claims were maintained, it is difficult to see that the husband could transfer anything other than a bare legal title pursuant to the agreement. This was because he held his beneficial interest either for the wife or the Official Trustee".

The Full Court confirmed that the appeal was about the jurisdictional issue, and not about substantive rights (at [16]):

> "this appeal is not about the substantive rights of the Official Trustee to recover whatever property has vested in it as a result of the husband's bankruptcy. If, in fact, at the time of that bankruptcy, the husband held an interest in the C property, the Official Trustee will be able to pursue its claim against that property in the Supreme Court of New South Wales or the Federal Court of Australia, if the present appeal is unsuccessful".

This begs the question why the application (and the appeal) was therefore necessary at all, a point which the Full Court did not address.

On the jurisdictional issue, the court noted that:

- the amended definition of matrimonial cause in s 4(1), subclause (eab) of "government body acting in the interests of a creditor" was inserted "to overcome the definition in *Australian Securities and Investments Commission & Rich* (2003) FLC ¶93-171" (at [25]), and

- the definition of bankruptcy trustee of a bankrupt party to the marriage in subclause (cb) was inserted by the BFLLAA.

After considering the definition of "bankrupt" under s 5 of the BA, and

the need for use of the term “bankrupt” to be considered “in its particular statutory context”, the Full Court noted that in respect of the latter clause the issue was:

> “whether the use of the phrase ‘bankrupt party’ in definition (cb) is merely to distinguish that party from the non-bankrupt party to the marriage or whether it was intended to limit claims by trustees to hose involving undischarged bankrupts — in other words, does the phrase have a temporal limitation” (at [38]).

The Full Court then noted that the phrase “bankrupt party to a marriage” was created by the BFLLAA and is not used outside the FLA and the Family Law Rules 2004 (Cth). Further, the BFLLAA also amended s 35(1)(a) of the BA to give jurisdiction to the Family Court “If at a particular time . . . a party to a marriage is a bankrupt . . . ” which indicated to the Full Court that the FLA jurisdiction is limited by a requirement that a party be undischarged from bankruptcy (at [43]). Similar wording included by the BFLLAA in s 79(11) and (12) FLA requires the court to join the trustee where the bankrupt is undischarged. The Full Court considered the purpose of a trustee setting aside a financial agreement, being to recover property which would otherwise have vested in the trustee, and that this must mean property acquired before discharge, since “The trustee has no interest in any property of a bankrupt acquired after discharge” (at [49]). This supported the view that “bankrupt” in (cb) is “intended to have adjectival force so as to limit the phrase ‘bankrupt party’ to meaning an undischarged bankrupt” (at [50]).

The Full Court agreed with the trial judge that “it is unlikely that the legislature intended that the trustee could commence proceedings to set aside a financial agreement at any time prior to the expiration of 20 years from the date of bankruptcy”. This was a reference to s 127(1) BA which allows this period for a trustee to recover the bankrupt’s property (though disclosed property revests in the bankrupt six years from discharge under s 129AA BA unless this period is extended by the trustee).

According to the Full Court (at [55]):

> “The effect of this reasoning is that a trustee in bankruptcy would

> not be able to apply to set aside a financial agreement entered into after a party's discharge from bankruptcy. As we have pointed out, however, the trustee retains the property that has vested in him or her and may pursue any relevant legal or equitable remedies to recover it. . . . The point is that the trustee is permitted to stand in the shoes of a person who is bankrupt — that is, an undischarged bankrupt — for the purpose of participating in proceedings for the settlement of the property of the parties to the marriage".

Given the unusual circumstances of this case, the Full Court's decision is relevantly simple. As the financial agreement was entered into after discharge from bankruptcy, there was no jurisdiction for the Family Court to set aside the financial agreement at the instance of the trustee in bankruptcy. However, for the reasons set out above it is not clear why the trustee would need or wish to. The bankrupt's property remains vested in the trustee, as the Full Court found, and the bankrupt had no ability to deal with it in the first place. If the financial agreement relates to property acquired by a person after discharge from bankruptcy, then the trustee could have no claim to it anyway.

However, in different circumstances, it is respectfully suggested that the temporal limitation of the court's jurisdiction on bankruptcy could create significant issues for the interaction between bankruptcy and family law. To take one example, if a husband were to transfer his half interest in his property to his wife, before becoming bankrupt and separating from her, the trustee could recover this transaction as a voidable transaction under s 120 or s 121 BA. If the trustee were to commence those proceedings within three years, the wife could bring property settlement proceedings under the FLA to adjust any amount which the trustee was able to recover from her. However, if the trustee were to commence those proceedings at any time after discharge of the husband from bankruptcy, it would seem that the Full Court is suggesting there would be no jurisdiction for the wife to commence any FLA proceedings, and the trustee's claim would be determined under the BA alone, potentially leaving the wife without remedy. The Full Court does not consider these issues, and the full implications of

this judgment remain to be seen.

The Full Court also upheld the trial judge's finding that the Official Trustee was not a "government body acting in the interest of a creditor" as it was not an official of the Commonwealth (at [67]).

The grounds upon which creditors or agencies may apply to set aside a financial agreement between parties to a marriage are set out in s 90K(1)(aa) of the FLA, namely that:

> "a party to the agreement entered into the agreement:
>
> (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
>
> (ii) with reckless disregard of the interests of a creditor or creditors of the party. . . "

Section 90UM(1)(b) of the FLA is in identical terms and relates to setting aside a financial agreement between parties to a de facto relationship.

There have been few reported decisions dealing with an application to terminate a financial agreement under s 90UM(1)(b) or s 90K(1)(aa). The former section was considered in *Lincoln (deceased) & Miller* [2016] FamCA 547.

Case study

Lincoln (deceased) & Miller [2016] FamCA 547

Prior to her death, the applicant de facto wife commenced proceedings to uphold a financial agreement entered into with the respondent in 2010 during a de facto relationship which the wife alleged commenced in 2009 but which the respondent denied existed at all. The respondent sought to have the financial agreement set aside as having been entered into under duress. The wife was diagnosed with a fatal melanoma on 24 May 2012 and the parties separated in June 2012, the wife signing a separation declaration on 21 June 2012. The couple also had a partnership between their two companies which resulted in litigation in August 2012, and the appointment of a receiver. The appointment of a receiver led to

disagreement with the respondent regarding the receiver's fees, which in turn led to his bankruptcy. At the time of the hearing, at least, the respondent remained an undischarged bankrupt. The wife died in 2012 and her legal personal representatives were substituted to the proceedings. There were various other proceedings but no evidence as to their status (including any role the trustee had taken in them), so that the court (Carew J) held that "The purpose of the current proceedings is unclear given the unknown status of the proceedings in other Courts. If they have been discontinued or abandoned, there seems little point in the current proceedings" (at [23]). This was particularly so given the respondent "eschews the existence of a de facto relationship and does not seek any property settlement pursuant to the Act" (at [24]).

Her Honour considered the status of the respondent to seek an order that the financial agreement be set aside. She noted that s 60 BA automatically stays any proceedings commenced by a person who becomes bankrupt, until the trustee makes an election to prosecute or discontinue the action. Carew J considered that although the respondent had not "commenced" the proceedings his response could be considered in the nature of a counterclaim which might be stayed under s 60. However, in *Re Timothy John Spratt*; *Ex Parte: Wilson Joseph Wilde* and *Ernest George Harris & Ors* v *Janelle Kaye Spratt and P & S Deco Quarries Pty Ltd and Robert William Peach and John Robert Rees* [1986] FCA 33, Pincus J had found that a counterclaim would be an action within the meaning of s 60(2) but only to the extent that a monetary set-off was exceeded. So too in *State of Queensland* v *Beames* [2003] QSC 339, a counterclaim was found to have been stayed by operation of s 60(2) and 60(3). Her Honour found that the response filed by the husband was "an action commenced" within the meaning of s 60(2) (at [36]). Her Honour considered *Trent & Rowley* [2014] FamCA 447, a case in which the trustee abandoned property settlement proceedings commenced prior to bankruptcy and the court found that the action was not a personal action which bankrupt could continue. Instead, the bankrupt was limited to seeking to review the trustee's decision under s 178 BA (note from 1 September 2017 the review of trustee's decisions is no longer found in s 178 but rather s 90-15 of the Insolvency Practice Schedule (Bankruptcy) which is Sch

2 to the BA). Following this decision, her Honour found the response filed by the husband could not be continued without the trustees election, and was not within the exception in s 60(4) for actions continued by a bankrupt in respect of personal injury or wrong done to the bankrupt (at [40]–[41]).

In any event, the court found that there was a de facto relationship and that the financial agreement should not be set aside under s 90UM as the respondent had not been under duress when entering into the agreement.

Another important decision is *Grainger & Bloomfield and Anor* (2015) FLC ¶93-677.

Case study

Grainger & Bloomfield and Anor (2015) FLC ¶93-677

The wife suffered a judgment to a creditor of $2.1m in late 2011. On 14 October 2012, she was served with a bankruptcy notice. On 1 November 2012, the bankrupt and her husband entered into a financial agreement purporting to transfer the bankrupt's interest in the matrimonial property to her husband and received an indemnity in relation to the mortgage. The wife filed a debtor's petition and became bankrupt on 7 January 2013. The judgment creditor, Ms Bloomfield, sought to set aside the financial agreement under s 90K(1)(aa)(i) FLA and also sought orders under s 90K(3) FLA for the transfer by the husband of the matrimonial property to the bankrupt estate, or alternatively, orders for the payment of an equivalent sum of money to the bankrupt estate. The husband applied to strike out the application on the basis the wife was bankrupt. On appeal, the court held:

- Jurisdiction exists for a matrimonial cause, which includes s 4(1)(eab) FLA third party proceedings, to set aside a financial agreement and "third party proceedings" in s 4A FLA is defined to include proceedings between a party to a marriage and a creditor or government body acting in the interest of a

creditor (but does not include a trustee in bankruptcy) (at [28]).

- Where a party to a financial agreement has become bankrupt, a creditor remains "a creditor" for the purposes of s 90K(1)(aa) FLA and "an interested person" for the purposes of s 90K(3) FLA. This is so, even though it was accepted that any relief obtained by the creditor would be for the benefit of the whole of the bankrupt estate not, merely, the creditor (at [34]) and that, due to later amendments, creditors of a bankrupt do not have standing in relation to s 79 property settlement proceedings (at [37], see s 79(10A)). The "better view", according to the court, is that "it is the legislative intention that, unlike the position of a creditor in relation to property settlement proceedings, the entitlement of a creditor to apply to set aside a financial agreement under s 90K(1)(aa) or s 90UM(1)(b) does not cease on the bankruptcy of the debtor, who is a party to the agreement". It should also be noted that leave of a court with jurisdiction in bankruptcy is required under s 58(3) (at [48]).

- That it was not appropriate to strike out an application for orders sought by the creditor under s 90K(3). Although the court did not expressly sanction the powers sought to be exercised by the creditor, it discussed the scope of judicial power under similar provisions of the FLA in s 87(9)(b) and considerations in *Chemaisse, in Marriage of [No 3]* (1990) 97 FLR 176 which the court held:

  > "can be read as cautioning against an over-expansive application of a provision such as s 87(9)(b) or s 90K(3). But they also suggest that the application of such a provision will depend upon the facts of the case in which the provision is to be applied".

  Given the facts in this matter had not been determined, the court was not prepared to shut out the creditor from seeking the relief claimed.

- In seeking to set aside a financial agreement, a creditor is limited to relying upon s 90K(1)(aa) and may not extend to raising other grounds, such as alleging failure to comply with s 90G FLA (at 82]).

In the absence of the findings in *Grainger*, the unfortunate lacuna in the FLA would have allowed for flagrant abuse by parties to a relationship who transfer assets under a financial agreement before one of them becomes bankrupt. Given that a Trustee in Bankruptcy has no standing to set aside a financial agreement under the FLA (since they do not fall within the definition of third party proceedings), if the court had found that upon bankruptcy creditors too ceased to have standing, there would be no one (other than presumably the spouse) with standing to apply to set aside a financial agreement entered into weeks before the bankruptcy of one of the parties to it. It would be better if the legislature fixed the original error in the *Rich* amendments which omitted to include trustees as persons with standing, however, at least creditors retain this right. It should be noted that the power would remain with the trustee in bankruptcy to seek to set aside the financial agreement under s 120 and/or s 121 BA (see *Official Trustee in Bankruptcy & Galanis & Anor* (2017) FLC ¶93-760 at [28]).

In another relevant decision in this area, *Megna & Anor v Marshall*,[24]

Brereton J was prepared to grant asset preservation orders preventing a financial agreement being effected before a creditor had had the opportunity to apply to set it aside.

Case study

Megna & Anor v Marshall [2005] NSWSC 1347; *Megna & Anor v Marshall* [2006] NSWSC 70

Mr Megna obtained a defamation verdict against Mr Marshall and his business partner, Mr Tory. Damages were yet to be assessed. Shortly afterwards, Mr Marshall and his wife entered into a financial agreement by which it appears that Mr Marshall's property interests

were to be transferred to his wife (who was not a party to the defamation proceedings).

Mr Tory wished to have the opportunity to apply to set aside the financial agreement under s 90K. He also sought an asset preservation order preventing the husband from taking any steps to carry into effect the financial agreement pending the outcome of his proposed application.

Brereton J found that the New South Wales Supreme Court had jurisdiction to hear the proceedings under s 90K of the FLA to set aside the financial agreement under s 4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). He found that there was sufficient risk of the disposition of the husband's assets which "ought to be available to satisfy a judgment against him" (at [6]) and that there was a prima facie case for final relief, even though the damages for defamation were yet to be quantified. The judgment against Mr Tory (who would be jointly liable for those damages) "provides a strongly arguable case that Mr Tory will have a claim for contribution against Mr Marshall" (at [7]). The Mareva orders were granted.

When the matter returned to court for hearing of the application to set aside the financial agreement, orders were made by consent to this effect. There was therefore no contest on the scope of the court's power to set aside a binding financial agreement at the instigation of a creditor. However, his Honour:

> "was satisfied, and made the order on the basis, of at least the ground referred to in s 90K(1)(a)(ii) [sic: s 90K(1)(aa)(ii)], namely that Mr Marshall entered into the subject agreement with reckless disregard to the interests of a creditor or creditors of the party, if not subparagraph (i) namely, for a purpose or purposes that included the purpose of defeating a creditor".[25]

His Honour ordered Mr Marshall pay the costs of Mr Megna *and* Mr Tory, and stood over the question of costs against Mrs Marshall.

Mrs Marshall also gave undertakings to the court not to commence proceedings to adjust property interests against the husband without notice to the other parties (and to notify them if the husband

commenced any such proceedings).

In a postscript to this case, on 25 June 2010, judgment was entered in favour of Mr Megna against David John Marshall and Richard Martin Tory in the sum of $395,000; and in favour of Mr Lloyd against each defendant in the sum of $220,000.[26] Interest and costs were also awarded against the defendants.[27]

Bankruptcy and Family Law Legislation Amendment Act 2005 (BFLLAA)

The BFLLAA excluded financial agreements from the definition of "maintenance agreement" in the *Bankruptcy Act 1966* (Cth) (BA).[28]

This means a bankruptcy trustee may challenge a financial agreement as an undervalued transaction, a transaction to defeat creditors, or even as a transaction which has a preferential effect (if otherwise applicable), in the same way that any transfer of assets by the bankrupt to a third party may be challenged. The Full Court in *Official Trustee in Bankruptcy & Galanis & Anor* (2017) FLC ¶93-760 noted (at [28]):

> "Thus the recovery procedures available to trustees in bankruptcy under Division 3 of Part VI of the *Bankruptcy Act*, which cannot be used against transfers made pursuant to maintenance agreements, now could be used against transfers made under financial agreements. Thus, financial agreements made under the *Family Law Act* were now vulnerable to attacks by trustees in bankruptcy (see the various iterations of section 123(6) of the *Bankruptcy Act*)".

Case study

Sutherland v Byrne-Smith [2011] FMCA 632

The court considered an application by a trustee in bankruptcy to set aside a transfer pursuant to a financial agreement entered into between de facto parties four months before the de facto husband filed a debtor's petition.

Driver FM accepted (at [20]) that the trustee could bring the application under s 120 and 121, relying upon the decision of Collier J in *Combis, Trustee of the Property of Peter Jensen (Bankrupt)* v *Jensen* [2009] FCA 778, and following the amendments in the BFLLAA.

Driver FM found that the transfer was a transfer at undervalue, as there was no consideration given by the de facto wife. This was because:

> "The parties' contributions to the marriage (both financial and non-financial) cannot be regarded as consideration for a transfer because such contributions constitute past consideration and past consideration is no consideration: *Official Trustee* v *Lopatinsky* [(2003) 30 Fam LR 499]; *Official Receiver* v *Huen* [2007] FMCA 304 (16 March 2007) per Lucev FM at [31]. This applies *mutatis mutandis* to de facto relationships" (at [27]).

Driver FM also found that an informal separation agreement is no consideration even if supported by forbearance to sue, since property settlement orders could still be sought in a Family Law Court. Similarly with a financial agreement, "these may be set aside or terminated by the Family Court or Federal Circuit Court on application by a party under s 90K or s 90UM of the Family Law Act" (at [27]). This seems, with respect, not to give full credit to the purpose of financial agreements to oust the jurisdiction of the Family Law Courts.

In the absence of adequate consideration therefore the transfer was void pursuant to s 120 of the BA.

Driver FM rejected the trustee's argument that the transfer was also void pursuant to s 121 of the BA as an attempt to defeat or delay creditors. His Honour found that the main purpose of the transfer was to secure funds in order to complete the renovation of the property so that it could be sold with the possibility of a capital gain.

Although he had already found that the transfer was void, Driver

FM nevertheless went on to consider the Family Law Act interests of the wife. His Honour found that the FLA did not apply because the parties had not been in a de facto relationship for more than two years. The court found that the presumption of a resulting trust was rebutted because the property was owned and secured jointly. However, his Honour found that the property was held on a constructive trust by the de facto wife such that it was unconscionable for the non-bankrupt wife to deny the contributions made by the bankrupt, and his interest in the property (relying upon his Honour's own decision in *Official Trustee v Brown* discussed below). The trustee accepted that Ms Byrne-Smith was entitled to 60% of the proceeds of sale of the property having regard to her greater contributions prior to and after cohabitation.

In addition, if entering a financial agreement leaves a person with insufficient assets to pay his or her creditors, then this itself is an act of bankruptcy.[29] A creditor may rely upon this act of bankrupt to file a creditor's petition for a sequestration order against the transferor. Alternatively, if the transferor becomes bankrupt for other reasons, this act of bankruptcy may be important as it may affect the date of the commencement of any bankruptcy under s 115 BA.[30]

Legislative amendments to overcome the Full Court's decision in *Official Trustee in Bankruptcy & Galanis & Anor* (2017) FLC ¶93-760

Following the decision in *Galanis,* the Government dealt with the two jurisdictional issues raised by that case. In *Civil Law and Justice Legislation Amendment Act 2018*, amendments were introduced:

- to the BA (s 35) to grant jurisdiction in bankruptcy to the Family Court where a trustee seeks to set aside a financial agreement under s 90K(1) or (3) of the FLA (or s 90UM(1) or (6)) in relation to financial agreement between de facto partners, and

- inserted a definition of bankruptcy in s 4 the FLA and confirmed in

s 4(6) that references to a bankrupt include references to someone who has been discharged from bankruptcy but whose property remains vested in the trustee in bankruptcy.

Footnotes

24 *Megna & Anor* v *Marshall* [2005] NSWSC 1347.

25 *Megna & Anor* v *Marshall* [2006] NSWSC 70 at [7].

26 *Megna* v *Marshall* [2010] NSWSC 686.

27 *Megna* v *Marshall (No 2)* [2011] NSWSC 52.

28 Schedule 3 item 1 to the *Bankruptcy and Family Law Amendment Act 2005*, amending the definition of "maintenance agreement" in s 5(1) of the BA.

29 Section 40(1)(o) of the BA. According to the Full Family Court in *Official Trustee in Bankruptcy & Galanis and Anor* (2017) FLC ¶93-760: "The evident aim of the legislature is to prevent the use of financial agreements to transfer assets for the purpose of defeating or delaying creditors" (at [30]).

30 See ¶15-090 above.

¶15-150 Streamlining bankruptcy and family law proceedings

If an application is made for property settlement or maintenance orders, and one of the parties is bankrupt or subject to a personal insolvency agreement, then the trustee in bankruptcy has the right to apply to be joined as a party to the proceedings and, if this occurs, the

court must join the trustee as a party if the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order.[31] The non-bankrupt spouse may choose to join the trustee to the proceedings.

If a party is bankrupt, the creditors are generally unable to participate in the proceedings to the extent the debt is provable in the bankruptcy (s 79(10A) *Family Law Act 1975* (Cth)). However, the court may grant leave in certain circumstances (*Vincent & Vincent* [2016] FCCA 227 discussed below at ¶15-152).

Similarly, once a trustee of a personal insolvency agreement (an agreement between a bankrupt and his or her creditors under Pt X of the BA) is joined as a party to the proceedings, the bankrupt spouse is not entitled, without leave of the court, to make any submissions in connection with the property that has vested in an application for property settlement or maintenance (s 79(15) or s 90SM(15) and s 74(6) or s 90SE(6)). The court must not grant leave unless there are exceptional circumstances (s 79(16) or s 90SM(16) and s 74(7) or s 90SE(7)).

In relation to property that does not vest in the trustee (such as superannuation), it would be difficult to see the court not granting leave to the bankrupt spouse in respect of this part of the case.

In *Pacelli & Hopkinson & Anor* [2010] FMCAfam 1248 the Federal Magistrates Court ordered that a bankrupt husband be reinstated as a party to property settlement proceedings. He had commenced the proceedings before becoming bankrupt. His trustee in bankruptcy was joined as a party to the proceedings and reached agreement with the non-bankrupt wife before final orders were made. However, the final orders omitted to deal with the husband's superannuation. The husband applied under s 79A to set aside the consent orders. The court found the application to be more directed at complaints against the trustee's administration of the bankrupt estate. His application was dismissed and "because of his continued disruptive approach to the proceedings, orders were made removing [him] from the proceedings".[32] However, when the superannuation issue was raised, the court noted that superannuation did not vest in the trustee in

bankruptcy, and the court found that the husband had standing to be heard in respect of non-vested property.[33] The court also noted that a trustee may apply to set aside orders under s 79A and that those rights extend to non-vested property under s 79A(5). The trustee "is taken to be a person whose interests are affected by a s 79 order which includes all matrimonial property — vested and non vested" (at [31]). This assisted the court in concluding that there was nothing in s 79A(5) which excluded the rights of a bankrupt to pursue action in respect of non-vested property (at [33]). This was the case, even though the effect of the orders was advantageous to the bankrupt (in that no orders had been made giving the wife any interest in the superannuation).

Trustees are not able to commence proceedings under s 79 or s 90SM. Trustees, however, have standing to bring proceedings under s 79A or s 90SN seeking to set aside orders that have already been made by the court.

Footnotes

31 See s 79(11) or s 90SM(11) (as to property settlement) and s 74(2) or s 90SE(2) (as to maintenance orders) of the FLA. In respect of debtors under personal insolvency agreements, see s 79(14) and 90SE(5). See also the discussion regarding *Official Trustee in Bankruptcy & Galanis & Anor* (2017) FLC ¶93-760 above which concluded that the jurisdiction only exists while the party is an undischarged bankrupt.

32 At [10] per Burnett FM.

33 At [23] and [33].

¶15-152 Property settlement — *Family Law Act 1975*, s 79 and s 90SM

Section 79(1) of the *Family Law Act 1975* (Cth) (FLA) deals with the alteration of property interests, and reads as follows:

> "(1) In property settlement proceedings, the court may 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; or
>
> (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage — altering the interests of the bankruptcy trustee in the vested bankruptcy property;
>
> including:
>
> (c) an order for a settlement of property in substitution for any interest in the property; and
>
> (d) an order requiring:
>
> (i) either or both of the parties to the marriage; or
>
> (ii) the relevant bankruptcy trustee (if any);
>
> to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines".

Section 90SM(1) is in similar terms and applies to the alteration of property interests of de facto couples.

A non-bankrupt spouse can apply for a property settlement under the FLA, even though the former spouse is a bankrupt or is a debtor subject to a personal insolvency agreement at the time the application is made. Even if a spouse becomes bankrupt during the proceedings, the application can continue and the non-bankrupt spouse can seek orders with respect to non-vested property.

A non-bankrupt spouse can apply for property settlement orders

against a bankrupt spouse's trustee, even though the time for commencement has expired, if the bankrupt spouse (not the trustee) consents (see *Hurley & Hurley (No 2)* [2017] FamCA 19). This is because the time limit in s 44(3) FLA grants an exception where there is "consent of both parties to the marriage" and even though s 79(12) FLA makes clear that the bankrupt spouse has no entitlement to be heard in respect of vested bankruptcy property without leave, this does not alter the bankrupt's right to consent to the property settlement proceedings being commenced in the first place, even if this was "well out of time and, importantly in this case, without his trustee having an opportunity to object" (at [9] per Cronin J).

The trustee in bankruptcy may be joined as a party to Family Court proceedings by virtue of s 79(11) which provides as follows:

> "If:
>
> (a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and
>
> (b) either of the following subparagraphs apply to a party to the marriage:
>
> (i) when the application was made, the party was a bankrupt;
>
> (ii) after the application was made but before it is finally determined, the party became a bankrupt; and
>
> (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and
>
> (d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;
>
> the court must join the bankruptcy trustee as a party to the proceedings".

Section 90SM(14) is in similar terms and relates to de facto couples.

However, trustees in bankruptcy will be reluctant to become involved in family law proceedings where the prospects for recovery may be limited or unclear, or where the costs will exceed the benefits likely to be obtained. In such circumstances, the court may consider allowing creditors who wish to be heard to intervene. This was the case in *Vincent & Vincent & Anor* [2016] FCCA 227 and in *Van Dyke* v *Lo Pilato*, *in the matter of Sidhu* [2016] FCA 1347.

Case study

Vincent & Vincent & Anor [2016] FCCA 227

In this matter, a significant creditor had intervened in proceedings between a wife and husband, the latter of whom became bankrupt during the proceedings. The creditor was owed $625,000 out of a total of $667,847 owing by the bankrupt husband. The Official Trustee indicated it did not intend to participate in the proceedings. The court noted the issue for trustees:

> "there is a practical problem if the trustee is not in funds and the creditors cannot fund the suit. In such a situation it would be unjust to the creditors not to allow them to represent themselves and pursue the suit for the benefit of the trust estate (indirectly for their even benefit). Whilst such an exercise is unusual, it is open if the justice of a particular case demands. To hold otherwise would allow impecuniosity (potentially caused by the bankrupt) to deny a significant creditor a remedy" [at 13].

Interestingly in determining whether this was an appropriate case to allow a creditor to intervene, Riethmuller J applied cases which have considered the Supreme Court's inherent jurisdiction to allow proceedings to be brought by any interested party in the name of a company. It is not clear why these cases were considered directly relevant in a family court application by a bankrupt for leave to intervene. Relevantly, however, in the present matter it involved an assessment of:

- whether the creditor's application has "reasonable prospects of success and some tangible benefit" — in this regard the question

was “whether the cause of action asserted in the pleading, together with such evidence as is relied on in the application, demonstrates an arguable case for the relief which the proposed litigation would seek” (at [17], quoting Austin J in *Cadima Express* v *DCT* [1999] NSWSC 1143 at [45])

- the attitude of the trustee in bankruptcy, and
- whether practical considerations support the proposed action.

In the circumstances of this matter, the court was satisfied that the creditor should be granted leave to intervene to defend the bankrupt’s estate from the wife’s application. As a significant portion of the husband’s assets consisted of superannuation which did not vest in the trustee, the court found it was appropriate that the husband remain as the first respondent to defend those interests.

Case study

Van Dyke v Lo Pilato, in the matter of Sidhu [2016] FCA 1347

On 1 July 2013, Ms Van Dyke obtained the benefit of an order that Mr Sidhu pay her equitable compensation (later assessed at $594,028) together with costs. On 1 November 2014, Mr Sidhu and his wife entered consent orders in the Family Court of Australia to transfer Mr Sidhu’s property interests to his wife, together with cash in the sum of $580,000, without disclosing the claim of Ms Van Dyke. He filed a debtor’s petition on 6 March 2015. The court was satisfied that leave needed to be granted to the creditor under s 58(3) to commence proceedings under the FLA to set aside the consent orders, but was also satisfied that in the circumstances of the case that leave was appropriate, noting that Ms Van Dyke sought the recovery of property for inclusion in the bankrupt estate where the trustee was not in funds to undertake this action. Even though it is “preferable that the trustee in bankruptcy bring the action himself” (at [31]) per Katzmann J) there was no evidence that he was able to be

placed in funds so to do.

Leave was also granted to a creditor to intervene in *Martin & Martin* [2015] FamCA 260 where Cronin J considered an application by a law firm, which was owed approximately $850,000 by the wife in relation to the family law proceedings, and in circumstances where shortly before the hearing of what had become proposed consent orders between the husband and the wife, the wife filed a debtor's petition and became bankrupt. The proceedings were subsequently dismissed until the creditor filed an application to enforce earlier consent orders, providing for payment of $1m to the wife from the sale of certain properties, against the husband. It was relevant that the court was satisfied that the firm was a secured creditor and that the trustee neither opposed nor supported the continuation of the proceedings. It was also relevant that the husband and the wife were found to have been attempting to avoid property falling into the hands of the wife in the proceedings which would have been caught by the law firm's charge (at [35]).

The Family Court's general approach to applications under s 79 or s 90SM to adjust property interests is discussed at ¶13-040.

The creditors of one or both of the parties are relevant in considering the property of the parties by valuing the assets and deducting the parties' liabilities. In *Biltoft and Biltoft*,[34] the Full Court confirmed this approach:

> "A general practice has developed over the years that, in relation to applications pursuant to the provisions of s 79, the Court ascertains the value of the property of the parties to a marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset . . . Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the Court ascertains the value of their property by deducting from the value of their assets the value of

their total liabilities, including the unsecured liabilities".

There are exceptions to this approach, and no strictly mathematical or accountancy approach will apply in all cases,[35] especially if a particular debt has been incurred in deliberate or reckless disregard of the other party's potential entitlement under s 79 (or s 90SM) of the FLA. The approach may also be re-considered following the High Court's decision in *Stanford & Stanford* (2012) FLC ¶93-518. See ¶13-200.[36]

In light of these general principles and the way the BFLLAA amended s 75(2) (see the next section), there is no definitive view as to the weight to be given to the interests of creditors in the assessment of the assets and liabilities, compared with including the interests of creditors as merely one of the factors to be taken into account under s 75(2) or s 90SF(3).

The Family Court can only deal with "vested bankruptcy property" and not property which might be recovered by a bankruptcy trustee pursuant to the income contribution regime or the voidable transaction provisions under the *Bankruptcy Act 1966* (Cth) (BA).[37] These moneys, according to Kemp FM, are held solely for the purposes of distribution among creditors and not for the benefit of the bankrupt. They are therefore outside the court's jurisdiction under the FLA.[38]

Footnotes

34 *Biltoft and Biltoft* (1995) FLC ¶92-614 at p 82,124.

35 *Prince and Prince* (1984) FLC ¶91-501 at p 79,076.

36 *Kowaliw & Kowaliw* (1981) FLC ¶91-092.

37 *Zachary* v *Zachary* [2008] FMCAfam 1209.

38 At [30].

¶15-154 Adjusting property interests — *Family Law Act 1975*, s 75(2)(ha) and 90SF(3)(i)

Section 75(2)(ha) was inserted into the *Family Law Act 1975* (Cth) (FLA) by the *Bankruptcy & Family Law Amendment Act 2005* (BFLLAA). It provides for the court, before making any orders adjusting the interests of the bankrupt estate in respect of vested bankruptcy property, to consider:

> "(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant. . . " (s 75(2)(ha)).

Section 90SF(3)(i) is in similar terms and relates to parties to a de facto relationship.

The court has, under s 79(1)(b) and 90SM(1)(b), the discretion to alter the interests of the "bankruptcy trustee in the vested bankruptcy property". In doing so, the court will consider contributions and the s 75(2) or s 90SF(3) factors. When the court examines s 75(2)(ha) or s 90SF(3)(i), the court will look at the interests of creditors and balances them against those of the family. Neither the trustee or the non-bankrupt spouse has priority. Further "[n]othing in the Pt VIII of the Act suggests an intention to differentiate between Commonwealth, State and Territory revenue authorities or an intention to differentiate between revenue authorities and other creditors" (*Commissioner of Taxation v. Tomaras* (2018) FLC ¶93-874; [2018] HCA 62 per Kiefel CJ and Keane J at [3].

It is not clear how this consideration interacts with the identification of liabilities when determining the property pool (see the preceding section).

Under s 75(2)(ha) and 90SF(3)(i), the court is to have regard to the effect on "the ability of a creditor of a party to recover the creditor's debt". There is no reference to a trustee in bankruptcy. In bankruptcy, it is the unsecured creditors whose position is to be considered. However, s 109 of the *Bankruptcy Act 1966* (Cth) (BA) sets out a priorities regime for the distribution of the bankrupt's estate. Unsecured creditors rank after various other priority claims, including

costs and expenses of the trustee.

One matter that will need to be considered in the FLA context, is the situation where there are insufficient assets in the bankrupt estate to make a distribution to unsecured creditors. Arguably, there is nothing for the Family Law Court to take into account as the making of property or maintenance orders will not have any "effect" on the creditor's ability to recover a debt.

Example

***Family Law Act 1975*, s 75(2)(ha) and 90SF(3)(i)**

The only matrimonial asset the subject of property settlement proceedings is a joint bank account holding the amount of $100,000. The trustee in bankruptcy of one party is joined to proceedings against the non-bankrupt spouse.

The taxed costs of the petitioning creditor are $10,000. The trustee's legal fees for the Family Court proceedings total $40,000 and the trustee's own remuneration is $50,000. Because each of these amounts will normally have priority over the claims of ordinary unsecured creditors (s 109(1)(a) of the BA), there is no prospect of creditors being paid a dividend in the bankrupt estate, even if the trustee were to successfully recover 100% of the matrimonial assets.

Arguably, when the court comes to consider s 75(2)(ha) or s 90SF(3)(i) of the FLA and the effect of any proposed order on "the ability of a creditor of a party to recover the creditor's debt", the court could conclude this criteria is of no relevance because creditors (with the possible exception of the petitioning creditor in respect of the costs of the bankruptcy proceedings) will not be receiving a dividend anyway.

A further consideration is the extent to which the court will adjust the property interests of the bankrupt which do not vest in the trustee in bankruptcy. For example, in taking into account the interests of creditors, the court may decide to satisfy a s 79 or s 90SM claim out of non-vested property, such as superannuation. There are important public policy considerations, however, and no express guidance is given in the legislation or the explanatory memorandum to the BFLLA as to how the competing interests are to be assessed.

Case study

***Lemnos & Lemnos* [2007] FamCA 1058 (30 August 2007), Le**

Poer Trench J

This case illustrates the difficulties faced by trustees in bankruptcy involved in family law property settlement proceedings. The husband was not a party to the proceedings. The husband was "a reluctant participant when he attended at Court" and had to be subpoenaed to attend and give evidence on behalf of the trustee.

The former matrimonial home was worth $4.5–5m. It was in the husband's sole name. The mortgage was $2.4m and the husband's tax liabilities were over $5m.

Regarding the interests of creditors, Le Poer Trench J held that:

> "Section 75(2)(ha) is only one of many factors the Court is required to consider under s 75(2) and is not given any special priority over the other factors". (at [59])

According to Le Poer Trench J, the effect of the BFLLAA is to:

> ". . . require me to consider this case in the usual manner adopted for consideration of Part VIII property applications with [the] exception that I am to treat all of the former property of the husband, now vested in the Trustee, as available for distribution to the wife if that be an appropriate result". (at [62])

His Honour rejected the trustee's submission that the proper course was to make a finding as to a money amount representing the wife's claim, which would then rank equally with other creditors for distribution of the bankrupt's available assets:

> ". . . that may be a possible result in a particular case although I would think that in most cases which are likely to be considered by the Court involving a similar situation (ie all of the parties' matrimonial assets vesting in a Trustee of one of the parties bankrupt estate) the applicant will be seeking a transfer of property or the declaration of an interest of the non-bankrupt party in the property vested in the Trustee". (at [64])

In addition, his Honour rejected the trustee's argument by reference to the principles set out in the High Court's decision in *Cummins* (considered below). His Honour indicated that the trustee in bankruptcy may hold the matrimonial property on trust for the wife because of:

> ". . . the special nature of beneficial ownership of property as between spouses irrespective of the fact that the legal title to the property may stand in one party's sole name". (at [66])

Unfortunately, Le Poer Trench J did not proceed to clarify whether, in this case, he was satisfied of the existence of an interest of beneficial ownership in the property by the wife.

His Honour found the respective contributions of the parties to be equal. Next, the court considered the factors under s 75(2) of the FLA. The wife argued that the husband's actions in respect of his income tax liability amounted to wasting of the matrimonial assets under s 75(2). Justice Le Poer Trench found that the husband's conduct in completing his tax returns between 1991 and 2002 (and claiming deductions for expenses (including mortgage interest) on West Street while living there) was "reckless and negligent at the least in filling in his tax returns for the relevant years". This included using his old address (Beatty Street) as his residential address throughout this period (and for seven years after it had been sold!). The court therefore held that it was appropriate to require the husband to satisfy the ATO debt from his own resources.

The effect of this was to ensure (though it would have been the case anyway) that there was even less prospect of the ATO debt being paid, as the trustee was not entitled to look to the wife's interest in the significant asset purchased with the money the husband's "waste" had produced. This appears anomalous, and would seem to allow non-bankrupt spouses to benefit from their bankrupt partner's breaches of taxation legislation.

The wife therefore:

(a) received the benefit of the husband's non-payment of tax

through distributions of his income into a discretionary trust (and to her as a beneficiary)

(b) received the benefit through the application of the income of her husband and herself to the mortgage on the matrimonial home

(c) shifted the liability to make good the tax wrongfully retained to the bankrupt

(d) forced the bankrupt's other creditors to accept a significantly smaller dividend because of the reduced pool of assets available to them.

In considering s 75(2)(ha), the court found that the interest of creditors meant that there should be no further adjustment in favour of the wife. Equally, however, the court was not prepared to increase the amount to be retained by the trustee as "to do so would work an injustice and hardship upon the wife in the circumstances of this particular case" (at [93]).

Finally, the court considered whether dividing the assets 50/50 was just and equitable. The court was not persuaded by the trustee's argument that the wife had received a windfall from the non-payment of tax by the husband. In any event, the court was not satisfied that the wife did or ought to have had knowledge of the non-payment of proper tax liabilities of the husband.

Nevertheless, the court did express:

> ". . . concern with the outcome of this case in so far as the creditor principally to lose out in the case is the Australian Tax Office and therefore the tax payers of this land. The question should realistically be asked why the wife should ultimately prosper at the expense of the public purse. The answer so far as I am concerned is that the *Family Law Act* as now standing provides for that to be the outcome in appropriate cases. The legislation does not elevate the status of creditors to a ranking above the other

considerations which the Court is required to consider under section 75(2)" (at [97]).

In the end, the wife's receipt of half of the $2.4m equity was found to be just and equitable.

Case study

***Trustee of the Property of G Lemnos, a Bankrupt & Lemnos & Lemnos and Anor* [2009] FamCAFC 20**

On appeal by the trustee, the Full Court allowed the appeal and remitted the matter to the trial judge for consideration according to law.

In two judgments, the Full Court held that the exercise of the trial judge's discretion had miscarried. Coleman J held that this was because it was clear that the trial judge had concluded that the wife should receive 50% equity in the matrimonial property, such that the orders made by the trial judge "had the effect of prioritising the wife's s 79 entitlement over the unsecured creditors of the husband's bankrupt estate" (at [173]). Coleman J held that only after consideration of the s 75(2)(ha) interests of creditors could the trial judge have concluded that it was "appropriate in this case to require the husband to satisfy the debt to the ATO from his own resources" (at [175]). Coleman J thought that consideration of this issue would have involved the trial judge in looking at the fact that the matrimonial property would not have been able to be acquired, renovated, maintained and retained by the bankrupt (so that it was available to be claimed by the non-bankrupt spouse) were it not for the savings generated by wrongful claims for tax deductions (per Coleman J at [175]). Coleman J believed that the focus of the trial judge on the absence of culpability on the part of the non-bankrupt wife distracted the trial judge from the proper exercise of his discretion. In effect, Coleman J believed that the trial judge pre-

judged the s 75(2)(ha) issue by considering that the wife had not been involved in the tax deductions.

Thackray J and Ryan J held that the trial judge erred in giving undue weight to the wife's innocence in the tax deductions claimed by the husband. The majority judgment held ([at 243]):

> ". . . Having had the benefit of the funds flowing from the husband's conduct, it would seem to us neither just nor equitable for the wife to escape all responsibility for payment of the primary tax that would otherwise have been paid".

Their Honours adopted the characterisation of the error in the trial judge's reasoning found in *Johnson and Johnson* [1999] FamCA 3969 where the Full Court (Ellis, Kay and Dessau JJ) held (at [244] and [245]):

> "20.4 . . . his Honour's discretion miscarried when he failed to provide for the wife to share in any penalties that may be imposed by the taxation commissioner.
>
> 20.5 In our view the fact that the wife was or was not involved in the tax avoidance process which may lead to the imposition of penalties was only one consideration that his Honour needed to weigh up when determining liability for the penalties as between the parties. The benefits indirectly gained by the wife in having the pool of assets otherwise increased as a result of the availability of funds which would otherwise have been paid out in tax also have to be considered.
>
> 20.6 . . . a just outcome demanded that the wife take the good with the bad. Whilst there is a sense of culpability about the penalties, they represent no more in this case than an outgoing incurred in creating the asset pool.
>
> 20.7 . . . Absent any suggestion that the husband was on a frolic of his own and acting contrary to the wife's express wishes, we see no reason for his Honour to have left the husband to shoulder the burden of the tax penalties.
>
> The views expressed in *Johnson* relate to allocation of

> responsibility for income taxation **penalties**. Although in the instant case it is accepted the husband was ‘on a frolic of his own’ we do not accept that the wife’s lack of knowledge or complicity in the husband’s wrongful deductions is determinative of whether she should ultimately share responsibility for the payment of primary taxation. . . ”
>
> [emphasis in original]

It can be seen that the majority drew a distinction between the liability for primary tax incurred by the husband, and the penalties which were imposed on top of this sum once it was not paid when due. In principle, however, the majority were satisfied that the trial judge had failed to consider “the significance of the fact that the wife had undoubtedly enjoyed the benefits flowing from the income taxation deductions” (at [246]). This fact needed to be considered alongside the wife’s innocence in the achieving of these taxation deductions. The matter was remitted for re-consideration.

The judgments in the appeal case make it clear that the balance between the competing interests of non-bankrupt spouse and creditors is unclear. What is clear, however, is that creditors and trustees in bankruptcy can have no expectation that creditor interests will be given any priority, nor the fact that creditors will remain outstanding even though significant matrimonial property is transferred to the non-bankrupt spouse.

The majority judgment also contains a further warning to bankruptcy trustees. Their Honours (at [247]) expressly stated that their comments based on *Johnson* did not necessarily apply to the position where the assets were in the name of the non-bankrupt spouse. This would raise further consideration of the jurisdiction to make orders between a trustee and the non-bankrupt spouse in respect of property other than “vested property”. In short, if the home in *Lemnos* had been in the name of Mrs Lemnos, the trustee may not have been unable to obtain any relief, at least in the Family Court.

Ultimately, it appears the matter settled without a rehearing.

The general approach in *Lemnos* was followed in *Simon* v *Simon* [2013] FCCA 432.

Case study

West & West & Anor [2007] FMCAFam 681

The trustees struggled given the lack of co-operation from the bankrupt husband. The bankrupt husband did not file any material in response to the evidence filed on behalf of the wife. He attended court only once and failed to comply with directions to file a response and financial statement as well as give evidence.

The trustees did what they could by cross-examining the wife "vigorously" to test her evidence. The trustees took issue with the credibility of the wife.

> "However, in doing so, the Trustees' submissions ignored that in the absence of the husband's participation in the proceedings the Court's findings will, in large part, be based on the wife's evidence" (at [23]).

This demonstrates the difficulty faced by trustees in bankruptcy in being involved in proceedings where factual assertions are made by the non-bankrupt spouse about which the trustees are not in a position to respond.

The parties cohabited for 19 years and had seven children. The husband had a judgment debt against him of $8,122 from RACV finance. The former matrimonial home had equity of $102,000–$108,000. There were other modest assets. The wife had a Centrelink debt of $14,584 and by the time of trial the husband's RACV finance debt was $69,000.

The trustees submitted that having been appointed under the BA, they were required by the BA to get in and protect the bankrupt's property for the benefit of creditors (s 129 of the BA). Being bound to act in this way, the trustees submitted that they were

entitled to be paid in accordance with the terms of the BA.

The trustees' principal submission was that vested bankruptcy property ought not to be included in the pool of assets for division between the husband and the wife. The court disagreed. Relying upon a paper delivered by Walters FM ("Some Aspects of the Interaction of Bankruptcy with Family Law", 12th National Family Law Conference, Perth 2006), the court agreed with the wife's submissions that the interaction of bankruptcy and family law is resolved by:

> ". . . a methodical application of the basic principles relating to the resolution of property settlement disputes in the Family Law Courts" (at [35], quoting Walters FM at [27]).

The court was satisfied that the husband's interest in the former matrimonial home was part of the pool for distribution between husband and wife.

Perhaps of most concern for trustees in bankruptcy was the manner in which the trustees' legal costs and expenses were dealt with. In a (respectfully) somewhat complicated fashion, the court appeared to have lumped together four quite different elements of the debts associated with the bankrupt estate:

(a) the principal debt owed by the bankrupt to the creditor (in this case, RACV Finance) in the sum of $8,122

(b) the petitioning creditor's costs of $13,500, which were incurred by RACV Finance in commencing bankruptcy proceedings and ultimately obtaining a sequestration order against the bankrupt

(c) the trustees' legal fees of $27,500 (presumably solely in respect of the Family Court proceedings), and

(d) the trustees' own remuneration and other disbursements of $17,568 (although the trustees' fees are different from the disbursements incurred by him to third parties: for present purposes this distinction is not relevant).

In considering this issue, O'Sullivan FM found:

> "In this case, I note the Trustees costs are over five times the amount of the judgment debt which the Trustees, I can only assume, cognisant of their duty to the creditors, have chosen to incur.
>
> In this case given that the effect of adding legal and other costs of the Trustees would be to reduce the net pool by almost 25%, I do not believe it is appropriate to include those costs. The Court was not pointed to authority that required the interests of the Trustees by way of recovery of their remuneration and other costs be taken into account, only the interest of the creditors" (at [73]–[74]).

With respect to his Honour, these considerations:

(a) incorrectly amalgamate:

(i) the debt owing to RACV Finance, the petitioning creditor, based upon a judgment debt

(ii) the court order by which the bankrupt was ordered to pay to RACV Finance its costs of the bankruptcy proceedings, and

(iii) the trustees' own remuneration and legal costs of administration

(b) incorrectly conclude that the trustees were responsible or even involved in the decision by a creditor (RACV Finance) to incur costs in pursuing a debtor to bankruptcy, and

(c) correctly note that there is no statutory basis for the court, under s 75(2), to have regard to the interests of the trustee as distinct from the creditors he or she represents, in being paid for the work which the trustee is obliged to perform, even in respect of the family court proceedings with which the trustee may (through no choice of his or her own) become involved.

There is nothing in s 75(2)(ha) which entitles the court to take account of the costs and expenses which a trustee in bankruptcy has incurred in the administration of the bankrupt's estate. The trustee in bankruptcy is not a creditor of the bankrupt for the purposes of this subsection. This gives rise to the anomaly that:

(a) given the trustee's remuneration and expenses have priority over the claims of all creditors, if there are insufficient assets in a bankrupt estate to permit a dividend to be paid to creditors, then it is arguable that no weight can or ought to be given to the interests of creditors for the purposes of s 75(2)(ha) in deciding how much, if any, of the matrimonial pool of assets ought to be left to the bankrupt estate. This is because creditors will not receive any portion of this sum anyway, and

(b) however, it is not until the court makes a determination as to how the pool of assets ought to be divided that it will be possible for a trustee to determine whether or not he or she will be able to pay a dividend to creditors.

This case highlights the need for trustees and their legal advisers to make an early assessment of the merits of becoming involved in property settlement proceedings, and to carefully review the merits and extent to which it is in the interests of creditors.

Federal Magistrate O'Sullivan adopted a list (created by Walters FM in his paper) of principles, considerations or factors likely to be relevant to the balancing exercise between the interests of the parties to the marriage and those of the creditors of a bankrupt spouse. Those factors were (at [76]):

> "(a) Any order that the Court might be minded to make which is likely to impact upon a creditor in the sense of affecting the creditor's rights must be 'reasonably necessary, or reasonably appropriate or adapted. . .' to effect a just and equitable division of property between the parties to the marriage and must take into account the legitimate interests of that creditor (see FLA s 90AE(3) and (4)).

(b) The Court might be minded to consider, including in the context of (for example) an ‘add back’, or in the context of deciding whether or not to ‘ignore’ a debt:

(i) Whether one of the parties ‘. . . has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets’ or whether a party ‘. . . has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value’. (see *Kowaliw*)

(ii) The non-bankrupt spouse’s knowledge of the events leading to the other spouse’s bankruptcy, including (for example) the nature and degree of the non-bankrupt spouse’s involvement in the business or investment activities of the bankrupt spouse, and whether, and to what extent, the non-bankrupt spouse ‘. . . has either benefited from, or contributed to, the bankrupt spouse’s insolvency’.

(iii) When and how a relevant debt was incurred by the bankrupt spouse, and whether, for example, the debt was incurred ‘in deliberate or reckless disregard of (the non-bankrupt spouse’s) potential entitlement under s 79’.

(iv) The factual circumstances surrounding the commencement or continuation of the property settlement proceedings — including, for example:

(1) whether the parties’ marriage has broken down and/or the parties have separated; and/or

(2) whether property settlement proceedings are or appear to be a strategic or tactical plan or initiative designed, in some way, to insulate the assets of the family (or a member of the family) from creditors, or to otherwise prevent creditors (or the Trustee on their

behalf) from recovering their debts, or an appropriate part thereof.

(v) Whether a creditor knew or ought to have known of a claim or potential claim by the non-bankrupt spouse to the bankrupt's spouse's property prior to or at the time that the debt was incurred.

(vi) Whether and in what manner the creditor pressed or pursued — directly or indirectly — his/her rights in relation to the payment of the debt prior to bankruptcy, or prior to the commencement of proceedings in the relevant Family Law Court, and whether the creditor did so in a timely fashion.

(vii) Whether, by words or conduct, a creditor (or Trustee) led or permitted the non-bankrupt spouse to form a reasonable view that the debt would not be pressed, pursued or enforced, and whether (and in what way) the non-bankrupt spouse was thereby induced — whilst acting in good faith — to change his/her financial position.

(viii) Whether, by words or conduct, the non-bankrupt spouse led or permitted the creditor (or Trustee) to form a reasonable view that the non-bankrupt spouse's actual or potential entitlements under the FLA would or might not be pressed, pursued or enforced, and whether (and in what way) the creditor (or Trustee) was thereby induced — whilst acting in good faith — to change his/her financial position.

(ix) Whether either of the spouses has failed to make a full and frank disclosure of his/her financial position at all relevant time.

(x) Whether the Trustee has failed to make a full and frank disclosure of all relevant information as it relates to the

identification and valuation of the property comprising the vested bankruptcy property, and a full and frank disclosure of all relevant information relating to provable debts.

(xi) The overall financial circumstances of the non-bankrupt spouse and children of the parties during the period since the incurring of the relevant debt or debts, and at the time of the property settlement proceedings (including the effect on the non-bankrupt spouse and the parties' children of the orders proposed by the parties to the proceedings)".

Having regard to the above matters, the court held that it was not appropriate to include the trustees' costs as a joint liability for the purposes of determining the pool of matrimonial assets.

In the absence of any evidence of contributions by the husband to the purchase of the former matrimonial home the court was satisfied that the wife had made the majority of the contributions to the parties' assets and that those assets (including superannuation) ought to be divided 85% in her favour.

In considering any adjustment under s 75(2) factors, the trustees in bankruptcy submitted that no adjustment ought to be made. Once again, however, the trustees were hindered by the absence of evidence of behalf of the husband.

In considering the matters set out in s 75(2)(ha), O'Sullivan FM noted that:

(a) the trustees had acted to protect the interests of the creditors

(b) the wife sought to maintain the former matrimonial home for the care of the children

(c) the husband had moved on and left the wife to "pick up the pieces" (at [109])

(d) the husband's conduct in so doing was consistent with the evidence of his behaviour during the marriage, and

(e) the wife had proposed to pay the RACV Finance debt (the principal debt, presumably not the legal costs incurred as petitioning creditor).

His Honour noted that creditors were unlikely to receive a dividend from any money which the court ordered the trustees be entitled to receive out of the matrimonial property. This was a result of the statutory priority in the BA providing for payment of the trustees' costs and expenses prior to making a distribution to creditors. His Honour therefore agreed that:

> ". . . it would be **perverse** if the wife and children were '**forced from their home**' and the operation of those relevant provisions of that legislation in relation to '**the Trustees costs**' meant RACV Finance would remain out of pocket" (at [111]) [emphasis in original].

With respect to his Honour, there is nothing perverse about a parliamentary-enacted statutory regime for persons to undertake a particular statutory function (the administration of a bankrupt estate) and to be entitled to look to that estate to be paid. Nor is there anything perverse about the assets of a bankrupt being realised towards payment of his or her debts, including the costs associated with the administration of his or her bankrupt estate. The effect of his Honour's approach was to deprive the bankrupt's estate of an otherwise appropriate share of the matrimonial assets because the court did not like the way that share would be applied. It could be argued that this is to take the amendments in the BFLLAA too far.

It also appeared that the fundamental mechanics of bankruptcy law were questioned in finding it to be relevant that:

> ". . . there was no other evidence of attempts to reach on [sic] agreements with the husband to meet the debt [of RACV Finance] in other ways. . ." (at [112]).

With respect to his Honour, it was not the trustee's responsibility to persuade the bankrupt to pay his creditors.

His Honour agreed with the wife's submission that there should be a 10% adjustment under s 75(2) in favour of the wife of the assets (including the superannuation).

In considering whether giving 95% of the assets to the wife was "just and equitable", his Honour found that:

> ". . . it would not be just and equitable for there to be an order requiring the sale of the former matrimonial home when the original debt could be met and the wife and children continue to remain in that home" (at [134]).

Further:

> "In this case, the Trustees have chosen to pursue the former matrimonial home. In doing so they made an economic decision which has seen the costs, for a debt of around $10,000, amount to more than $60,000 and counting. The Trustees will no doubt have weighed the interests of the creditors in doing so" (at [138]).

With respect to his Honour, this calculation of the effects of the Trustee's choice is somewhat inaccurate. The costs referred to included the petitioning creditor's (ie RACV Finance's) legal costs of pursuing the debt to bankruptcy. Those costs were approximately $13,500. They had nothing to do with the trustees, were not incurred by or on behalf of the trustees, and were incurred prior to the trustees being appointed. They were costs owing to RACV Finance as a creditor of the bankrupt, by reason of the order of the court in which a sequestration order was also made against the bankrupt. They were a debt, subject to taxation of those costs, which was owed to the creditor, just as much as the principal debt upon which the sequestration order was based.

It is true, however, that the trustees' costs of being involved in the proceedings were significant, having regard to the size of the asset pool. And this is in reality the trustee's dilemma. In order to seek to preserve the interests of creditors in the assets forming

the matrimonial pool, the trustee must incur costs. Those costs have priority, according to the BA, over the interests of creditors. However, to the extent that the court will take account of the interests of creditors (but not trustees), the harder the trustee defends the interests of creditors, the less funds there will be available for those creditors, and therefore the less weight that those interests will be given.

Case study

***Trustee for the bankrupt estate of N Lasic & Lasic* [2009] FamCAFC 64**

The trustee appealed against an order that the whole of the judgment sum be paid to the creditor, bypassing the trustee, who was thereby left unable to recover any of the more than $500,000 owing to him and his lawyers in respect of the bankruptcy and the proceedings. The trustee argued that the trial judge had erred in:

- not setting aside the consent orders, given that they had been obtained by a fraud in which the wife had been complicit
- ordering payment directly to the creditor, as any sum payable vested in the trustee in bankruptcy, and
- his assessment of the wife's contribution entitlements.

The wife cross-appealed alleging the trial judge erred, among other things, in not making a finding of whether or not the trustee was a "person affected" within the meaning of s 79A of the FLA.

Mr M, the creditor, was joined as a party to the appeal, and sought orders that both the appeal and cross-appeal be dismissed. Mr M's debt was damages for an assault on him by the husband and his son.

The court had not set aside the s 79 order which had been

entered by consent between Mr and Mrs Lasic in 1998, well before the 2003 amendments which introduced Pt VIIIAA. Rather, Coleman J "amended" the orders. The Full Court found that there was therefore no basis to rely upon Pt VIIIAA as the source of power to order payment to Mr M.

The court accepted that Coleman J could have varied the consent orders to direct payment to a creditor. However, because Mr Lasic was bankrupt, this meant that:

> ". . . at the date of the hearing, [Mr M's] rights to recovery of the judgment debt were governed by the provisions of s 109 of the *Bankruptcy Act*. . . . Having proved in the bankruptcy he did not retain an independent right to enforce the judgment . . . nor as we have explained receive payment of the judgment debt" (at [207]).

The court was as concerned as Coleman J that payment to the trustee in bankruptcy would mean that there were would be no funds for Mr M (because of the trustee's remuneration and legal costs).

In considering the challenge to the trial judge's assessment of the contributions, the Full Court noted the three pronged attack of the trustee (at [216]):

- that the wife's evidence should have been rejected entirely
- that the trial judge's indexation of the husband's notional interest by reference to inflation, and ignoring capital growth, was flawed, and
- that there were inadequate reasons for the use of inflation to determine the husband's entitlement.

The Full Court rejected the first argument and held that the trial judge had done "the best he could" in relation to "an extraordinarily difficult task" of determining respective contributions where the husband "was not present and not represented" (at [221]).

The Full Court accepted that the trial judge's use of inflation as the basis for calculating the husband's notional entitlement failed to have regard to the reality that certain of the properties in the wife's name had "increased in value at a rate far in excess of the inflation rate, without it seems any contribution being made to the property. . . " (at [231])

The Full Court was also satisfied that the orders should have been set aside, rather than varied, having regard to the significant adjustment to the orders which the trial judge contemplated.

The matter was remitted to a different trial judge for retrial.

Case study

Trustee for the bankrupt estate of N Lasic & Lasic [2010] FamCA 682

The matter was reheard before Stevenson J. By the time of the rehearing, it was conceded that the property interests in Yugoslavia which were granted to the husband in exchange for the wife retaining all of the Australian property, did not exist.

Although the parties agreed that there was jurisdiction for the court to set aside the orders, her Honour found separately that the husband and wife had "joined in a dishonest enterprise designed to divest him of all substantial property, with the intention of defeating any verdict in favour of Mr M" (at [22]). The court also disposed of an argument that only Mr Lasic's legal personal representative could seek orders against the wife. Section 79(1C)(a) of the FLA provides for legal personal representatives to become involved where the deceased spouse was a party to the proceedings prior to death. However, the proceedings were finalised by the consent orders in 1998 and the husband was never a party to the trustee's s 79A application.

The court noted that it was left only with the evidence of the wife. Her Honour found Mrs Lasic to be a "singularly unimpressive witness", giving evidence which at points was "inherently incredible and

unreliable” (at [51]).

Interestingly, rather than treating the couple’s dishonest enterprise as grounds to set aside the orders entirely, this fact was treated as a basis for making new orders, her Honour finding that: “[u]nless orders are now made in substitution for the consent orders, the trustee will receive nothing and Mr M will continue to be deprived of his now quantified damages and costs”. Strictly speaking, however, if the orders were simply set aside as a dishonest enterprise, the parties should be restored to their former position, in which case Mr Lasic’s bankruptcy trustee would have been entitled to 50% of the properties which were jointly owned prior to the transfer.

In any event, upon a reassessment, and after consideration of the relevant s 79 and 75(2) factors, the court found that the matrimonial property should be adjusted 72.5% to the wife and 27.5% to the trustee.

In a further demonstration of the complexity of this area, the matter was complicated by the appearance of the solicitor (Mr F) who had acted for Mr M, and who remained unpaid. Mr F claimed, as against Mr M, and therefore against the husband’s trustee, a “fruits of the action” lien. Stevenson J was satisfied that a lien existed against the property of the husband, but was not so ready to find a lien against property in the hands of the wife, in circumstances where the consent orders transferring the property to the wife had been entered three months prior to the judgment in favour of Mr M. Given the orders represented a dishonest scheme to transfer Mr Lasic’s property, however, her Honour found that “[t]he rights of no innocent third party would be compromised by an order in favour of Mr F against the wife”. Her Honour ordered that the wife pay Mr F his costs and interest within one month. What is perhaps most interesting about this order is that in identifying the interests of the husband and the wife as her Honour did, and then making a further and separate order against the wife, it appears that her Honour ordered that the wife pay Mr F from her “own” funds. The irony of this is that neither Mr F, nor Mr M who owed Mr F the money, had any claim against Mrs Lasic. Their only rights were against the husband, to be paid from the husband’s property.

Case study

Needham & Trustees of the Bankrupt Estate of Needham [2016] FamCA 253

The court considered an application between a husband, aged 73 years, and a wife, aged 71 years, who both had previous marriages and lived together from 1984 until 1999 making equal contributions. Property settlement proceedings were not commenced until 2006, during which period the wife's contributions were found to be substantially greater, and the final application was not determined until 2016. In the meantime, the husband became bankrupt on 16 February 2015 with creditors of $2.3m and legal fees of $1.1m. The Trustee in Bankruptcy was joined to the proceedings. Relevantly, the court:

- Noted that the jurisdiction granted by the 2005 amendments "enables a trustee to join proceedings for the purpose of resisting claims by a non-bankrupt spouse to vested bankruptcy property. The legislation does not, however, empower the Respondent Trustees to utilise the provisions of the FLA to enlarge the vested bankruptcy property available to the bankrupt spouse's creditors" (at [48]).

- Followed the approach in *Stanford and Stanford* (2012) FLC ¶93-518, *Bevan & Bevan* (2013) FLC ¶93-545, *Sebastian & Sebastian (No 5)* [2013] FamCA 191 and *Petruski & Balwea* (2013) 49 Fam LR 116 in considering whether or not it is just and equitable to make an adjustment of property interests between the parties, and applying a "holistic" assessment of all the contributions.

- Held that Trustees are subject to the same ongoing obligation of disclosure as the spouses in Div 13.1.2 of the Rules, including r 13.01 which "imposes a 'duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner'" (at [65]).

- Rejected the argument that there was an obligation on the trustee to undertake public examinations under s 81 of the *Bankruptcy Act 1966* (Cth), noting that (at [68]–[69]):

– *Masoud & Masoud* (2016) FLC ¶93-689 at [21]–[23] is authority that the duty of disclosure is not absolute in terms of obtaining documents not in a party's possession, and

– "the Respondent Trustees were best placed to make an assessment as to whether utilization of section 81 of the Bankruptcy Act was practicable".

- Accepted the submission put on behalf of the respondent Trustees that "in considering the matters set out in section 75(2), I am required to have regard to the relevant circumstances of the [non-bankrupt] wife and also to the effect of any proposed order on the ability of creditors of the husband to recover their debts. I am not required, however, to consider the current personal circumstances of the [bankrupt] husband" (at [109]).

- Accepted the submission that in respect of s 75(2)(ha) FLA, any adjustment in favour of the wife would necessarily decrease the amount potentially payable to creditors even further (at [115]).

- Noted that in the context of a s 79 FLA property settlement action it is otiose to consider s 75(2)(n) which requires the court to have regard to the terms of any order/proposed order in relation to "vested bankruptcy property in relation to a bankrupt party" (at [120]–[124]).

- Did not accept that the principle in *Kowaliw & Kowaliw* (1981) FLC ¶91-092 was relevant, even though the husband was made bankrupt in respect of conduct which could be regarded as "reckless, negligent or wanton". It was relevant that the respondent trustees "did not seek to imputed the debt arising from the husband's conduct to the wife" (at [131]).

- Adjusted the property interests between the wife as to 68% and the trustees in bankruptcy as to 32% of the matrimonial pool.

¶15-156 Maintenance

The *Bankruptcy and Family Law Legislation Amendment Act 2005* (BFLLAA) inserted a subsection (2) into s 72 of the *Family Law Act 1975* (Cth) (FLA). Section 72 now provides:

> "**Right of spouse to maintenance**
>
> (1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:
>
> (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
>
> (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
>
> (c) for any other adequate reason;
>
> having regard to any relevant matter referred to in subsection 75(2).
>
> (2) The liability under subsection (1) of a bankrupt party to a marriage to maintain the other party may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt party if the court makes an order under this Part for the transfer".

Section 90SE of the FLA relates to parties to a de facto relationship. Section 90SE(2), like s 72(2), extends the meaning of property in s 4(1) to include vested bankruptcy property of a bankrupt party.

A non-bankrupt spouse may make an application for maintenance against a bankrupt spouse and the trustee, notwithstanding that at the time the application is made the other spouse or partner was bankrupt. The court may, in fact, satisfy the maintenance claim by making an order that such maintenance is to be paid to the non-bankrupt by a transfer of vested bankruptcy property.

A trustee in bankruptcy has the right to apply to vary or modify a maintenance order under s 83(1A). The trustee needs to show that

material facts were withheld from the court or false material presented when the order for maintenance was made. The trustee can also seek to set aside the order on the basis of an abuse of process, such as lack of full and frank disclosure.

¶15-158 The “happily married” bankrupt’s spouse

What if the non-bankrupt spouse does not wish to separate from the bankrupt? Subject to High Court authority discussed below, the answer seems to be that the non-bankrupt party and the children of the marriage or relationship cannot make any claim against the bankrupt estate. Strictly speaking, separation is not an element of an application for orders under s 79. This is different to s 90SM as discussed below. However, a court exercising a power under s 79 or s 90SM may refuse to make orders on the grounds that to do so would be just and equitable or an abuse of process.

In *McCormack & McCormack & Anor* and *Peakes & Peakes & Anor* [2009] FMCAfam 1250, Wilson FM dismissed two separate applications for approval of consent orders under s 79. In each case, the husband was bankrupt from failed business ventures. The trustee in bankruptcy was joined as a second respondent in each case. The proceedings were brought with respect to vested bankruptcy property. The aim was apparently to avoid paying stamp duty on the transfers to the wives of the bankrupt’s half interests in real property. Wilson FM was not satisfied that the proceedings related to a “matrimonial cause” under the FLA (at [4]–[5]):

> “[4] . . . They arise from a commercial dealing that has failed. The fact that one party to a marriage is purchasing an interest in property (in which he or she already holds an interest) from the trustee in bankruptcy of the other does not, to my mind, mean that the proceedings arise out of the marital relationship.
>
> [5] In those circumstances I am not satisfied that the matter before the court satisfies the definition of matrimonial cause. Even if it did, the court retains a discretion as to whether to make a property settlement order”.

The court did not accept that there was any support for consent orders being made from the decision in *Huen* v *Official Receiver* (2008) FCAFC 117 (discussed below at ¶15-170). This was because:

> ". . . in that case there was a disputed entitlement to a beneficial interest in a property, and the court was prepared to make a declaration of constructive trust. What sets that case aside from this case is the quite clear correlation between the proceedings as between one party to the marriage and the trustee in the bankruptcy, and the proceedings between the parties inter se in the Family Court" (at [7]).

Whether this distinction leaves it open to "happily" married couples to nevertheless commence property settlement proceedings in order to determine the interests of the non-bankrupt spouse in vested bankruptcy property, remains to be seen. However, it will not be appropriate to commence proceedings simply to make consent orders (especially, it would seem, if there is a suggestion of seeking to avoid incurring a stamp duty liability):

> "In this case neither of the parties intend to separate, and the only reason, it seems to me, for the seeking of an order is to provide the parties with some perceived comfort of a court order which, as I have said, is not necessary, or to minimise their exposure to taxes, which, as I have said, is not an appropriate exercise of the court's discretion" (at [8]).

In *Starkey & Starkey* [2010] FamCA 477, the Family Court also declined to become involved in making a declaration that the parties had separated on a particular date. This was inconsistent with the previous assertions of the wife who sought the declaration apparently in order to assist in obtaining a stamp duty exemption where the wife was not prepared to make a statutory declaration to this effect because of "cultural issues". Murphy J expressed doubt about whether there was jurisdiction to make such a declaration in the circumstances but declined to exercise any such jurisdiction, if it existed.

In a non-bankruptcy context, however, the High Court has delivered some comfort to happily married spouses seeking property settlement relief. See *Stanford & Stanford* (2012) FLC ¶93-518.

Importantly, for consideration in a bankruptcy context, the High Court noted in *Stanford* that where the relationship has come to an end (at [42]):

> "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)".

One of the significant impacts of bankruptcy upon a marital relationship of course, is the termination of the ability of the husband and wife to deal with their matrimonial assets jointly. The trustee will typically seek to reach agreement with the non-bankrupt spouse to realise the bankrupt's interest in the property. In the same way the High Court noted in *Stanford*, albeit not in a bankruptcy context, all of the assumptions between the parties *to the marriage* as to the common use of the property have come to an end. In those circumstances, would it not be just and equitable for the court to make an order for the division of the property between the trustee in bankruptcy and the non-bankrupt spouse?

Where one of the parties to a marriage becomes bankrupt, although the parties may not be separated, nor even physically separated, the operation of bankruptcy upon the matrimonial asset pool may mean that it is just and equitable to make an order.

Example

Hypothetical example of Mr and Mrs Jones

Mrs Jones comes in a state of distress to see her lawyers. Mr Jones has just been declared bankrupt, having accumulated significant gambling debts without Mrs Jones' knowledge. All of the family's assets are in Mr Jones' name. What can she do?

If Mr and Mrs Jones remain together, the answer is (subject to the application of the High Court's decision in *Stanford*): nothing. Mrs Jones and their four children miss out on any of the family's assets since Mrs Jones has not contributed directly to their purchase and has spent the last 20 years raising the couple's four children. She is not otherwise a creditor of Mr Jones and will not share in any distribution from the bankrupt estate. She might be able to claim an interest as the beneficiary of a constructive trust in a state court or bankruptcy court but this could be a risky and expensive claim.

On the other hand, if Mrs Jones tells her lawyer that she is thinking of leaving her

husband, then the answer could be radically different. Her lawyer could recommend proceedings under the FLA to make an urgent application against the trustee in bankruptcy, seeking maintenance on an interim basis, followed by a property application pursuant to the FLA.

What is the role of legal advisers called upon to advise Mrs Jones in the immediate aftermath of her devastating news? Surely it would be remiss of such an adviser not to point out the obvious inconsistency between the two scenarios.

The *ASIC v Rich* case[39] (see ¶15-140) is also relevant to those advising Mr and Mrs Jones. Although the judge found that he had no jurisdiction to deal with the binding financial agreement entered into by Jodee and Maxine Rich, O'Ryan J made it perfectly clear that he would have liked to. Further, he reserved some telling criticism for all those who advise others to enter into binding financial agreements as an asset protection device. He said:

> "What is also of concern is that various commentators have stated that if there are third party creditors or a business in serious trouble or there is the prospect of bankruptcy then the parties should settle by a financial agreement. This appears to be the advice that is being given to legal practitioners, and no doubt to their clients, and in my view, in certain circumstances, it may raise ethical issues".[40]

Parties to a marriage or de facto relationship may legitimately enter into a financial agreement at any time prior to, during, or post-marriage. The parties to such an agreement will need advice as to the legal effect of such an arrangement upon their asset holdings. The same must apply to the amendments under the BFLLAA. O'Ryan J's comments may cause solicitors to be concerned about advising clients of the full extent of their rights under the FLA.

The considerations of the High Court in *Stanford* as to the applicability of s 79 to intact relationships do not apply to de facto relationships. This is because the definition of a "de facto financial cause" is in fundamentally different terms to the definition of a "matrimonial cause". In order for a Family Law Court to have jurisdiction regarding a "de facto financial cause" as defined in s 4 FLA, there must be a "breakdown of the de facto relationship".

Thus, if the de facto relationship has not broken down, the Family Law Courts will not have jurisdiction.

Footnotes

39 *ASIC* v *Rich* (2003) FLC ¶93-171; [2003] FamCA 1114.

40 Ibid, at 78,752.

OTHER DEVELOPMENTS MOVING PEOPLE TO THE FAMILY COURT

¶15-160 *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006*

Legislative reforms which may encourage separation were made in changes to the *Bankruptcy Act 1966* (Cth) (BA) by the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006*.

In amending s 121 of the BA, the government attempted to make it clear that the grant by a non-bankrupt spouse or partner to the bankrupt of a right to occupy the home *is not* consideration for the purpose of the defences to that section. Therefore, if a bankrupt transfers his half-interest in his property to the other party in consideration for the right to live in the property for the next 10 years, this will be insufficient to amount to consideration for the purposes of s 121. Accordingly, the trustee in bankruptcy may still seek to claw back this asset even though the transfer took place 10 years ago, and the non-bankrupt party had no reason to suspect any ulterior motive for the transfer.

However, the change *does not* apply where the arrangement between the parties has been entered pursuant to orders made under the *Family Law Act 1975* (Cth). Therefore, using the example in ¶15-150, if Mr and Mrs Jones enter into property orders under the *Family Law Act 1975* even though they remain living in the same property, this *will* be consideration such that the transfer may achieve protection against a claim by Mr Jones' trustee in bankruptcy.

¶15-170 The Cummins decision

In 2006, the High Court decided a case that favours trustees but might encourage applications to be brought under the *Family Law Act 1975*

(Cth) (FLA) against trustees in bankruptcy.

In *The Trustees of the Property of John Daniel Cummins, A Bankrupt* v *Cummins*[41] (*Cummins*), a bankrupt barrister failed to lodge tax returns for 45 years. Thirteen years prior to bankruptcy, Mr Cummins transferred his half-interest in the family home to his wife, and his barrister's chambers to a family trust. Mr Cummins' bankruptcy trustees were ultimately successful in the High Court in recovering these assets under s 121 of the *Bankruptcy Act 1966* (Cth) (BA). It is the asset protection and tax avoidance or abuse of the BA in this case that led, in part at least, to the implementation of the *Bankruptcy Legislation Amendment (Anti-avoidance) Act 2006* to the BA.

There is another significant element to the High Court's judgment in this matter, which may affect the way in which interests in the family home are considered.

Facts and arguments

In 1970, Mr and Mrs Cummins purchased a property at Hunters Hill as joint tenants for $31,000. In 1987, Mr Cummins' half-share was transferred to Mrs Cummins. In 2000, Mr Cummins became a bankrupt. His trustees commenced proceedings in respect of the 1987 transfer and (eventually) Mrs Cummins was ordered to transfer her husband's half-share back to the trustees in bankruptcy, pursuant to s 121 of the BA.

Mrs Cummins argued that because she had contributed 76.3% of the purchase price of the property, she should only have to remit the remaining 23.7% to the trustees. She relied upon the long established principles regarding resulting trusts and the High Court's own decision in *Calverley* v *Green*:[42]

> "[I]f two persons have contributed to the purchase money in unequal shares, and the property is purchased in their joint names, there is, again in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase money".

It is necessary to step back from this statement and examine it carefully. What it says is that apart from one exception, a court will *presume* that parties who contribute unequal shares of the purchase price of a property will hold the property *in those same shares*, even though the property is held (for instance) as joint tenants.

This argument appears quite regularly in bankruptcy. The non-bankrupt spouse or partner, such as Mrs Cummins, argues that property held in joint names is held on trust for her in a much greater portion than the title would indicate. This reduces the amount of the bankrupt's share and the assets available to creditors in the bankrupt estate.

The exception to which the High Court was referring was the long-standing presumption of advancement between husbands and wives (and certain other relationships).[43] That is, where it is one party who has contributed a greater percentage of the purchase price, then the court presumes that they intended this to be a gift to the other party. This displaces the normal presumption that the owner of the property holds this property on trust for the person who paid for it.

In *Cummins*, the High Court revisited these presumptions. Because the earlier decision in *Calverley* v *Green* was in respect of a de facto relationship, the court did not have to expressly overrule its earlier decision. The court made it clear it was only considering traditional matrimonial relationships, but it gave every indication that the same reasoning may also apply to de facto relationships.

An inference of intention

The issue the High Court was considering was in respect of an inference only. It is capable of being rebutted by evidence to the contrary. Nevertheless, the High Court approved the following statement about "beneficial ownership of the matrimonial home" in a "traditional matrimonial relationship":

> "It is often a purely accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the Vendor, where both are contributing by money or labour to the various expenses of the household. It is often a matter of

chance whether the family expenses are incurred and discharged or services are rendered in the maintenance of the home before or after the purchase".[44]

The High Court went on to approve the statement that:

> "Where a husband and wife purchase a matrimonial home, each contributing to the purchase price and title is taken in the name of one of them, *it may be inferred that it was intended that each of the spouses should have a one-half interest in the property, regardless of the amounts contributed by them*"[45] [emphasis added].

In the absence of evidence of a contrary intention therefore the High Court held:

> "That reasoning applies with added force in the present case where the title was taken in the joint names of the spouses".[46]

The court's judgment operates to presume a husband and wife each have the benefit of a 50% share each in the equity in the matrimonial home:

- where the title is in both names, but the contributions to its purchase were unequal, and
- even where the title to the property is in one name, and the contributions to its purchase were unequal.

Case study

Bankruptcy and the family home

Consider the situation where a couple buy real property. One party, Anne, is an accountant with her own practice, so, because she is more "at risk", the property is put in the name of the other party, her wife, Carla. Carla puts a small amount towards the deposit, but all of the mortgage payments are made by Anne. Let us assume that Anne, several decades later, becomes bankrupt as a result of significant gambling losses incurred in the days

before she filed her debtor's petition.

The bankruptcy trustee has no claim under the BA against the property. Payments in respect of the purchase and the mortgage were not made with intent to defeat creditors (s 121). The payments may have been an undervalued transaction (s 120) but, as the bankrupt was solvent at the time the mortgage payments were made, the transfer will be protected from attack under s 120. In any event, they are well outside the statutory time limits. Even under the most recent reforms to the BA the trustee would be limited to a potential claim in respect of amounts paid during the past four years (see s 139CA).

Nevertheless, pursuant to the High Court's decision in *Cummins*, Carla may be *presumed* to hold the whole of the property on trust for herself and Anne as to one-half share each. The trustee in bankruptcy may be able to recover one-half of the value of the property (which by now is worth a considerable sum). Carla may be forced to sell the property to realise the bankrupt's share.

It is not possible to execute documents today to prove the intention of the parties when they purchased a matrimonial property many years ago. The High Court has said that when considering evidence the parties had a different intention:

> "Apart from admissions the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase . . . or so immediately thereafter as to constitute a part of the transaction".[47]

What did Mrs Cummins do next?

Before the trial judge handed down his decision on 24 September 2003, Mr and Mrs Cummins' 38-year marriage was over. Proceedings were commenced in the Family Court by June 2002.[48]

Mrs Cummins was not able to avail herself of the BFLLAA as her family law proceedings commenced before that Act commenced on 18

September 2005. Otherwise, her remedy might have been to commence proceedings against the trustee in bankruptcy and seek to recover a greater share of the matrimonial property, not because of a resulting trust claim, but because of her entitlements under the Family Law Act.

The *Cummins* decision has been influential in several subsequent cases.

Case study

Pascoe v Nguyen **[2007] FMCA 194**

A property was bought in the names of Mr and Mrs Nguyen in 1985 as joint tenants.

Mr and Mrs Nguyen claimed that they were not married, notwithstanding evidence of an overseas marriage ceremony and that they regarded themselves as husband and wife. The trustee in bankruptcy of Mr Nguyen's estate argued otherwise. The High Court decision of *Cummins* did not deal with de facto relationships.

It therefore became important for the bankrupt and his wife to establish that they were not in fact husband and wife. This would allow the respondent's wife to contend that the matrimonial property was held on a resulting trust for her given that she had (she said) put up all of the funds for the original purchase of the property.

There was a small difficulty with this plan. Admissions made in cross-examination allowed the Federal Magistrate to proceed on the basis that Mr and Mrs Nguyen were legally married.

His Honour was also assisted by findings of credit based upon the actions of the bankrupt and his wife following bankruptcy, including the bankrupt transferring two vehicles in his name to his relatives, and the bankrupt and his wife attempting to file consent orders at the Family Court.

Ultimately, however, his Honour was not satisfied that the payments alleged to have been made by the non-bankrupt spouse were in fact made by her, either for the purchase of the property or the repayment of the mortgage. The allegation of a constructive trust therefore failed.

However, his Honour concluded that the *Cummins* inference of joint ownership of the matrimonial property would otherwise have applied.

Case study

***Sui Mei Huen v Official Receiver for and on behalf of the Official Trustee in Bankruptcy* [2008] FCAFC 117**

A property was purchased by Mr and Mrs Huen in joint names in August 2003. The family moved into the property on 25 August 2003 before Mr Huen left in early September of that year, signing an agreement on 1 September 2003 that Mrs Huen owned 100% of the property.

Mr Huen became bankrupt on 22 August 2005. Less than two months later, Mr and Mrs Huen applied for a divorce which order took effect from 31 January 2006.

At trial, the Official Receiver argued the agreement was void under s 120 of the BA for lack of consideration. Alternatively, the Official Receiver argued that, following *Cummins*, at all times the bankrupt and his wife held a one-half interest in the property and that the *Cummins* principle overrides any equitable doctrine of exoneration. This was to defeat the wife's argument that various amounts which she alleged had been borrowed against the property to lend to the husband's business ought not to be taken into account.

The court agreed with the Official Receiver that the agreement was ineffective and/or void. Ms Huen appealed successfully to

the Full Court of the Federal Court.

On appeal, there were two significant changes of approach from the court below:

(a) The Official Trustee abandoned at the hearing any claim that the transfer to Ms Huen under "the Agreement" was void under s 120 of the BA.[49]

(b) Ms Huen did not press a claim that a resulting trust existed, rather, "on the hearing of the appeal Counsel for the appellant based her claim essentially on a constructive, not a resulting, trust".[50] The significance of this is that a constructive trust, unlike a resulting trust, does not depend upon the intention of the parties. Although the wife had run the case on both bases below, Lucev FM had said that the *Cummins* principle will apply to preclude a constructive trust:

> "There is nothing express in the principle in *Cummins* to indicate that it applies only to resulting trusts and not to constructive trusts. On its face the principle applies to all types of trusts".[51]

and

> "Once again, the *Cummins* principle precludes a constructive trust being found in this matter, at least up until the time of the Bankrupt leaving the Melville Property on 1 September 2003".[52]

However, on appeal, the Full Court of the Federal Court disagreed. The Full Court focused on the scope of the agreement between Mr and Ms Huen and found that it extended beyond the mere wording of the agreement dated 1 September 2003.[53] The Full Court looked at:

(a) the fact that the debt secured on the Atwell property, previously owned by the couple, had been increased to provide funds for the sole benefit of the husband[54]

(b) the fact that the wife paid the deposit on the Melville Property of $5,000 from her own funds

(c) the existence of "matrimonial difficulties for some time" when the family moved into the Melville property

(d) the departure of the husband from the Melville property within a week or so of signing the agreement dated 1 September 2003, and

(e) the conduct of the parties following the purchase of Atwell property.[55]

The Full Court looked at the way in which the trial judge had applied the *Cummins* decision and expressly found that:

> ". . . there is nothing in the joint reasons for judgment in that case to suggest that the presumed intention in favour of an equitable joint tenancy of the matrimonial home can never be displaced by an express or constructive agreement between the husband and the wife or by the enforceable creation by one of a trust in favour of the other of his or her presumed joint interests. We therefore consider that the learned Federal Magistrate was wrong when he concluded, at [35]–[36] of the reasons below [the court set out paragraphs [35] and [36] of the Federal Magistrates reasons, which are set out above]".[56]

In relation to the application of the *Cummins* principle, the Full Court concluded:[57]

> "65 In our view, his Honour misunderstood what circumstances were available in the present case to distinguish it from *Cummins* where the presumption of an equality of equitable interests in the matrimonial home was not rebutted. In addition, paragraph (b) of the passage just quoted[58] suggests that the learned Federal Magistrate regarded the failure of the appellant and the bankrupt in their application to the Family Court to

disclose all of the facts relevant to their respective interests in the Melville property as precluding a constructive trust from arising as a matter of equity and good conscience.

66 We consider that, far from being a disqualifying factor, the assertions of the appellant and the bankrupt in their application to the Family Court were an historical recital in lay terms intended to support an order, at least arguably equivalent to what equity would have achieved, independently of the Family Court, by way of a constructive trust. We also find it difficult to support the learned Federal Magistrate's finding that 'all that has occurred is that the bankrupt has walked away from the matrimonial relationship'. In doing so, he also walked away from the Melville property, apparently leaving the appellant and the children in exclusive possession of it and disclaiming any responsibility for payments thereafter of instalments due under the mortgage or of any other outgoings in relation to the property".

The court considered that the imposition of a constructive trust was warranted, in the circumstances, even more so than in the classic High Court case of the constructive trust: *Muschinski v Dodds*.[59]

The obligations which Ms Huen undertook, according to the Full Court, were as set out in the orders which the court made:[60]

". . . it will be declared that the respondent trustee holds the legal estate as to one half-share in the Melville property upon trust for the appellant subject to the following conditions:

(i) that the appellant continue to pay all mortgage instalments, rates, taxes and other outgoings in respect of the Melville property so as to indemnify Yue Kwong Huen ('the bankrupt') and the bankrupt's estate completely against those expenses;

(ii) that the appellant continue to reside in the Melville property with the children of her marriage to the bankrupt;

(iii) that the appellant make no further claim on the bankrupt or the bankrupt's estate under the *Family Law Act 1975* (Cth) or otherwise for the maintenance or support of herself or the said children".

A declaration of a constructive trust in these terms leads to some interesting conjectures. It was not clear what would happen if Ms Huen failed to pay the mortgage, or moved — would the constructive trust collapse? Presumably there would at that stage need to be some form of accounting, of the kind the Official Trustee sought, but which the Full Court found was not necessary having regard to the orders they proposed to make.

In doing so, however, the court indicated that such accounting would need to allow for, among other things:[61]

(a) The support provided "to the bankrupt as the care giver of their children" which "is not readily brought to account in any process of equitable accounting though, in our opinion, it is a matter of considerable importance in doing equity between the parties".

(b) The inference that the agreement absolved the bankrupt of any parenting responsibilities thereby allowing him to earn income for his own use.

The court found that the difficulty of allowing for these items supported the conclusion that a constructive trust should be imposed instead.

Due to the fact that the court was not considering a claim by the trustee under s 120 (undervalued transfer), it is not clear what weight these matters would have been given in the question of consideration for the transfer of the property. In *Lopatinsky*,[62] the Full Federal Court held that contributions (in the sense in which

that term is used in the *Family Law Act 1975*) to a marriage cannot provide consideration for a transfer of property. The Full Court in *Huen* did not even refer to *Lopatinsky* even though it was considered by the Federal Magistrate.

Nevertheless, it appears that there is scope in certain circumstances for the contributions of the parties to a relationship to be raised in the context of an argument that property is held on a constructive trust for one or both of them. It is also clear from the Full Court's decision that where it would otherwise be inequitable, a *Cummins* presumption of equal ownership may be overridden by a constructive trust to achieve justice between the parties.

Case study

***Rangott v Sharp* [2007] FMCA 324**

A trustee attacked a transfer between a bankrupt and her (now separated) husband pursuant to s 120 of the BA. The property transferred was the wife's one-half interest in the property registered in the joint names of Mr and Mrs Sharp.

The relevant facts were:

(a) Mr and Mrs Sharp were married in 1985.

(b) Mr Sharp retired from the Australian Federal Police in 1995 with a payout of $450,000.

(c) In January 1996, Mr Sharp commenced work as a security consultant.

(d) In early 1996, Mrs Sharp purchased "Occasions Bridal Boutique".

(e) The property was acquired in April 1996.

(f) The bankrupt's one-half share was transferred to the husband on 9 August 2002.

(g) Mr and Mrs Sharp separated in February 2004.

(h) Mrs Sharp was declared bankrupt on 13 August 2004.

Mr Sharp contended that he had provided the substantial equity in the property, being a deposit of $35,750 and $156,441 from his retirement funds. The remainder was jointly borrowed, giving Mr Sharp an interest of about 76% and the bankrupt 23%.

Mr Sharp said that the presumption of advancement was rebutted because:

- he never intended to benefit his wife from his retirement funds, and that these funds had been acquired over a much longer period than his marriage to the bankrupt
- this was second marriage for him and the bankrupt
- at the time of the purchase of the property, Mr Sharp had relocated to Sydney at least for work and was maintaining two separate residences, and
- he and the bankrupt maintained a degree of financial separation with individual bank accounts.

In considering the effect of *Cummins*, Mowbray FM held that in that case:

> "High Court has recently confirmed that it will be difficult for a non-bankrupt spouse who provided a greater proportion of the purchase price to argue that he or she should have any more than 50 per cent of the equity".[63]

and

> "28. While there are clearly factual differences between *Cummins* and the current case, *Cummins* illustrates how strong the presumption of advancement is and the

difficulty in rebutting it. In my view, even without any reliance on the strong confirmation from *Cummins*, having regard to the matters outlined above the presumption has not been rebutted. This is particularly so where there is no evidence of Ms Sharp's intention, the only evidence of Mr Sharp's intention is very recent, there are doubts about the reliability of Mr Sharp's evidence and where the title was taken in the joint names of the spouses.

29. In the result Ms Sharp took the same legal and equitable interest in the Fadden property on its purchase in April 1996. The interest which she held and transferred to Mr Sharp on 9 August 2002 was this 50 per cent interest".[64]

The court therefore was able to proceed to consider the transfer of the property on the basis that it was the bankrupt's one-half share that had been transferred. Ultimately, the court found the transfer void.[65]

Case study

Official Trustee in Bankruptcy v Brown & Anor [2011] FMCA 88

The Federal Magistrates Court was faced with separate applications under the Family Law Act (FLA) and the Bankruptcy Act (BA). The BA proceedings were to divide real property interests between Ms Brown, her former husband Mr Daevys and the Official Trustee in Bankruptcy as trustee of the bankrupt estate of Mr Daevys.

Chronology	
December	Cohabitation

1996	
9 June 1997	Purchase of property by Ms Brown
23 November 1997	Marriage
8 April 1998	Development application lodged noting both D & B as owners
2 March 2004	Bankruptcy of Mr Daevys after filing debtor's petition
2 March 2007	Mr Daevys discharged from bankruptcy
13 July 2007	Separation
8 June 2009	Divorce
17 November 2009	Caveat by D
23 November 2009	FLA proceedings
18 November 2010	Application by D for annulment of his bankruptcy dismissed.

Mr Daevys was bankrupted on his own petition but did not disclose any interest in property, including any claim to a property at Mount White registered in the sole name of Ms Brown. However, following his discharge from bankruptcy, Mr Daevys commenced FLA proceedings seeking property adjustment orders in respect of the property. Mr Daevys appears to have

failed to appreciate that any interest which he had in the property had vested in the Official Trustee, and had not “re-vested” (in accordance with the provisions of the BA) in him, even though he had been discharged from bankruptcy. He therefore could not recover the property or any interest in it, for his own benefit. When this became clear, he applied for the annulment of his bankruptcy. However, this application was dismissed by Driver FM as it failed to disclose any basis upon which Mr Daevys’ debtor’s petition should not have been accepted.[66] Driver FM also found that the non-disclosure of Mr Daevys’ interest in the Mount White property was deliberate.

When the Official Trustee became aware of the family law proceedings, separate proceedings were commenced by the Official Trustee against Ms Brown, in respect of the Mount White property. Since the bankruptcy of Mr Daevys occurred prior to the commencement of the BFLLAA, the court had no jurisdiction to alter the interests in any property of Mr Daevys which had vested in the Official Trustee. The Official Trustee claimed against the property on the basis of a resulting or constructive trust.

Federal Magistrate Driver accepted that he had to consider the principle in *Cummins* discussed above. He was satisfied that Mr Daevys had an interest, and therefore the only question was its quantum. The Official Trustee said that in circumstances where the principle in *Cummins* applied, there was no basis for contending that the interests of the husband and wife should be separately identified, and that the court should simply find that the property was a jointly owned asset and divide the asset between the Official Trustee and Ms Brown as to 50% each. In support of this, the court noted that a development application had been lodged noting both Mr Daevys and Ms Brown as owners, and that although the mortgage was in the sole name of Ms Brown, both made mortgage payments and therefore “both adopted the mortgage” (at [23]). His Honour was satisfied that “[b]oth respondents appear to have dealt with the Property as if it were a shared matrimonial asset” (at [27]).

However, his Honour was not satisfied that the outcome of the

case was determined by the *Cummins* principle. He distinguished the decision in *Cummins* on two grounds, namely that:

- in the present case the property had been purchased prior to marriage, and
- there was no suggestion (presumably unlike *Cummins*) that the property had been purchased with any intention to defeat creditors.

Against the first point, however, the property was purchased after commencement of cohabitation and (in all likelihood) a de facto relationship. The High Court in *Cummins* expressly ruled out deciding whether the resulting trust principles extended to a de facto relationship, as it did not arise in that case.

Against the second distinction drawn in *Daevys*, there was no suggestion in *Cummins* either that the property had been purchased with any intention to defeat creditors. In fact the property had been purchased in joint names. It was the transfer of Mr Cummins' half share to his wife which the court had agreed should be set aside under s 121 of the BA, and it was only upon the court determining that the transfer should be set aside that any question of a resulting trust in favour of Mrs Cummins was raised. That is, the two issues were quite discrete and Mr Cummins' void transfer was not relevant to the interest which he was found by the court to have in the property, prior to its transfer.

Driver FM drew a further distinction from *Cummins* in not accepting that Mr Daevys and Ms Brown had "a 'traditional matrimonial relationship' like that described by the High Court in *Cummins*" (at [31]). It is not completely clear what it was, in particular, about their relationship which removed it from the "traditional" category. It would appear that his Honour had regard to the fact that certain inheritance money which Mr Daevys had received during his bankruptcy (and kept instead of giving to the Official Trustee as he should have) was not accounted for to Ms Brown, or used to contribute directly to the property. It also

appears that following the death to which this inheritance related, Mr Daevys' contributions to the mortgage, rates and other payments became "irregular" (at [31]).

Having found against the Official Trustee's suggestion that the property should be divided equally based upon a *Cummins* type resulting trust, it remained for Driver FM to assess the respective financial contributions of each of the parties on a standard resulting and/or constructive trust basis, and to "treat the acquisition and improvement to the Property as a joint venture between the respondents who were partners to the joint venture".[67]

On this basis, his Honour found Ms Brown had contributed two-thirds of the funds towards the purchase and improvement of the property and ordered that the Official Trustee receive 33% of the sale proceeds of the property, with Ms Brown to receive the balance.

Case study

Weston v McAuley [2017] FCCA 1

In this case, the trustee relied squarely on *Cummins* to claim 50% of the proceeds of sale of the former matrimonial home, which had been purchased in 1998 as tenants in common, 95% to the wife, 5% to the husband, who was an accountant and who later became bankrupt. According to Drive J, the "bankrupt may have been a good accountant but he was a poor businessman. He acted in the manner of Mr Micawber" (at [91]).

The parties had been married for 52 years and had owned several properties. The wife had worked in her husband's practice as well as having "raised the children and performed domestic duties" (at [8] per Driver J). The couple remained together and there were no property settlement proceedings between them. As Driver J noted (at [19]):

> "In the absence of s.79 Family Law Act proceedings brought between the bankrupt and Mrs McAuley there is no scope for the trustee to be heard in the Family Court or this Court on the adjustment of property rights under the Family law Act as between the couple.
>
> 20. In the absence of property proceedings under the Family Law Act, the general law of property applies to assets owned or held by Mrs McAuley and the bankrupt. That includes the application of equitable principles and the provisions of the *Bankruptcy Act 1966* (Cth)".

Based on the general law and equitable principles as described in *Cummins*, the trustee understandably sought a declaration that the former matrimonial property was in fact owned by the married couple equally, despite the registration on title (95% to the non-bankrupt wife and only 5% to the bankrupt husband).

Driver J accepted the trustee's contention that "unlike all other assets of a marriage, the matrimonial home has a special place in equity for equality between long term married couples" (at [62]).

The court also accepted that in *Cummins*, the High Court "overrode the presumption of a resulting trust in favour of the wife in that case that ordinarily would have arisen because of her greater contribution to the acquisition of the matrimonial home" (at [62]).

However, the court distinguished *Cummins* because of:

- the presumption of advancement, and
- the actual intention of the parties.

In an important consideration of the issue, Driver J found that the High Court in *Cummins* had **not** abolished the presumption of advancement (that in certain circumstances a husband will be deemed to have intended to make a gift to his wife, not to advance monies to be held on a resulting trust). Thus "any over payment of the purchase price by the bankrupt was intended to be a gift" (at [84]).

In any event, the court was satisfied that the parties had **actually** intended to acquire the property in the interests which they did. The evidence demonstrated that "the couple purchased land at various times in joint names or singularly. That history supports an inference that the couple intended that they should benefit from the properties collectively but does not support an inference that they couple intended any particular property would benefit both of them equally" (at [89]). This is a challenging conclusion for trustees in bankruptcy who are left to try and reach such inferences from the history of the transactions of the parties to the relationship and who in such a case as this might be forgiven for concluding exactly the opposite — namely (and consistently with *Cummins*) that it did not matter whose name the property was in, it was property owned for the joint benefit of the "traditional matrimonial relationship".

However in this case, there was further specific evidence of the wife that was not able to be shaken in cross-examination, regarding the husband's previous financial difficulties (including a Pt X BA agreement with his creditors in 1992) and which also included "several conversations with her husband which established a mutual intention that the property was to be hers completely. In short, having lost her entire investment previously, Mrs MacAuley wanted to secure her future" (at [92]). This intention could not be fully achieved because the bank insisted upon the husband being on the title, but this was "a partial retreat" and the court accepted this was an adjustment to presumption of advancement and to the parties' intention but found that this intention:

> "did not in essence change. The property was to be Mrs McAuley's alone to the maximum extent permitted by the bank in the provision of its mortgage and business finance" (at [94]).

Thus, the court was satisfied that there was no resulting trust in favour of the bankrupt and the wife was entitled to retain 95% of the proceeds of the sale of the property (at [96]). This case demonstrates the importance of evidence of the parties' **actual**

intentions at the time property is purchased, particularly if the property is acquired with asset protection in mind, this should be documented in some clear manner, such as a deed. This will not prevent voidable transaction claims by a later appointed trustee in bankruptcy (see ¶15-120 above).

Tip

Have actual documented evidence of the parties' intentions when acquiring property, even if the property is being purchased in the sole (or predominantly in the) name of one party only.

Footnotes

41 *The Trustees of the Property of John Daniel Cummins, A Bankrupt* v *Cummins* [2006] HCA 6.

42 *Calverley* v *Green* (1984) FLC ¶91-565, per Gibbs CJ at p 79,560.

43 The presumption also applies in respect of certain other relationships as well. In Meagher and Gummow, *Jacobs Law of Trusts in Australia*, 6th Ed, Butterworths, Sydney, 1997 at [1212], it is described as operating "where the legal title is, on a purchase, vested in someone whom the person providing the purchase money is under an obligation to support, namely, his wife, child or someone to whom he stands *in loco parentis* … there is a presumption that the property was vested as an absolute gift or as an advancement".

44 *The Trustees of the Property of John Daniel Cummins, A Bankrupt* v *Cummins* [2006] HCA 6, Full Court judgment at [71] quoting Scott, *The Law of Trusts*, 4th Ed, 1989, vol 5, §454 at 239.

45 Ibid, at pp 197–198.

46 Ibid, Full Court judgment at [72].

47 *Charles Marshall Pty Ltd* v *Grimsley* (1956) 95 CLR 353 at 365; quoted in *Cummins*, Ibid.

48 *The Trustees of the Property of John Daniel Cummins, A Bankrupt* v *Cummins* [2006] HCA 6, Full Court at [4].

49 *Huen* v *Official Receiver* [2008] FCAFC 117 at [44].

50 Ibid at [25].

51 *Official Receiver* v *Huen* [2007] FMCA 304 per Lucev FM at [35].

52 Ibid at [86].

53 *Huen* v *Official Receiver* [2008] FCAFC 117 at [51].

54 Evidence about this was sparse, given the way in which the trial at first instance was conducted. The parties had agreed on a series of facts, some of which were conditional upon certain additional evidence being provided: *Official Receiver* v *Huen* [2007] FMCA 304 at [3]–[4].

55 *Huen* v *Official Receiver* [2008] FCAFC 117 at [52].

56 Ibid, at [55].

57 Ibid, at [65]–[66].

58 This is a reference to the Federal Magistrate's regard to

the fact that “the Bankrupt and Respondent have sought consent orders from the Family Court without disclosing the circumstances now said to give rise to a constructive trust as a matter of equity and good conscience”: id at [64].

59 *Muschinski v Dodds* (1985) 160 CLR 583.

60 *Huen* v *Official Receiver* [2008] FCAFC 117 at [81].

61 Ibid, at [80].

62 *Official Trustee in Bankruptcy* v *Lopatinsky* (2003) 129 FCR 234.

63 *Rangott* v *Sharp* [2007] FMCA 324 at [25].

64 Ibid, at [28]–[29].

65 Ibid, at [82].

66 *Daevys* v *Official Trustee* [2010] FMCA 906.

67 Ibid, at [32].

¶15-180 Making an application in a bankruptcy or family law matter

Rules have been created to deal with matters involving bankruptcy and family law in the Family Court. Chapter 26 of the Family Law Rules 2004 (Cth) (FLR) governs such applications.

These rules were amended by the Family Law Amendment

(Insolvency Law Reform) Rules 2017. The Family Law Amendment (Insolvency Law Reform) Rules 2017 were introduced to give effect to the significant amendments to corporate and personal insolvency law arising out of the *Insolvency Law Reform Act 2016* (Cth). The *Insolvency Law Reform Act 2016* made substantial changes to the *Bankruptcy Act 1966* (Cth) (BA) and *Corporations Act 2001* (Cth) for a number of purposes, including greater regulation of insolvency practitioners and greater harmonisation between personal insolvency administration (administered under the BA) and corporate external administration (administered under the *Corporations Act 2001*).

The FLAR introduced what the explanatory statement described as "a small number of minor technical changes to the Rules . . . to update references to provisions that are repealed or replaced".

An application is commenced under the *Bankruptcy Act 1966* by filing a *Bankruptcy — Application* (r 26.04), or in an application in which final relief has been granted, by filing the form: *Bankruptcy — Application in a Case*.

A respondent or interested party in a bankruptcy application must, at least three days before the hearing (r 26.07(2)):

1. file a form: *Bankruptcy — Notice of Appearance*

2. file a form: *Bankruptcy — Notice stating grounds of opposition to an Application or an Application in a Case*

3. file an affidavit in support of the grounds of opposition, and

4. serve the notices and supporting affidavit on the applicant.

Disclosure

With some limitations, the FLR bind the trustee regarding disclosure obligations, in the same way as a party to the marriage. Technically, there is no specific exception to trustees in bankruptcy from the pre-action procedures in Sch 1 of the FLR. However, it should be noted that there is a specific exclusion to at least part of the disclosure regime. Rule 13.1.2(2) FLR provides that "This Division [being

presumably Division 13.1.2 regarding the duty of disclosure in financial cases] does not apply to a party to a property case who is not a party to the marriage or de facto relationship to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute".

In addition, the Family Court of Australia website advises that "the pre-action procedures required by Family Law Rules 2004 do not apply to cases in the Family Court where a party to the marriage or de factor relationship is bankrupt". (see http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/bankruptcy/family-law-and-bankruptcy)

This exception is understandable. Practically the trustee is often at a forensic disadvantage in terms of the information and documentation which might be expected from parties to the relationship. However, apart from the exception in r 13.1.2(2), (which appears to be limited, at least on its face, to Div 13.1.2), there does not appear to be any specific exclusion to the pre-trial procedures in the FLR.

In general terms, the limits of the disclosure obligations were considered by the Full Court of the Family Court in *Masoud & Masoud* (2016) FLC ¶93-689; [2016] FamCAFC 24 at [21]–[23]. The Full Court said that the duty of disclosure is not include an absolute obligation to "garner documents by any means", and so did not require a party to obtain documents using the compulsory powers of the court (for instance, to issue a subpoena requiring production to the court). This is important in bankruptcy, given the trustee's powers of compulsion under the BA (see for instance s 77A, s 77C and s 81 BA).

Needham & Trustees of the Bankrupt Estate of Needham [2016] FamCA 253 (20 April 2016) per McLelland J considered the question of disclosure in light of the obligations of a trustee in bankruptcy and held that a trustee was bound by the obligations of disclosure, but, as in *Masoud* was not obliged to obtain documents not in the possession custody or control of the trustee:

> "**The Respondent Trustees' obligations of disclosure**
>
> 63. The Respondent Trustees did not concede that the Trustee in

Bankruptcy was bound by the duty of disclosure set out in Division 13.1.2 of the Rules. In that context it is of note that Rule 13.02(2) provides:

This division does not apply to a party to a property case who is not a party to the marriage or de facto relationship to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute.

64. Clearly, the Trustees were not a party to the marriage. Nevertheless, the financial circumstances of the husband's bankrupt estate will be directly relevant to identifying the vested bankruptcy property and therefore to the issues in dispute.

65. In those circumstances, I am of the opinion that the Respondent Trustees are subject to Chapter 13 of the Rules including Rule 13.01 which imposes a 'duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner'.

66. That obligation includes, pursuant to Rule 13.07, the duty to disclose each document that 'is or has been in the possession, or under the control, of the party disclosing the document'. There has been no suggestion that the Respondent Trustees have not disclosed documents in their possession or under their control. The complaint by counsel for the wife was in respect to alleged inadequate enquiry by the Respondent Trustees with a view to obtaining relevant information and documentation. In particular it was submitted that the Respondent Trustees fell short of fulfilling their duty of disclosure by not having utilised the provisions of section 81 of the Bankruptcy Act with a view to endeavouring to obtain information and documentation from the husband in respect to his financial affairs and those of associated entities.

67. The Rules are silent as to whether the Trustee in Bankruptcy is obliged to make enquiries of the bankrupt spouse in order to obtain relevant documentation for the purpose of disclosing such documentation in family law proceedings.

68. However, in *Masoud & Masoud* [2016] FamCAFC 24 at [21] –

[23], the Full Court said that the duty of disclosure is not absolute in terms of obtaining documents that are not in the disclosing parties' possession. Specifically the obligation does not oblige a party to 'garner documents by any means'. The Full Court also said that the obligation does not include a party being required to utilise Court processes to compel a non-party to produce documents, for the purposes of the family law proceedings.

69. Although the facts in *Masoud* (supra) were different from the present case, I propose to take a similar approach in relation to this issue. I am not persuaded that there is an obligation under the Rules for the Trustees to undertake an examination of the husband pursuant to section 81 of the Bankruptcy Act. Amongst other matters, this would involve committing significant additional resources on the part of the creditors. In the absence of evidence of imprudent conduct, the Respondent Trustees were best placed to make an assessment as to whether utilisation of section 81 of the Bankruptcy Act was practicable.

70. It is unquestionably the case that the Court can have regard to a party's non-disclosure in considering whether the party has other assets that should be considered in determining the matrimonial property pool. Non-disclosure can also be relevant to considering whether the non-disclosing party has earnings that remain undisclosed and whether that person has undisclosed potential for future income.

71. In *Gould & Gould* [2007] FamCA 609; (2007) FLC 93-333 at 81,715, the Full Court said in that respect:

Where the Court is satisfied the whole truth has not come out it might readily conclude the asset pool is greater than demonstrated. In those circumstances it may be appropriate to err on the side of generosity to the party who might be otherwise be seen to be disadvantaged by the lack of complete candour.

72.However, even it is assumed that the Respondent Trustees have failed in their duty of disclosure, that does not necessarily result in an adjustment in favour of the other party. As the Full Court recently confirmed in *Masoud* at [24]:

It needs to be observed too that it is well recognised that there is a difference between circumstances where there is inadequate disclosure which suggests the existence of undisclosed assets and where it does not (see *HDM & MM and Anor* [2006] FamCA 47).

73.This is also made clear in *Gould* (supra) at 81,716 where the

Full Court held that, where findings of non- disclosure are made, it may be ‘appropriate to increase the asset pool to take account of the non-disclosure’. Alternatively, or in addition, where there is evidence to satisfy the Court ‘on the balance of probabilities there existed assets other than those contained in the asset pool’, the Court can make an adjustment in favour of the other party on account of the non-disclosure pursuant to section 75(2)(o).

74. In this case, the question as to whether there is additional property is a matter for mere speculation. There is no evidence that satisfies the Court that additional property exists that should be included in the asset pool. In that context the Respondent Trustees have relied upon two affidavits sworn by Ms W, sworn respectively on 9 April 2015 and 22 June 2015, as well as an affidavit of Mr Crawford, sworn on 23 November 2015. Ms W is an accountant in the employee of Z Partners (QLD) Pty Ltd and has had the day-to-day conduct of the bankrupt estate of the husband. Mr Crawford is a chartered accountant and a director of Z Partners.

75. Ms W, who was not required for cross examination, provided evidence of her attempts to obtain information regarding the husband’s financial affairs from the husband. It is unnecessary to detail that evidence save as to note that the husband has been most uncooperative.

76. Mr Crawford’s affidavit sworn 23 November 2015 was tendered as Exhibit 4 in the proceedings. That affidavit detailed attempts made on behalf of the Respondent Trustees to ascertain whether the husband had any interest in those entities that were the subject of the 2006 freezing order.

77. The evidence of Mr Crawford was summarised in paragraph 4 of his affidavit in the following terms:

Since my appointment, I have investigated all known assets of the bankrupt’s estate including but not limited to those assets referred to in the Supreme Court of New South Wales freezing orders entered on 9 October 2006 and alleged to be assets of the bankrupt.

78. At paragraph 23, Mr Crawford concluded:

Other than the trustee's interests in the real property, I have not identified any other commercially recoverable asset of the bankrupt.

79. It is accepted that the reference to the 'real property' is a reference to the Suburb C property.

80. In my view, in all the circumstances, the Respondent Trustees have acted appropriately in endeavouring to ascertain what forms part of the vested bankruptcy property. The evidence falls short of establishing, on the balance of probabilities, that the husband has additional interests that should be included in the matrimonial property pool".

Needham & Trustees of the Bankrupt Estate of Needham [2017] FamCAFC 94 (23 May 2017, per May, Strickland and Cronin JJ)

On appeal, the Full Court upheld the finding that the trustee was bound by the obligations in the Rules regarding disclosure, and also that the trustee had complied with those obligations:

"44. The Trustees contended that 'the application of fairness and equity demands that any adjustment in the wife's favour should be minimal'. In response to the wife's complaint that the Trustees had failed to properly investigate the husband, it was submitted by the Trustees:

36. In summary in respect to the issue of disclosure, it was submitted that further enquiry would have been a futility having regard to the fact that it was a difficult estate that included overseas investigations in circumstances where the husband was wholly uncooperative. The practicality of further investigation, it was argued, also had to be seen in the context of the investigators having limited funds available to pursue such investigations.

45. We accept this submission, and indicate that it is sufficient if all reasonable enquiries are made taking into account the particular circumstances, and the need for proportionality".

ORDERS AND INJUNCTIONS BINDING THIRD PARTIES TO FAMILY LAW PROCEEDINGS

¶15-190 Intervention and third parties

Creditors are one example of third parties whose interests may be affected in family law proceedings.

Since 2004, following the amendments introduced by the *Family Law Amendment Act 2003* (Cth), which introduced Pt VIIIA *Family Law Act 1975* (Cth) (FLA) (see the discussion in *Commissioner of Taxation v Tomaras* (2018) FLC ¶93-874; [2018] HCA 62 per Edelman J at [113]-[114], the Family Court has had broad powers to alter the interests of third parties. Even without orders directly affecting a third party, the court will allow third parties to intervene in family law proceedings in a number of circumstances.

The classic statement prior to the 2004 amendments was that of Gibbs J in *Ascot Investments Pty Ltd v Harper and Harper*:[68]

> "There is nothing in the words of the sections that suggests that the Family Court is intended to have power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform".

However, in *Biltoft and Biltoft*, the Full Court of the Family Court said:[69]

> "Nor, as has been pointed out earlier, is there anything in the decision of the High Court in *Ascot Investments Pty Ltd v Harper and Harper* to suggest that this Court cannot make an order dividing the assets of the parties because such a division might hamper a third party in his or her chances of recovery of a debt".

Notwithstanding this comment, it is accepted that a court exercising FLA jurisdiction has power to allow a third party creditor to intervene in proceedings between a husband and wife or a de facto couple. This extends to making asset preservation orders preventing a husband

and wife or a de facto couple from dealing with assets of the marriage or relationship.

Section 92(1) and (3) of the FLA provide for a party to intervene in family law proceedings:

> "(1) In proceedings (other than divorce or validity of marriage proceedings), any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.
>
> . . .
>
> (3) Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party".

Specifically, when considering intervention by a creditor in property settlement proceedings under Pt VIII of the FLA, the court has available to it the provisions of s 80:

> "(1) The court, in exercising its powers under this Part, may do any or all of the following:
>
> . . .
>
> (f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;
>
> . . .
>
> (i) impose terms and conditions;
>
> . . .
>
> (k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice".

Section 90SS of the FLA contains similar provisions in relation to de facto couples.

In *Deputy Commissioner of Taxation v Kliman & Kliman*,[70] it was held

that, when considering the intervention of a third party creditor:

> ". . . the protection of third party creditors can be said to be a part of the exercise of the jurisdiction under s 79 where it is in the interests of one or both of the parties to a marriage that there be such protection".

Further:[71]

> ". . . the Court has long recognised that as an essential first step in the exercise of its jurisdiction under s 79, it must determine the property of the parties to a marriage, and it does this by deducting from the value of their assets the value of their liabilities. In this context, the Court generally always has regard to the position of significant creditors".

In *Zdravkovic and Zdravkovic*,[72] the Full Court of the Family Court approved the court's power to order a third party debt to be discharged, even where the third party has not intervened:

> ". . . in an appropriate case, as part of the adjustment of the financial rights of the parties, the Court may in proceedings under sec 79 order the discharge of a debt to a third person, whether such person is an intervener or not. Once it is clear and beyond doubt that a debt is owing to a third person and that all the probabilities are that it will be enforced unless it is discharged by payment, then the Court is not precluded from ordering its discharge by the parties of one of them as a condition or as part of the overall readjustment of the parties' financial rights, if such a course is convenient or just. Situations, where such orders have been appropriate and where they have been made, are numerous. Amongst the almost innumerable examples which come to mind are . . . income tax liabilities . . .
>
> The Court is not precluded from ordering the discharge of such a debt merely because the creditor has not obtained judgment or has not made a claim in the proceedings for repayment . . . "[73]

Insofar as the court based its jurisdiction on s 80(1)(f), the majority in *Deputy Commissioner of Taxation v Kliman* held that:[74]

> "It is reasonable to assume that a payment of a party's tax debt is at least objectively, a payment for his or her benefit".

In *Y Pty Ltd and Anor & Cho and Anor* [2010] FamCA 113, the court considered "problems that this court seems to have successfully avoided directly confronting during its whole existence" (per Cohen J at [1]). The court was considering an application by two companies, X Pty Limited and Y Pty Limited who were given a second mortgage by the husband over property registered in his sole name. However, the wife produced a document which the husband and she had signed and which purported to give her half of the property, and require the husband to give her the proceeds of sale of his half share of the property after payment of the first mortgage. The husband served notice under the Family Law Rules, on X and Y, giving notice of his intention to seek consent orders in the Family Court. After filing the application, but before serving it, the husband filed a debtor's petition. The court refused to make the orders because X and Y had not been joined to the proceedings. However, after serving a further letter on the companies, the orders were made by consent. X and Y then sought to intervene. The court held that by seeking a review of the consent orders the companies had already intervened. The court refused to make a declaration that the orders bound the companies, however, as otherwise there would be inconsistent orders. The court made directions for the hearing of the review of the orders.

In *Martin & Martin* [2015] FamCA 260, Cronin J considered an application by the bankrupt wife's former solicitors to enforce previous consent orders against the husband, so as to enable payment to them of their outstanding legal fees and litigation funding debt of some $850,000. The court found that:

> "the ability of the Court to order a payment by one party directly to a creditor does not need to rely on Part VIIIAA. The power lies in s 79 (see *Deputy Commission* [sic] *of Taxation* v. *Kliman and Kliman* [2002] FamCA 629; (2002) FLC ¶93-113. A similar approach was adopted by the Full Court in *Zdravankovic* and *Zdravankovic* (1982) FLC ¶91-220 where the Full Court held that once it was clear and beyond doubt that a debt was owing to a third person, and that it would in all probability be enforced, there

> are clearly appropriate cases where as part of the adjustment of the financial rights of the parties, the order could be made for the payment director to the creditor. . . . It is evident that there is no other prospect of X Firm being paid because of the fact that the wife has studiously avoided pursuing what would otherwise appear to have been her rights at law as against the husband" (at [65]).

The court found there was a sufficient nexus between the rights of the law firm and both the husband and the wife and their property interests.

It should be noted also that once a third party has been joined, it does not matter whether the parties to the marriage withdraw their application. In *Cao & Trong and Anor* [2018] FamCA 460, the Commissioner of Taxation sought and obtained leave to intervene in property settlement proceedings. The husband and wife then sought to finalise the property settlement proceedings without orders. The court held that "Once a party . . . [the Commissioner] has all of the procedural rights to file documents in a live proceeding" (per Cronin J at [44]), including to file an application in the proceedings, "and is entitled to alter his position as to proposed relief at time when discovery process discloses something new or indeed other evidence emerges. That is particularly so in a jurisdiction where under s 79(2) the court is not permitted to make an order which is not just and equitable" (*id.* at [46]).

> Cronin J concluded that the ATO debt was either established, or alternatively the court had jurisdiction to determine any dispute. Therefore (at [67]): "In my view, the Commissioner has the right to seek an alteration of the property interest of the husband and the wife if it can be shown that he may not be able to recover the debt otherwise".

The fact that the parties did not wish to proceed with their s 79 application did not matter:

> "I do not accept that a withdrawal by either or indeed both parties makes any difference. Subject obviously to the Commissioner indicating that he [is] seeking to alter the parties' property and that

those who had withdrawn or discontinued might want to be then heard, the court can proceed". (*id.* at [70])

Alternatively, the court found:

> "Provided the court is altering the interests of the husband and wife in circumstances arising out of their marriage relationship, the court can make an order in favour of a creditor (once a party) because that creditor has all of the rights of a party, regardless of whether the parties to a marriage have chosen not to proceed, or . . . to ignore the rights of the creditor". (*id.* at [77])

The court dismissed the wife's application to have the proceedings dismissed.

Footnotes

68 *Ascot Investments Pty Ltd* v *Harper and Harper* (1981) FLC ¶91-000 at p 76,061.

69 *Biltoft and Biltoft* (1995) FLC ¶92-614 at p 82,127, approving the same statement made by Nygh J in *Af Petersens and Af Petersens* (1981) FLC ¶91-095 at p 76,660.

70 *Deputy Commissioner of Taxation v Kliman & Kliman* (2002) FLC ¶93-113; [2002] FamCA 629 per Ellis ACJ and Finn J at p 89,115.

71 Ibid, at p 89,113.

72 *Zdravkovic and Zdravkovic* (1982) FLC ¶91-220.

73 Ibid, at pp 77,205–77,206, approved by the majority in *Deputy Commissioner of Taxation* v *Kliman & Kliman* (2002) FLC ¶93-113; [2002] FamCA 629 at p 89,113.

74 *Deputy Commissioner of Taxation* v *Kliman & Kliman*

(2002) FLC ¶93-113; [2002] FamCA 629 at p 89,117.

¶15-200 Part VIIIAA of the *Family Law Act 1975*: orders and injunctions binding third parties

Part VIIIAA of the *Family Law Act 1975* (Cth) (FLA) effectively overturned part of the High Court's decision in *Ascot Investments Pty Ltd v Harper*[75] (see ¶15-190), where the High Court held that the Family Court had no power to make orders to the prejudice of third parties.

The operation of Pt VIIIAA, particularly s 90AE and 90AF, gives the court power to make orders binding on third parties where the order is in relation to property of a party to the marriage, provided the order is in exercise of the court's power pursuant to s 79 (property alteration) or 114 (injunctions). Part VIIIAB extends the operation of Pt VIIIAA in relation to parties to a de facto relationship (see s 90TA).

In *Commissioner of Taxation v. Tomaras* (2018) FLC ¶93-874; [2018] HCA 62 the High Court considered the operation of the provisions. Justice Gordon held that:

> "[71] Section 90AE was intended to cover, and covers, a range of possible arrangements that a party to the marriage may have which involve a third party, including ownership of life insurance products, shares in corporate entities and the creditors of the parties to a marriage whether they are family, friends or financial institutions. The range of available orders was 'intended to be broad and include[d] substitution of the party liable for a debt, adjusting the proportion of a debt that each party is liable for or ordering the transfer of shares between the parties to the marriage'.
>
> [72] However, the circumstances in which the orders may be made against a third party are confined. Relevantly for the purposes of this appeal, the court may only make an order

concerning a debt of a party to a marriage which binds a third party if 'it is *not foreseeable* at the time that the order is made that to make the order would result in the debt not being paid in full' (emphasis added). As will become apparent, this provision is important in applying s 90AE to a debt owed to the Commonwealth which arises under a taxation law.

[73] Part VIIIAA is facultative and protective. It relevantly provides that Pt VIIIAA has effect despite anything to the contrary in any other law (written or unwritten) of the Commonwealth, a State or Territory, and anything in a trust deed or other instrument, and that a third party in relation to a marriage is not liable for loss or damage suffered by any person because of things done (or not done) by the third party in good faith in reliance on an order made by a court in accordance with Pt VIIIAA.

[74] Finally, the drafters specifically addressed the effects of the provisions on the executive functions of government. That is evident in two separate ways. First, s 90AE imposes a duty on the court to be satisfied that any order takes into account the taxation effect (if any) of the order on the parties to the marriage and on the third party as well as the social security effect (if any) of the order on the parties to the marriage. Second, Pt VIIIAA had a deferred commencement. The Senate's Supplementary Explanatory Memorandum explained that the purpose of the deferred commencement was to:

'ensure that any affected third parties, such as banks or financial services bodies, are given sufficient time to make any necessary changes, for example to their operating systems, as a result of the introduction of these provisions. The deferred commencement will also ensure that any necessary consequential amendments, such as amendments to taxation or social security legislation, can be made before the provisions commence'.

No subsequent consequential amendment to the taxation or social security legislation was identified in argument". (footnotes omitted)

Section 90AD(1) defines a debt owed by a party to a marriage as

property for the purposes of Pt VIIIAA. Section 90AD(2) provides that property includes a debt owed by a party to a marriage, with s 90TA(3) providing that property includes a debt owed by a party to the de facto relationship.

The court's powers to make a third party order are limited by s 90AE(3). It is here that the third party creditor may have some capacity to insist that the debt outstanding be paid or provided for (see *Commissioner of Taxation v Tomaras* (2018) FLC ¶93-874; [2018] HCA 62). The subsection requires the court to be satisfied of the following before making an order affecting third party interests:

- that it is reasonably necessary to effect a property division between the parties (s 90AE(3)(a))
- that if the order deals with a debt, that it is not foreseeable that the debt will not be paid in full if the order is made (s 90AE(3)(b))
- that the third party has been accorded procedural fairness (s 90AE(3)(c))
- that the order is just and equitable (s 90AE(3)(d)), and
- that the order has taken account of the matters in s 90AE(4).

Section 90AE(4) contains a number of other relevant matters the court must consider in contemplating a third party order, such as the taxation effects, and the ability of a party to repay a debt after an order is made.

Although the court is bound to consider the interests of the third party, this does not necessarily mean the third party will, in all circumstances, be joined as a party to the proceedings or, if joined, remain a party. In *Samootin v Wagner & Anor*,[76] the Full Court of the Family Court refused an appeal against orders which dismissed the wife's application to join certain third parties.

The Full Court (obiter) said that the third party provisions do not provide for the joinder of third parties, rather for orders to be made against them. Procedural fairness must be accorded the third party

which may mean being joined; but, in the present case, what had happened in effect was for those parties "to apply to be removed as parties to the case" (at p 80,513) and that there was nothing in the proceedings which would make it appropriate that the third parties remain in those proceedings.

This decision should not be read too broadly given that r 6.02 of the Family Law Rules 2004 (Cth) provides for the joinder of any party whose rights may be directly affected, and whose involvement is necessary, to determine all issues in dispute in a case.

There is some doubt about the constitutional validity of the amendments which introduced the court's power to adjust the interests and rights of third parties, although no formal High Court challenge has been determined. In *Slazenger v Hunt*, the High Court in refusing special leave to appeal held that a constitutional challenge to certain of the provisions of Pt VIIIAA was premature, as the proceedings before the trial judge had not been conducted, and an appeal to the Full Court of the Family Court on the question had not been heard.[77]

There are a number of other uncertainties in relation to the interpretation and extent of the third party provisions in Pt VIIIAA of the FLA. This should not stop third party creditors from getting in early, by intervening in property settlement proceedings between husband and wife or a de facto couple, in appropriate cases. Failure to take proactive steps has caused some creditors loss, as considered in the case study in ¶15-210.

A further area of uncertainty is in relation to the costs incurred by the third party. Section 117(1) of the FLA provides that the general rule is that parties to proceedings bear their own costs. However, s 90AJ provides that the court may make an order for the payment of the reasonable expenses of the third party where:

- the court has made an order under s 90AJ or s 90AF, and
- the third party has incurred an expense as a "necessary" result of the order of an injunction.

It would seem doubtful that a strict interpretation of s 90AJ would include the legal costs incurred by the third party *before* the order is made, as distinct from those incurred in order to give effect to it. However, this issue remains to be clarified.

Commissioner of Taxation v Tomaras **(2017) FLC ¶93-806; [2018] HCA 62**

In this case, the ATO did intervene in property settlement proceedings based upon its debt owing by the wife in the relationship. The abbreviated chronology was as follows:

- The parties married in 1992.
- The ATO issued tax assessments against the wife during the relationship, leading to a default judgment on 12 November 2009 in the sum of $127,669.
- On 5 November 2013, the husband was declared bankrupt.
- On 20 November 2013, the wife commenced property settlement proceedings against the bankrupt (not the trustee in bankruptcy, it would seem).
- In February 2016, the ATO was given leave to intervene in the proceedings.
- By 9 August 2016, the liabilities of the wife to the ATO were $256,078 (the significant increase being further General Interest Charge (GIC) on the debt the subject of the judgment).
- After joinder of the ATO, the wife sought amended orders under s 90AE FLA as follows:

  > "Pursuant to s 90AE(1)(b) of the [FLA], in respect of the [wife's] indebtedness to the [Commissioner][for] taxation related liabilities in the amount of $256,078 as at 9 August 2016 plus General Interest Charge (GIC), the [husband] be substituted for the [wife] as the debtor and the [husband] be solely liable toteh [Commissioner] for the said debt".

- Following this amendment, a question of law was stated, ultimately before the High Court, as follows:

> "Does s 90AE(1)(-(2) of the [FLA] grant the court power to make Order 8 of the final orders sought in the amended initiating application of the [w]ife?"

Before the Full Court, the answer to the question was:

> "Yes, but with the proviso that s 90AE(1) confers power only to make an order that the Commissioner be directed to substitute the husband for the wife in relation to the debt owed by the wife to the Commissioner". (see *Commissioner of Taxation v Tomaras* [2018] HCA 62 at [35])

The ATO obtained special leave to the appeal to the High Court. The case was heard by Kiefel CJ, and Gageler, Keane, Gordon and Edelman JJ in four separate judgments. However, all agreed that s 90AE FLA grants a power to order the ATO to replace one party to a marriage, with the other, in respect of a tax debt, but that this power was not unconstrained. The High Court answered the stated question as follows at [97]:

> "Although in relation to a debt owed to the Commonwealth by a party to a marriage s 90AE(1) confers power to make an order that the Commissioner be directed to substitute the husband for the wife in relation to that debt, it is otherwise inappropriate to answer the question without it being found, or agreed, that, within the meaning of s 90AE(3), the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage, and it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and without the court being satisfied that, in all the circumstances, it is just and equitable to make the order".

In essence, the High Court was critical of the stated question being answered in the abstract hypothetical situation which had been put to it. The protection of creditors in s 90AE(3) was important, and in circumstances where "the husband is a bankrupt and the wife is

solvent, it is not possible to see how the condition in s 90AE(3)(b) could be satisfied in this case" (per Kiefel CJ and Keane J at [9]).

Section 90AE(3)(b) provides that the court is not to make an order under s 90AE unless it is "not reasonably foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full". Section 90AE(3)(d) provides that the court must also be satisfied that "in all the circumstances it is just and equitable to make the order".

It can be seen that these conditions will rarely be met where one of the parties is bankrupt. Where it is sought to shift a liability to the bankrupt, the creditor will be prejudiced, as they will either rank pari passu with ordinary unsecured creditors of the bankrupt spouse, in accordance with the priority regime in s 109 BA. Or alternatively, if the liability imposed on the bankrupt is a post-bankruptcy liability (because the circumstances giving rise to it arose after bankruptcy) then the bankrupt will, whilst bankrupt, be facing a further liability, with no assets and will possibly need to consider a second bankruptcy.

In fact, the High Court appears uncertain as to whether there is much scope at all for an adjustment. Kiefel CJ and Keane J went on to say:

> "More generally, it is difficult to see how any case whether there is a real prospect that the substitution of one spouse for another as the debtor or the revenue authority would create or enhance a risk of non-payment would not fall foul of s 90AE(3)(b)" at [9].

Their Honours also queried how the newly indebted party to the marriage could contest any liability for an adjusted revenue debt without the benefit of the rights of objection of the taxpayer (and further query whether the privacy and secrecy obligation of the Commissioner would preclude the newly indebted party from even obtaining all necessary details of the debt).

Footnotes

75 *Ascot Investments Pty Ltd* v *Harper and Harper* (1981) FLC ¶91-000.

76 *Samootin* v *Wagner & Anor* (2006) FLC ¶93-265; [2006] FamCA 432.

77 *Slazenger* v *Hunt* [2006] HCATrans 473 (1 September 2006). The High Court made it clear, however, that the dismissal was without prejudice to make a further application "once proceedings before O'Ryan J were concluded and an appeal to the Full Court is decided".

¶15-210 *Deputy Commissioner of Taxation and B & S; Re Avonbay Pty Limited (in liquidation) and Gafford Pty Limited (Receiver and Manager Appointed) (in liquidation)*[78]

This case was decided before the commencement of the *Bankruptcy and Family Law Legislation Amendment Act 2005*. However, it illustrates the potential consequences for a third party (the Deputy Commissioner of Taxation (DCT)) of not intervening at an early stage.

The effect of orders made by May J in the Family Court on 8 May 2002 was to charge the husband's companies, A and G, with payment of the property settlement sum due to the wife ($950,000). This in effect gave the wife priority in respect of her claim against her husband over and above unsecured creditors of each company including the ATO. The Family Court orders were made before a liquidator was appointed to the two companies. The assessments of the liquidators of the companies were that, if valid, the charges would remove any surplus from the companies and deliver it entirely to the wife. Unsecured creditors would receive nothing.

The DCT's application for injunctive relief was dismissed as there was insufficient evidence at that stage of the fact that there would not be any recovery from the companies of the tax debt. Of particular relevance is May J's finding that "the evidence reveals that the DCT was made aware of the existence of proceedings in this Court prior to

judgment being handed down", and that having been informed of the existence of the proceedings "the DCT could have intervened at any point prior to 8 May 2002".

The liquidator's application (indemnified by the DCT) was successful and the 8 May 2002 orders were set aside against Avonbay. The wife appealed.

The companies were not parties to the family law proceedings and, on appeal, the Full Court of the Family Court held that there was no obligation to join the companies, given that they were in effect the alter ego of the husband, and that notification would not have necessarily been given by the husband to unsecured creditors. In the end, the court found that the husband director had failed in his duties to unsecured creditors in *not* bringing the application brought by the wife (for a charge to secure her claim) to their attention. The wife was found to have no similar obligation, even though she was the one who was seeking the order.[79]

The Full Court was sympathetic to the position of the wife and also the trial judge, who were both labouring under the difficulty caused by the husband's failure to properly identify the financial positions of the two companies, A and G, leading the court and the wife into error as to the value of those companies and the amount of outstanding debts (including tax).

The Full Court accepted that the 8 May 2002 orders would adversely affect the interests of the unsecured creditors, including the ATO. It agreed that on 5 December 2002 the court had properly exercised its jurisdiction under s 79A to set aside the 8 May 2002 orders. It disagreed that the wife had done anything to justify the order that the trial judge had made on 5 December 2002 — that is, that she pay half of the liquidator's costs of the proceedings to set aside the charge; nor did it think it appropriate to make any order in respect of the costs of the appeal.

The DCT therefore incurred the costs of:

- the first, unsuccessful, application for injunctive relief

- pursuant to an indemnity given to him, the liquidator's costs of the second application to set aside the 8 May 2002 orders. These costs were not, in the end, offset by an order against the wife, and

- pursuant to the indemnity, the liquidator's costs of the appeal.

The DCT may have been much better off if it had intervened in the Family Court proceedings before the 8 May 2002 orders were made.

Footnotes

78 Unreported, May J, judgments delivered on 18 November 2002 and 5 December 2002. Appeal judgment in *S & M & Ors* [2003] FamCA 1387. See Lutrey, P, "Unsecured Creditors and the Family Court" (2003) 15(1) *AIJ* 18.

79 The court held that the situation may have been different if the wife had known that the order sought might "adversely affect the interests of other third parties such as secured creditors". With respect to their Honours, the whole point of a charge is to secure the claim of the secured creditor ahead of the claims of unsecured creditors — which invariably is to adversely affect their position, even if notionally there is no reason to suspect that the company will not continue to meet its debts on an ongoing basis.

¶15-220 *Foley and Foley & Anor* [2007] FamCA 584 (14 June 2007)

Foley is a more successful example of intervention by a creditor in family law proceedings. The husband and wife both sought a declaration under s 78 of the *Family Law Act 1975* (FLA) in the Family Court that their beneficial interests in the matrimonial property were held:

(a) as to the husband — 25%, and

(b) as to the wife — 75%.

The title to their property was owned as joint tenants.

The Australian Postal Corporation (APC) intervened as a judgment creditor of the husband as the declaration sought would adversely impact upon the recoverability of its judgment debt.[80] At stake was the equity in the matrimonial home of $657,000 where the judgment debt against the husband was $765,000. There were other creditors and, potentially at least, other assets of the husband and wife. However, the extent of these were not clear from the judgment.

The APC sought a declaration that the husband and wife owned the property as tenants in common equally.

Interestingly, no party sought orders under s 79 of the FLA.

The following facts were relevant:

(a) The wife was previously widowed and inherited a home in Northern NSW and $200,000 as proceeds of an insurance policy over the life of her former husband.

(b) The parties met in late 1983 and married on 29 April 1984.

(c) Six months after marriage, the parties acquired the matrimonial home for $122,000. The wife contributed $98,000 from the sale of her Northern NSW home, and the balance of $14,000 was funded from a joint loan secured by a mortgage over the property, which was registered in joint names.

(d) There was no evidence directed as to why ownership of the home was in joint names.

(e) The effect of their respective contributions was that the wife contributed 92% of the purchase price and the husband 8%.

(f) In 1998, the husband bought an interest in a company, W Pty Limited, which purchase was partly funded by a mortgage over

the family home.

(g) On 10 September 1999, the husband signed a personal guarantee in favour of APC for the debts of W Pty Limited.

(h) In June 2002, the husband sold his interest in the company, but did not obtain a release of his obligations executed under the guarantee to APC.

(i) On 6 September 2006, judgment was delivered in favour of APC against the husband in the sum of $560,927.52. The wife gave evidence that, together with interest and costs, the actual amount owing was more than $800,000.

Notwithstanding the significantly greater contribution of the wife to the acquisition of the property, it was accepted that the husband had made the greater share of the financial contributions of the relationship since that time. The wife was unable to quantify what adjustment was required.

The husband could not quantify the amount either, but was happy with any figure for the wife's interest in the property between 75% and 92%.[81]

The Family Court considered the facts and law in *Cummins*. Justice Bennett noted the consideration by the High Court in *Cummins* of the presumption of advancement by asking the question:[82]

> "What was there to conclude in August 1987 that the face of the register did not represent the full state of ownership of the Hunters Hill property, and that the ownership as joint tenants was at odds with, and subjected to, the beneficial ownership established by trust law?
>
> 48. The same question can be asked of the parties here, but in more current terms. Namely what evidence is there that the face of the register does not represent the full state of ownership of the property, and that the ownership of the property as joint tenants is at odds, and should be read subject to, the beneficial ownership established by authority

such as *Calverley v Green* (supra)

49. In both *Cummins* and the present case the evidence relied upon by the parties asserting an equitable interest was the disproportionate initial financial contributions to the purchase of the property".

The court noted that, unlike *Cummins*, there was no suggestion of an attempt to place the property beyond the reach of a creditor of trustee.[83] But the court also noted that there was no evidence before it as to why the property had been placed into both names at the time of its acquisition.[84] The Family Court considered the *Cummins* principle as it applies to matrimonial relationships[85] as well as *Draper*.[86]

Justice Bennett considered at length the judgment of Rares J in that case, as regards the presumption of equal ownership of property, but found in the case before her there was:

> ". . . a dearth of evidence about the contributions and treatment by the husband and wife of their interests in the family home post acquisition, save that it was their family home and principal security".[87]

In the circumstances, the court held that there was no basis to impose a trust in a "vacuum of evidence":

> "73. Neither party made any real attempt to address issues of inequity, unconscionability or unjust enrichment as between themselves. They were pre-occupied with what they perceive to be the unfair circumstance of APC, as a judgment creditor of the husband, being able to access the interest which the title reflects that husband holds in the family home. It is only as a consequence of the APC asserting its rights to recover against the husband's interest in the family home, that the parties seek relief from this court to recognise the wife's equitable title as greater than her legal title in the family home. Their motivation is not, of itself, fatal. However, it does shape the context of the case as one in which the claims of the wife against the husband must be carefully scrutinised. Unfortunately, in this case, the husband

> and the wife have failed to adduce evidence upon which I can be satisfied that it is unconscionable for the husband to retain an interest in the family home which is equivalent to that of the wife or that, to do so, would amount to him being unjustly enriched".[88]

The application of the husband and wife was dismissed.

See also *Van Dyke* v *Lo Pilato*, *in the matter of Sidhu* [2016] FCA 1347 in which the court was satisfied that leave needed to be granted to the creditor under s 58(3) to commence proceedings under the FLA to set aside consent orders made between the bankrupt and his wife, but was also satisfied that in the circumstances of the case that leave was appropriate, noting that Ms Van Dyke sought the recovery of property for inclusion in the bankrupt estate where the trustee was not in funds to undertake this action. Even though it is "preferable that the trustee in bankruptcy bring the action himself" (at [31]) per Katzmann J) there was no evidence that he was able to be placed in funds so to do.

Footnotes

80 *Foley and Foley & Anor* [2007] FamCA 584, per Bennett J at [1].

81 Ibid, at [42].

82 Ibid, at [47].

83 On the other hand, it might easily be suggested that the whole of the proceedings was motivated by such as desire; however, it is true that there was no additional transfer, transaction or arrangement to which the husband and wife pointed to establish that the husband's interest in the property was beyond the reach of creditors.

84 *Foley*, op cit at [51]: "This is in stark contrast to the circumstances in the recent case of *Draper* …."

85 Ibid, at [55].

86 *Draper* v *Official Trustee in Bankruptcy* [2006] FCAFC 157.

87 Ibid, at [66].

88 Ibid, at [73].

CORPORATIONS AND TRUSTS

THIRD PARTY INTERESTS

TRUSTS

Editorial information

Written by Louise Hennessy and updated by Chris Othen

¶16-000 Introduction

It is usually the family home, bank accounts, share portfolios and superannuation that form the basis of a dispute between a separating husband and wife. But what happens when a family company exists, and the husband and/or wife are involved in the running of the business or have a financial interest in the business? What considerations arise where the separating parties have trust interests?

Legal practitioners with little experience of company or commercial matters may be unfamiliar with the basic principles of corporations. Those with little knowledge or experience of trusts may feel uncomfortable when a client queries what will become of trust assets. Consequently, legal practitioners may overlook or fail to consider advising their clients as to the relevant financial disclosure to request from their spouse, and what practical steps, if any, they should take to protect the client's position pending a final resolution of financial aspects of the marriage.

The aim of this chapter is to introduce the legal practitioner who has little or no experience of corporations and trusts to useful preliminary background information. Legal practitioners advising spouses within

matrimonial proceedings where assets include companies or trusts should consider obtaining advice from a legal practitioner or specialist in each area.[1]

Footnotes

1 This chapter does not purport to be an all-encompassing resource on corporations or trusts, and for more detail practitioners should consult the chapter on corporations and trusts in Wolters Kluwer's *Australian Family Law and Practice* and Wolters Kluwer's *Corporations and Securities Reporter*.

¶16-010 Relevant legislation

The main legislation legal practitioners will have recourse to are the *Family Law Act 1975* (Cth) (FLA) and the *Corporations Act 2001* (Cth) (CA). Wolters Kluwer's *Australian Family Law and Practice* chapter on corporations and trusts provides a useful table at ¶41-005 setting out the relevant sections of the *Corporations Act 2001*. Since 1 July 2006, the Federal Circuit Court has had unlimited property jurisdiction concurrent with the Family Court, as a result of the repeal of s 45A of the FLA. As a result there is no monetary limit on the jurisdiction of the Federal Circuit Court with respect to property proceedings under the FLA. The jurisdiction of the Federal Circuit Court to make orders declaring or altering property interests of parties under s 78 or s 79 of the FLA before 1 July 2006 was limited by s 45A. Therefore where reference is made in this chapter to making applications in the Family Court, it applies equally to the Federal Circuit Court.

Significant amendments were made to corporations law by the *Company Law Review Act 1998* which commenced on 1 July 1998 and again by the *Personal Property Securities Act 2009* (Cth) on 30 January 2012.

¶16-020 Jurisdiction

Where the husband and the wife wholly own and control the company, the powers of the Family Court are sufficient to regulate and deal with the parties' operation of the company and to adjust their proprietary interests in it. It is important to understand that the primary power of the court is to compel a spouse personally in their capacity as directors and/or shareholders and not a power to make orders against the company itself. The power of the court to make orders binding on the company is pursuant to Pt VIIIAA of the FLA (see Chapter 15).

The Family Court and Federal Circuit Court can also deal with family companies as follows:

- by making orders against the parties *in personam* under the FLA
- by making orders against the company pursuant to the FLA (for example under Pt VIIIA, s 114 or s 106B)
- by using the *Corporations Act 2001* (Cth) and the *Family Law Act 1975* (Cth), and
- by exercising the court's accrued or associated jurisdiction.

PRINCIPLES

¶16-030 General principles of corporations

In order for the legal practitioner to be able to advise the client generally where an interest in a corporation forms part of the asset pool, the practitioner is required to have an appreciation of the basic principles underlying a corporation. In many cases, it is still quite common for a spouse with an interest in a corporation to lack the basic knowledge of how the corporation is run and organised.

Separate legal entity

When a corporation is created, it exists as a separate legal entity from its directors and members (shareholders). As a result, the corporation

can own property, and sue and be sued.[2]

Interests

Members of the corporation may have claims against, but under Corporations Law principles have no legal or equitable interest in, the property.

The board of directors and the members are the primary interested parties of the company. One of the powers directors have is the ability to commence legal proceedings on behalf of the company. There are exceptions to the rule that enable minority shareholders to commence proceedings. The company's right of legal action lies against the directors.

Management

The court will not interfere with the internal management of a company providing it acts within its powers, neither will it interfere with internal irregularities, which can be ratified by an ordinary resolution of a general meeting of its members.

Plaintiff

Where a wrong is done to the company, the company itself is the proper plaintiff to bring proceedings.

Exceptions

At common law, minority shareholders will be protected where:

- the interests require justice
- the act of the company is *ultra vires*
- the act of the company requires a special resolution, and such a resolution is oppressive
- a member's personal rights are infringed, and
- the majority perpetrate a fraud on the minority.

Indoor management rule[3]

Parties dealing with companies should not be required to enquire into its internal management. Thus, a third party creditor is not obliged to enquire that the person they are dealing with has the authority to bind the company as its agent. See also s 128 and 129 of the *Corporations Act 2001* (Cth).

Footnotes

2 *Corporations Act 2001*, s 124.

3 Also known as *the rule in Turquand's case* following the case of *Royal British Bank* v *Turquand* (1856) 119 ER 886.

¶16-040 Classification of companies

The following types of companies can be registered under the *Corporations Act 2001* (Cth) (CA) and are classified according to the extent of the liabilities of its members:

- proprietary companies limited by shares
- proprietary companies unlimited with share capital
- public companies limited by shares
- public companies limited by guarantee
- public companies unlimited with share capital, and
- no liability (public) company.[4]

Many family companies are registered as a proprietary company limited by shares. In order to comply with s 113 and 114 of the CA, a proprietary company must have no more than 50 non-employee shareholders, and it must have at least one member.

Footnotes

Footnotes

4 *Corporations Act 2001*, s 112.

INTERESTED PARTIES

¶16-050 Corporate structure

The five interested parties concerning a corporation are:

- directors
- board of directors
- shareholders
- members in a general meeting, and
- the company.

¶16-060 Directors

Section 9 of the *Corporations Act 2001* (Cth) defines a director as:

> "(a) a person who:
>
> (i) is appointed to the position of a director; or
>
> (ii) is appointed to the position of an alternate director and is acting in that capacity;
>
> regardless of the name that is given to their position; and
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> (i) they act in the position of a director; or

(ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes;

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body".

Where there are family corporations, it is possible that either or both husband and wife are directors, or their children or other family members may be directors.

De facto directors

De facto directors can still be held accountable as directors if they exercise control even where they have not been appointed. De facto directors are persons who hold themselves out to be directors despite a lack of appointment.

Shadow directors

Shadow directors exert strong influence over the running of the company although they remain behind the scenes.

¶16-070 Control

Careful consideration should be given to whether a client, the client's spouse or other family members may exercise a degree of control over a family company. Any influence on the running and management of the company, where that person has not been appointed as a director, could impact on the future success or otherwise of the company. Parties involved in divorce or financial proceedings may take actions or influence decisions, which may otherwise not have been taken if they were happily married, in order to create difficulties, tensions or to diminish the value of a company.

The practitioner should bear this in mind during the course of negotiations or court proceedings and where a valuation of the

company is underway.

Examples

***Deputy Commissioner of Taxation v Austin* (1998) 16 ACLC 1,555**

Madgwick J held that the test for determining whether a person has acted in the capacity of a director would normally be a question of degree and would require a consideration of the duties performed by the person in the context of the operations and circumstances of the company in question.

***Natcomp Technology Australia Pty Ltd v Graiche* (2001) 19 ACLC 1,117; [2001] NSWCA 120**

In contemplating whether a person was acting as either a shadow or de facto director, the Supreme Court considered:

- whether they exercised actual top level management functions
- whether they acted with full discretion as regards matters of great importance to the company
- in the context of the operations, circumstances and size of the particular company in question, whether they performed the duties of a “director”, and
- whether outsiders perceived them to be a “director”, an impression which may have stemmed from the supposed director holding themselves out as such.

Caution

What if a client asks their adviser whether they should remain as a director of a family company or step down from that role? Only the client can decide, but the following should be explained to them:

- a director has obligations and duties to fulfil, and these cannot be ignored when the marital relationship has come to an end
- those obligations include using their best endeavours to ensure that the company continues to be a viable option and to maximise returns for its members
- a director has the right to inspect company financial books and records which could prove important where there are

concerns about the business activities of a spouse or other family members involved in the company

- a director can, where warranted, exclude other directors from involvement in the management of the company
- as a director, a spouse remains privy to company documents and information and management of the company's affairs
- a director can take steps to limit the liability of a company and seek to preserve assets (eg containing an overdraft limit on company bank accounts, preventing company assets from being charged as security for further company borrowings), and
- by resigning from their position as director they will avoid the obligations, personal liability and risks which they remain exposed to as a director.

¶16-080 Spouse as silent or non-participating director

A spouse who is a silent or non-participating director is not absolved of their duties as a director. They remain liable to continue their directorial duties and for company debts. Where the company is trading insolvent, s 588G of the *Corporations Act 2001* (Cth) (CA) provides that the directors are responsible for a company's debts. Therefore, a silent or non-participating director is at risk where they know little or nothing about the day-to-day business of the company as potential liabilities stem from activities which they have not participated in or had any knowledge about.

Example

***Group Four Industries Pty Ltd v Brosnan & Anor* (1992) 10 ACLC 1,437**

Debelle J set out quite clearly in this case that a spouse whose involvement in a company is limited, albeit they are a director, cannot rely on their spouse as regards the

business of the company: “[W]hile some may say it was not unreasonable for a wife who is a part time employee of the company and who has employment elsewhere to rely on her husband who is engaged full time in the business of the company, such a view cannot obtain if the wife is a director of the company. Once the wife takes on the office of the director, she undertakes duties and obligations which require an active interest to be displayed in the affairs of the company”.

Note

What defences are available to a spouse where, as a director, they have breached their duties and the company is trading insolvent? The defences are found in s 588H of the CA and are summarised as follows:

- where the person can prove that at the time the debt was incurred they had reasonable grounds to expect that the company was solvent and would remain solvent[5]
- where the person has relied on information from a reliable person about whether the company was solvent and the reliable person was responsible for providing adequate information that the company was solvent[6]
- where the director was ill or for some other good reason did not take part at that time in the management of the company,[7] and
- where the person can prove that they took all reasonable steps to prevent the company incurring the debt.[8]

When the court determines whether the defence has been proved it considers the following:

- any action taken by the person with a view to appointing an administrator of the company

- when the action was taken, and
- the results of the action.

Footnotes

5 Guidance was provided by Ormiston J in the case of *Morley* v *Statewide Tobacco Services Ltd* (1992) 10 ACLC 1,233.

6 See *Australian Securities and Investments Commission* v *Adler* (2002) 20 ACLC 576; [2002] NSWSC 171.

7 *Southern Cross Interiors Pty Ltd (In liq)* v *Deputy Commissioner of Taxation* (2001) 19 ACLC 1,513; [2001] NSWSC 621.

8 *Byron* v *Southern Star Group Pty Ltd* (1997) 15 ACLC 191.

¶16-090 Fiduciary obligations

A director owes a fiduciary duty to the company.[9]

A director must therefore:

- act honestly and in good faith
- act to the best of their ability in the interests of the company
- not allow personal interests to conflict with or override the interests of the company
- not misuse company property or information
- account for any benefits obtained through their position, and
- act with a duty of care and diligence.

Caution

It may be a defence where proceedings are instituted by another spouse to prefer the interests of the company over the interests of an individual shareholder, by virtue of the director's fiduciary duty to the company.

Footnotes

9 *Hospital Products Ltd* v *United States Surgical Corp and Ors* (1984) 156 CLR 41.

¶16-100 Obligations at common law

A director owes the following common law duties to a company:

- to act bona fide in the best interests of the company
- to act in good faith
- to exercise powers for proper purposes
- to exercise the duties of skill, diligence and care, and
- to avoid conflicts of interest.

¶16-110 Statutory obligations

Directors have the following statutory duties under s 180–191 of the *Corporations Act 2001* (Cth) (CA):

- to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person in the same role and circumstances would exercise (subject to the business

judgment rule in s 180(2) of the CA)

- to act in good faith in the best interest of the corporation and for a proper purpose, and

- not to improperly use their position or information obtained to gain advantage for their own benefit or that of another or to cause detriment to the corporation. This duty continues if they stop being a director or officer of the corporation.[10]

Failure to comply or a breach of these gives rise to civil penalties.

Footnotes

10 *Forkserve Pty Limited* v *Jack & Ors* (2001) 19 ACLC 299; [2000] NSWSC 1064.

¶16-120 Constitution

The constitution is a binding contract between the company and each member. A copy of the constitution of a company is essential when advising a spouse with business interests. The constitution contains provisions obliging directors to act in certain ways. Prior to 1 July 1998, a company's constitution was found in its articles of association. This was abolished following the changes made to a company's constitution by the *Company Law Review Act 1998*.

¶16-130 Appointment

While the constitution may provide for the appointment of directors, Pt 2D.3, Div 1 of the *Corporations Act 2001* (Cth) also provides for the appointment of directors.

¶16-140 Removal

The removal of directors is covered by Pt 2D.3, Div 3 of the *Corporations Act 2001* (Cth).

SHARES

¶16-150 Members

The relevant provisions covering issuing, converting and redemption of shares are located in Ch 2H of the *Corporations Act 2001* (Cth) (CA).

Members do not have a direct or beneficial interest in the assets of the company but they do have rights and obligations in relation to the assets.

Section 1070A of the CA defines share attributes as follows:

- personal property
- transferable or transmissible as provided by the company's constitution, and
- capable of devolution by will or by operation of law.

¶16-160 Classification of shares

A member's rights in relation to voting, dividends and participation in the capital of the company are dependent upon the class of shares held. Usual classes are:

- *ordinary shares* — members are entitled to dividends and surplus assets of the company
- *preference shares* — normally carry a fixed rate of dividend which is paid before the dividend on ordinary shares and can carry preferential rights in respect of dividends and return of capital. There are many types of preference shares, such as non-cumulative, cumulative, redeemable, etc. Preference shares sometimes do not carry voting rights

- *redeemable preference shares* — shares which, on a stated maturity date, the issuing company will buy back for face value plus dividend. They rank ahead of ordinary shares

- *participating preference shares* — members are able to participate in surplus dividends or return of capital, and

- *governing directors' shares* — these provide the governing director with control of the company.

The rights attaching to various classes of shares within a company can usually be determined in the company constitution, though subsequent changes to share rights can also be reflected in Minutes of Member's Meetings. Determining the rights attaching to various share classes within the same company is important where the parties to the marriage are not the sole shareholders of the company and therefore their interest in the company (rather than the entire value) is the asset that is property of the parties to the marriage available for distribution on property settlement. The rights that attach to various share classes, for example rights to dividends and rights to vote can impact upon the value of the shareholding.

¶16-170 Transfer of shares

A transfer is not complete until it is registered and the name of the transferee is registered in the member's register. To be effective, a proper instrument of transfer must be delivered to the company.

Where a financial settlement includes a transfer of shares from one spouse to another a suitably qualified person should draft or advise upon the transfer instrument.

¶16-180 Pre-emption rights

It is not unusual for a company's constitution to provide for pre-emptive rights in respect of share transfers. Different articles may provide for different rights. Common examples are:

- for the member to first offer the shares to other members of the company
- members may be obliged to take the shares on offer, and
- the share price may be fixed or a formula may be in place to ensure a certain price.

Where pre-emption rights exist, they may affect the value of shares to be accounted for within property proceedings.

ACCESSING INFORMATION AND DOCUMENTS

¶16-190 Small or large private company

The size of a company will dictate the auditing and filing requirements it is obliged to meet.

Private companies must satisfy two of the following criteria to be classified as a large private company:[11]

- the consolidated gross operating revenue for the financial year of the company and any entities it controls is $10m or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $5m or more, and
- the company and any entities it controls have 50 or more employees at the end of the financial year.

In order to be classified as a small private company, a private company must satisfy two of the following criteria:[12]

- the consolidated gross operating revenue for the financial year of the company and any entities it controls is less than $10m

- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is less than $5m, and

- the company and any entities it controls have fewer than 50 employees at the end of the financial year.

Footnotes

11 *Corporations Act 2001*, s 45A(3).

12 Ibid, s 45A(2).

¶16-200 Filing and accounting obligations

Company	Filing and accounting obligations
Large company	• audited financial statements to be prepared • preparation of financial statements in accordance with all Australian Accounting Standards • lodge financial statements with the Australian Securities and Investments Commission • presentation of accounts at the shareholders annual general meeting
Small company	• no requirement to prepare annual financial statements • only required to have audited accounts where members holding 5% of the issued shares require the company to do so • no requirement to disclose financial information in the annual returns • no requirement to hold an annual general meeting

¶16-210 Access and availability of information to shareholders

Members can apply to the court pursuant to s 247A of the *Corporations Act 2001* (Cth) (CA) to inspect the books of a company providing that the application is made in good faith and for a proper purpose.[13] Copies of the books may be made unless the court orders otherwise. Section 247A of the CA is subject to client legal privilege.

Directors of a company can permit access to company books, as can a shareholder resolution passed at a general meeting. Neither option would appear likely where a company is controlled equally by a separated husband and wife.

Footnotes

13 If the main purpose of the inspection application is to assist in litigation to which the company is not a party, then inspection will not be permitted, see *Bride* v *Commissioner for Corporate Affairs* (1989) 7 ACLC 1,202; *Cescastle Pty Ltd* v *Renak Holdings Ltd* (1991) 9 ACLC 1,333. See also *Schweitzer & Schweitzer* [2012] FamCA 445 and *Nyles & Nyles* [2010] FamCA 363 where company records were sought for family law litigation.

¶16-220 Inspection

Company constitution

This is available to shareholders where an application is made in writing.[14] If the Australian Securities and Investments Commission (ASIC) has required a copy of the constitution to be lodged with them, a copy may be requested from ASIC.

Minutes and resolutions

Shareholders are entitled to have access to the minute books of the company for meetings of shareholders as well as the resolutions passed by shareholders.[15] It is important to note that where a company is solely owned by the husband and the wife the Family Court can provide for directors' minutes to be discovered but there is no such right for shareholders where third parties are involved.

Register

Members can inspect the register of members and obtain copies thereof.

Company in liquidation

Where a company is wound up, leave of the court must first be obtained before a member is entitled to inspect company books.[16]

The overriding consideration in compelling disclosure from a company under the Family Law Rules 2004 and the Federal Circuit Court Rules 2001 is relevance to a fact in issue in the proceedings and whether the documents are in the custody, possession or control of a spouse.[17] Where relevant documents are not within the custody, possession or control of a spouse, orders need to be sought against the company to compel production.

Footnotes

14 *Corporations Act 2001*, s 139(1).

15 Ibid, s 251B.

16 Ibid, s 486.

17 *Barro No 2* (1983) FLC ¶91-317 and *Schweitzer & Schweitzer* [2012] FamCA 445.

¶16-230 Inspection where spouse a director

Provisions under the *Corporations Act 2001* (Cth) (CA) make it easier for a director to obtain access to company records. A spouse who is a director is in a more advantageous position than a member where access to documents is required.

At common law, directors have an ongoing right of access, inspection and to copy any company documents, which makes sense when they have a fiduciary duty to manage and have to make decisions that are in the best interests of the company.

By virtue of s 290(1) of the CA, a director has right of access to financial records of the company at all reasonable times and an application can be made to the court under s 290(2) for a person to inspect on behalf of a director. The right to inspect cannot be exercised once a director's appointment has been terminated.

A director may inspect the company books at all reasonable times for the purposes of a legal proceeding in which the director is a party.[18] This also applies where a director brings proceedings in good faith or where a director has reason to believe will be brought against them. The right to inspect extends to seven years after ceasing to be a director. The company must permit the inspection, and a director has the right to take copies of the company books.

Footnotes

18 Ibid, s 198F.

¶16-240 Meeting of directors

During a separation, spouses are more guarded and suspicious of their estranged spouse's activities and motives. This can prove difficult where husband and wife are directors of a company and where one party is more involved in managing the affairs of the business than the

other. In situations such as these, it can be useful for the less active or non-participating director to request a meeting to enable them to maintain a role in the management of the company, control the affairs of the company to a limited extent, obtain financial information about the company, and exert some control where necessary if another director is acting outside the scope of their authority.

¶16-250 Convening a meeting

The constitution (or articles or replaceable rules) contains the rules governing the procedure for meetings. Further, s 248A–248G of the *Corporations Act 2001* (Cth) contain the rules for directors' meetings.

A meeting is called by a director giving reasonable notice or in accordance with the procedure outlined in the constitution. Minutes of a director's meeting must be kept[19] and the company is obliged to keep its minute book at its registered office or principal place of business.

Footnotes

19 Ibid, s 251A and 251AA.

¶16-260 Shareholder meetings

Shareholder's meetings can be requisitioned in the following circumstances:

- by a director
- by directors on requisition by 100 members entitled to vote, and
- by any two or more members of the company holding at least 5% of the company's share capital.

A member is entitled to receive notice of all general meetings of

members, and they have the right to ask questions at the meeting. The resolutions that may be passed at a meeting are limited to the proposed business of which notice has been given.[20]

Footnotes

20 For more information see Wolters Kluwer's *Australian Family Law and Practice* on Corporations and Wolters Kluwer's *Australian Corporations and Securities Law Reporter*.

¶16-270 Talking tactics

From a practical and time-saving perspective, a spouse can consider convening a meeting of the company which will avoid the delays, costs and limitations which accompany discovery through the Family Court or via third party production and subpoena processes.

From a tactical standpoint, convening a meeting has the advantage for the spouse of being able to take action after the meeting in relation to the company's affairs.

¶16-280 Meeting procedures

With respect to directors' meetings, the quorum is at least two directors, and for meetings of members it is two members. One member in attendance does not constitute a quorum.[21]

Footnotes

21 For more information, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-220.

¶16-285 Personal property securities

Practitioners in family law matters should search the Personal Property Securities Register following the changes made by the *Personal Property Securities Act 2009* (Cth) (PPS Act) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) which came into effect on 30 January 2012.

In essence, the PPS Act establishes a single national law governing security interests in personal property (including company charges) and a single national system of registration of security interests embodied in a public Personal Property Securities Register (PPS Register) maintained by the Insolvency and Trustee Service Australia (ITSA).

COURT PROCEEDINGS

¶16-290 Jurisdiction

Jurisdiction is conferred on the Family Court of Australia in respect of all civil matters arising under the *Corporations Act 2001* (Cth) (CA).[22] By virtue of s 1337C(2) of the CA and subject to s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), jurisdiction is conferred on the Family Court of Western Australia. Since 1 July 2006, the Federal Circuit Court has unlimited property jurisdiction concurrent with the Family Court, as a result of the repeal of s 45A of the *Family Law Act 1975* (Cth) (FLA).

Footnotes

22 *Corporations Act 2001*, s 1337C.

¶16-300 Transfer of proceedings

Proceedings commenced under the *Corporations Act 2001* (Cth) (CA) may be transferred to or from the Federal Court, State and Territory Supreme Courts, the Family Court, the Family Court of Western Australia[23] and the Federal Circuit Court. Unlike the position under the cross-vesting legislation, s 1337H is broad enough in its terms to permit transfers from a State Supreme Court to the Federal Circuit Court.

What is required under s 1337H and 1337J of the Corporations Act?

Section 1337H of the CA permits the Federal Court and the State and Territory Supreme Courts to transfer the proceedings to another court, including the Family Court and Federal Circuit Court. Section 1337J of the CA deals with similar transfers from the Family Court or State Family Courts.

A proceeding must be pending in the court, and any of the three following grounds must exist:

1) the relevant proceeding arises out of or is related to another proceeding pending in the Federal Court or another state or territory court, and it is more appropriate for the proceeding to be determined by the other court

2) it is more appropriate that the proceeding be determined by the other court taking into account:

   - whether the relevant proceeding would have been incapable of being instituted in the court but for the CA and cross-vesting legislation

   - the extent to which the matters to be determined in the relevant proceedings are not within the jurisdiction of the court apart from the CA, and

   - the interests of justice[24]

3) the other court is the most appropriate court to determine the relevant proceeding.

Further matters the court must bear in mind when considering whether to transfer a proceeding are:

- the principal place of business of any corporation involved in the proceedings
- the places where the events the subject of the proceedings took place, and
- the other courts that have jurisdiction to deal with the proceeding.

An application to transfer can be made at any stage of the proceedings, or by motion of the court.[25]

Chapter 25 of the Family Law Rules 2004 (Cth) (FLR) applies to the transfer of proceedings under the CA. Rule 11.20 of the FLR provides that if an order is made to transfer a case from one court to another court, the registry manager must fix a date for a procedural hearing once the file is received, and notice must be given to each party of the date fixed.

Footnotes

23 Ibid, s 1337H, 1337J and 1337L.

24 For a fuller explanation, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-270.

25 *Corporations Act 2001*, s 1337M.

¶16-310 Procedure

Procedures for *Corporations Act 2001* (Cth) matters in family proceedings are governed by Ch 25 of the Family Law Rules 2004 (Cth) (FLR).[26]

By virtue of r 25.02, the FLR adopt the Federal Court (Corporations) Rules 2000 as if those Rules were provisions of the FLR and r 25.03 of the FLR modifies certain provisions of the Federal Court (Corporations) Rules 2000.

The powers of the court specified in Sch 2 of the FCCR are delegated to judicial registrars in the Family Court.[27]

Footnotes

26 Ibid, s 1337G.

27 For a summary of Ch 25 of the Family Law Rules 2004, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-290.

¶16-320 Application

Form

The application is commenced by filing an Application in a Case with an affidavit if seeking a transfer to another court or orders about the conduct of proceedings under s 1337P of the CA. Otherwise the usual procedure of the court in question applies.[28]

Caution

Where a company is under administration, the following applicable phrase must be included after the company name on the form: *"in liquidation", "receiver appointed", "receiver and manager appointed", "controller acting", "administrator appointed" or "subject to deed of company arrangement"*.

Joinder of company to existing proceedings

Section 79(10) of the FLA provides that a person whose interests would be affected by the making of the order, is entitled to apply to become a party to the marriage in property settlement proceedings. A person includes a company. Where an applicant in proceedings under the *Family Law Act 1975* (Cth) (FLA) wants to join a company as an additional respondent, they can so do by listing the company as a respondent to the proceedings. Where the company itself seeks to intervene, the company must set out the claim and basis of that claim in an affidavit supporting the application and otherwise follow the procedure in Pt 6.2 of the FLR or Pt 11, Ch 1 Federal Circuit Court Rules 2001 (FCCR).

Transfer of proceedings from the Federal Court

Where the application is brought in the Federal Court, in order to comply with r 2.2 of the Federal Court (Corporations) Rules 2000 (FCCR), the application must be in Form 2 (Originating Process) or Form 3 (Interlocutory Process) and must state which sections of the *Corporations Act 2001* (Cth) (CA) and/or the *Australian Securities and Investments Commission Act 2001* applies, and what relief is being sought.

Further requirements under the FCCR are as follows:

- The applicant must file an affidavit in support of their application together with a record of search of ASIC in relation to the company that is the subject of the application. The search must be carried out no earlier than seven days before the application is filed.[29]

- The respondent is required to file a Form 4 of the FCCR and an affidavit.[30]

- Where a rule requires publication of notices, then r 2.11 FCCR is to be followed, and publication should take place once in a daily newspaper that circulates generally in the state or territory where the body has its principal or last known place of business.

Transfer of proceedings from the family courts

These are commenced by an Application in a Case and supporting affidavit.[31]

Service

Where a document is required to be served on a corporation, it must be served in accordance with s 109X of the CA, for proceedings in the Federal Court and in accordance with Ch 4 of the FLR in the Family Court and Pt 6, Ch 1 FCCR in the Federal Circuit Court.

Rule 2.7 of the FCCR requires the application and supporting documentation to be served on each respondent and the company:

- at least five days before the hearing of originating proceedings, and
- at least three days before the hearing of interlocutory proceedings.

In the family law courts, r 7.04 FLR requires service as soon as practicable after filing. Rule 6.19 FCCR, requires service no less than three days before the date of hearing for an Application in a Case.

Rule 2.9 of the Federal Court (Corporations) Rules 2000 requires the notice of appearance (Form 4) and supporting affidavit to be served on the applicant/plaintiff:

- at least three days before the hearing originating proceedings, and
- at least one day before the hearing of interlocutory proceedings.

Evidence

The rules of evidence and procedure which are applicable in the CA proceedings before the Family Court are such as the Family Court considers appropriate in the circumstances. Generally, the rules of evidence and procedure of the Family Court are applied.[32]

If a party intends to rely upon rules of evidence and procedure other than those of the Family Court, then that party must specify the rules in the application and seek directions before the matter is set down for

trial.[33]

Rights of appearance

A person who is entitled to practice as a barrister or solicitor in the court from which the proceedings are transferred has the right of appearance in the court where the matter is ultimately transferred.[34] Further, that person has the right to practice in relation to any other proceeding out of which the transferred proceeding arises or to which the transferred proceeding is related, being another proceeding that is to be determined together with the transferred proceeding.

Appeals

Appeals do not lie from decisions made with respect to the transfer of proceedings nor with respect to decisions regarding the applicable rules of evidence and procedure.[35]

Enforcement of judgments

A judgment of the Family Court given following a transfer of proceedings to it pursuant to the CA is enforceable as if the judgment had been given by the Family Court entirely in exercise of its original jurisdiction.

Footnotes

28 Family Law Rules 2004, r 25.05.

29 Federal Court (Corporations) Rules 2000, r 2.4 and the affidavit is in the form that complies with r 2.6 of the Federal Court (Corporations) Rules 2000.

30 Federal Court (Corporations) Rules 2000, r 2.9.

31 For more details on an application to confer jurisdiction on the family courts in reliance on a cross-vesting law, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-292.

32 *Family Law Act 1975*, s 123.

33 For more information, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-296.

34 *Corporations Act 2001*, s 1337U.

35 Ibid, s 1337P(2).

REMEDIES AVAILABLE UNDER THE CORPORATIONS ACT

¶16-330 Potential problems

A spouse who is a minority shareholder in a company can expect to encounter some problems where their spouse has a majority shareholding or has the potential to join with other members to obtain one.

It may be that those acting together with the benefit of a majority shareholding act to exclude the minority shareholder or act in a way that is detrimental to a minority shareholder. Majority shareholders may pass resolutions to allot additional shares to dilute the value or voting power of the shares held by the minority shareholder.

These rights are in addition to the general powers of the court *in personam* against parties to the marriage in their capacities as directors and/or shareholders of a company pursuant to s 114 (Injunctions) and s 80 (General Powers of the Court).

¶16-340 Action

Under the *Corporations Act 2001* (Cth), there are a number of civil actions that can provide additional relief to litigants involved in

property settlement proceedings.

¶16-350 Recovery action

Oppression/unfair conduct

Where a shareholder is aggrieved by a range of conduct, they can institute proceedings under s 234 of the *Corporations Act 2001* (Cth) (CA). An example of when this may be appropriate action is when a shareholder is effectively "locked out". See s 232 of the CA for what a shareholder is required to establish.

On hearing an application, the court has a wide range of powers which include an order to wind up the company, an order regulating the future conduct of the affairs of the company, the purchase of a member's shares by other members or by the company, appointing a receiver, etc.

An action for oppression is instituted by way of application.

Where a minority shareholder involved in family law proceedings believes that the company is being operated in a way that is now affecting the generation of, for example, dividends, or is restricting the transfer of shares, they should compare the current practice with previous operations to see if there has been a change before taking steps to issue proceedings for oppressive action or unfair conduct.

Winding up

Where agreements can no longer be reached between the members, and they are unable to communicate with one another,[36] it may be prudent to seek an order to wind up a family company.

An application to wind up a company can be instituted by a creditor (such as a spouse who has a loan account), shareholder or the company.

The following are examples of circumstances which would justify an application:

- the company is insolvent

- the directors act in their own interests which may be inconsistent with the interests of the company and its members
- conduct of the company is oppressive, discriminatory or unfairly prejudicial
- there are just and equitable grounds which include:
  - there has been a breakdown in mutual trust and confidence of the shareholders
  - deadlock or disagreement in the management of the company
  - misconduct, oppression or fraud in the management of the company, and
  - failure of the substratum.

Application to wind up is commenced by way of an Application in a Case or Initiating Application with an affidavit in support.[37]

Caution

- Be aware that a spouse, who has already issued a statutory notice of demand for payment following loans to the company as a precursor to winding up the company, should consider carefully any commercial ramifications arising from a persistent demand for repayment. See *Kowaliw and Kowaliw*.[38]
- Be aware that where a company is being wound up, any transaction between the company and a party within four years of the relation back period is voidable.[39]
- Parties will need to address the consequences of avoiding an uncommercial transaction, when it is intended that the assets

of a company be transferred to one of the spouses leaving the company without sufficient assets to meet the existing debts of the company. The benefiting party may therefore consider any of the following:

– an order transferring other property to the company to replace the property removed

– an indemnity from the other spouse, and

– a release/assignment of the credit loan account of the spouse remaining in the company.

Derivative suit

A shareholder may initiate a derivative suit action in the name of the company against its officers and others when the company improperly refuses or fails to take its own action.[40] A person eligible to bring or intervene in a proceeding can apply to the court for leave to do so.

Footnotes

36 See *Malos* v *Malos* (2003) 44 ACSR 511; [2003] NSWSC 118.

37 For details of the documentation required see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-332.

38 *Kowaliw and Kowaliw* (1981) FLC ¶91-092.

39 For more information, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-332.

40 *Corporations Act 2001*, s 236–242.

THIRD PARTY INTERESTS

¶16-360 Introduction

Prior to Pt VIIIAA of the *Family Law Act 1975* (Cth) (FLA) (introduced by the *Family Law Amendment Act 2003*), which commenced on 17 December 2004 for married couples and for separations after 1 March 2009 for de facto couples (by virtue of s 90TA FLA), the court had limited powers where there were third party interests in a company. The leading case on the court's power to bind third parties was *Ascot Investments Pty Ltd v Harper and Harper*.[41] In that case, the High Court found:

1. an order cannot be made where the effect of the order will be to deprive the third party of an existing right or where it would impose a duty which the party would not otherwise be liable to perform

2. it was not intended by the parliament that the legitimate interests of third parties should be subordinated to the interests of a party to a marriage or that the Family Court should be able to make an order that would operate to the detriment of third parties.

However, the provisions of Pt VIIIAA of the FLA override *Ascot Investments*.

Sources of power to bind third parties other than Pt VIIIAA

Since that decision, and prior to the commencement of Pt VIIIAA, the High Court and Family Court have developed the Family Court's ability to deal with family companies involving third party interests in the following ways:

- to set aside transactions pursuant to s 106B of the FLA

- to make orders directly in relation to property in ante-nuptial or post-nuptial settlements made in relation to the marriage under s 85A of the FLA

- where there are other ample assets available for distribution between the parties, to establish that a party has a financial resource represented by the third party's property

- to find that a third party is the alter-ego of a party to the proceedings

- to find that the third party is a sham and a device to assist one party to evade his or her obligations under the FLA

- to find that a third party is a puppet of a party to the marriage so that in reality an order against the company is an order against one of the parties[42]

- to grant injunctive relief[43]

- to make an order against a third party who is assisting one of the parties to the marriage and their actions combined seek to disadvantage the other spouse,[44] and

- pursuant to s 78 of the FLA to make a declaration that the spouse be declared the equitable owner of certain property held by the company.[45]

The introduction of Pt VIIIAA of the FLA gave the family law courts express legislative power to make orders binding on third parties provided that the requirements of the Part are met. This means that there is now express legislative power under s 90AE in property settlement proceedings and under s 90AF where injunctive relief is sought to bind third parties.

Footnotes

41 *Ascot Investments Pty Ltd* v *Harper and Harper* (1981) FLC ¶91-000.

42 See *Gould and Gould*; *Swire Investments Ltd* (1993) FLC ¶92-434.

43 *Yunghanns & Ors* v *Yunghanns & Ors*; Yunghanns (1999) FLC ¶92-836; *Blueseas Investments Pty Ltd* v *Mitchell & McGillivray* (1999) FLC ¶92-856; *Ferrall and McTaggart (Trustees for the Sapphire Trust) & Ors* v *Blyton* (2000) FLC ¶93-054.

44 *Ascot Investments* v *Harper* (1981) FLC ¶91-000 at p 76,062; *Howard and Howard* (1982) FLC ¶91-279 at 77,595.

45 *Moran and Moran* (1995) FLC ¶92-559; *Ferrall and McTaggart (Trustees for the Sapphire Trust) & Ors* v *Blyton* (2000) FLC ¶93-054.

¶16-370 Object

The object of Pt VIIIAA of the *Family Law Act 1975* (Cth) (FLA) is to "allow the court, in relation to property of a party to a marriage, to: (a) make an order under s 79 or 114; or (b) grant an injunction under s 114; that is directed to, or alters the rights, liabilities, or property interests of a third party".[46]

These provisions also apply to spouse parties in de facto matters by virtue of s 90TA FLA.

Who is a "third party"?

A third party is defined in s 90AB of the FLA as "… a person who is not a party to the marriage", and "person" is defined at former s 22(1)(a) of the *Acts Interpretation Act 1901* to include a "body politic or corporate" as well as an individual.

What is the scope of Pt VIIIAA?

The wide ranging intention of Pt VIIIAA can be found in s 90AC(1) of the FLA which provides that "[t]his Part has effect despite anything to

the contrary in any of the following (whether made before or after the commencement of this Part):

(a) any other law (whether written or unwritten) of the Commonwealth, a State or Territory;

(b) anything in a trust deed or other instrument".

It also gives protection to third parties by virtue of s 90AC(2) of the FLA which states that nothing done in compliance with Pt VIIIAA by a third party is taken to be a contravention of law or instrument referred to.[47]

Footnotes

46 *Family Law Act 1975*, s 90AA.

47 See Wolters Kluwer's *Australian Family Law and Practice* at ¶41-045, which provides a useful table setting out the relevant provisions covering the court's powers in connection with third parties.

¶16-380 Orders and injunctions binding third parties

Part VIIIAA of the *Family Law Act 1975* (Cth) (FLA) allows a court to make orders generally that direct the third party to do something in relation to the property of a party to the marriage or that alters the rights, liabilities or property interests of a third party in relation to a marriage. These circumstances can only be exercised in limited circumstances. The circumstances are set out in s 90AE(3), and, in summary, are as follows:

- the order must be reasonably necessary to effect the appropriate division of property between the parties to the marriage
- if the order concerns a debt of a party to the marriage "it is not

foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full"

- the third party has been accorded procedural fairness
- it is just and equitable to make the order, and
- the order takes into account the taxation effect on either of the parties to the marriage or the third parties, or both of them, the social security effect of the order on the parties to the marriage, the third party's administration costs in relation to the order, and the capacity of the party to the marriage to repay the debt after the order is made.

The court therefore has wide powers to alter the property interests of a third party subject to the limitations as set out in s 90AE(2) and (3) of the FLA, and third parties thus have liberal scope to address whether the court has the capacity to make orders affecting them and whether the court's discretion to do so should be exercised.

Examples

***Hunt v Hunt & Lederer & Ors* (2006) 208 FLR 1, (2006) 36 Fam LR 64**

The wife sought orders pursuant to s 106B and 90AE(2)(a) of the FLA against her husband and three third party respondents. The wife's application was opposed by the respondents on the basis that the court had no jurisdiction to make the orders, as the provisions relied upon are unconstitutional and that there was no reasonable likelihood of success. O'Ryan J upheld the validity of each provision on 14 March 2006 and indicated that he would dismiss the application for summary judgment. A further hearing took place on 17 May 2006, and his Honour revoked the prior orders dismissing the summary judgment application and instead dismissed the objections to jurisdiction. On appeal, the Full Court upheld the trial judge's decision. However, the validity of s 90AE powers were not challenged on appeal. The appellate decision upholds the trial judges decision to grant an anti-suit injunction against third party companies pursuant to the court's inherent jurisdiction and in equity.

In obiter and without reading to decide the issue of the constitutional validity of Pt VIIIAA, the Full Court in *B Pty Ltd & K* (2008) FLC ¶93-380 cited with approval a number of passages from *Hunt v Hunt & Lederer*.

***D Pty Ltd (in liq)* v *Calas (Trustee), in the matter of D Pty Ltd (in liq)* (2016) FLC ¶93-751**

The Federal Court of Australia found that consent orders made by the Family Court of Australia which charged real property owned by a third party, D Pty Ltd, with the

obligations of the husband, in favour of the wife, did not constitute an "unreasonable director-related transaction" of D Pty Ltd within the meaning of s 588FDA of the *Corporations Act 2001*. Consequently, and although D Pty Ltd had consented to the consent orders at the time that they were made by the Family Court but had not in fact been a party to those consent orders, the charge over the real property held by D Pty Ltd created by the consent orders was enforceable. This question arose in circumstances where D Pty Ltd had entered into liquidation shortly after the wife had a sequestration order made against her and a trustee in bankruptcy had continued enforcement proceedings on the wife's behalf against the husband. The trustee in bankruptcy sought that the sale proceeds of the property owned by D Pty Ltd were declared to be held on trust by the liquidator for the benefit of the wife in compliance with the husband's obligations under the consent orders. The Family Court made those orders, finding that D Pty Ltd was bound by those orders. The liquidator made an application to the Federal Court of Australia seeking declarations that the charge against the property of D Pty Ltd was void and unenforceable. The Federal Court declined to make the declarations sought on the basis that the charge did not constitute an unreasonable director-related transaction, and that in circumstances where the declarations sought by the liquidator conflicted, or appeared to conflict, with the consent orders, being orders made by another superior court in the Australian legal system, it was not appropriate to make the declarations sought. The Federal Court also noted that, had it been of the view that the transaction did constitute an unreasonable director-related transaction, it would have been inclined to transfer the proceedings to the Family Court of Australia.

¶16-390 Examples of when parties may ask the court to act

Transfer orders (s 90AE(1)(d), *Family Law Act 1975* (Cth) (FLA))

Such an order would be addressed to a director of a company requiring the company to register a transfer of shares from one party to the other.

Debt adjustment order (s 90AE(1)(a), (b), (c) and 79, FLA)

One party may be substituted for the other where there is a joint liability to a creditor pursuant to a guarantee given by the spouse of the company's indebtedness. Creditors may very well like to be heard by the court where the appropriateness of shifting responsibility for a debt from one party to the other is questionable on the basis of commercial viability or from a risk perspective. The court should not make an order where there are any concerns regarding the capacity of the substituted borrower to meet their liabilities. See also *Mollinson &*

Mollinson (2014) 1 Fam LR 225.

Order directed at a third party to do something in relation to property

Examples of this type of order include requiring a third party to acquire a spouse's minority shareholding in a corporation, or requiring a third party to transfer governing shares in a corporation to a spouse, or requiring a third party to consent to a transfer where such consent is necessary.

An order altering property interests of a third party

An example of this type of order is one altering the proportion of ownership of shares held by a spouse and third party.

Order restraining a third party commencing proceedings

An example of this type of order is one preventing the family company from commencing proceedings for recovery of the debt pending resolution of the substantive proceedings.

Tax consequences of orders sought by the parties (and any third party) require consideration and will necessitate expert opinion and evidence. The practitioner should also be aware of any consequences of an order for a party eligible for social security.

¶16-395 Personal property securities

Major reforms to the law of personal property securities, which came into effect — generally speaking — on 30 January 2012, were made by the *Personal Property Securities Act 2009* (Cth) (PPS Act) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Cth) (amending Act).

In essence, the PPS Act establishes a single national law governing security interests in personal property (importantly, including company charges), and a single national system of registration of security interests embodied in a public Personal Property Securities Register (PPS Register) maintained by the Insolvency and Trustee Service Australia (ITSA).

The following is adapted from the Explanatory Memorandum to the Personal Property Securities Bill 2009:

> "A security interest in personal property arises from a transaction that in substance secures the payment or performance of an obligation. The interest in the personal property, taken as security for a loan or other obligation, is a security interest. The PPS Act applies to transactions which have the effect of securing a payment or other obligation, regardless of the form of the transaction, the nature of the debtor or the jurisdiction in which the personal property or parties are located (subject to specified exceptions). This is known as a functional approach.
>
> Security interests in personal property to be listed on the PPS Register will include assets that may be used to secure a loan. Personal property is any property other than land or buildings. It includes physical goods such as works of art, furniture, jewellery, cars, boats, farm machinery, business equipment, crops and livestock. It also includes intangible property such as rights under a contract and intellectual property."

Tip

Practitioners now need to undertake PPS Register Searches.

TRUSTS

¶16-400 Introduction

A detailed account of trusts and property applications can be found in Wolters Kluwer's *Australian Family Law and Practice* at ¶41-500. What follows here is a general summary of trust principles that all practitioners should be familiar with. It is imperative that, where trust assets are identified, appropriate advice is obtained from a trust

specialist if the family law practitioner has little knowledge or experience of this often complicated area of law. Any orders or settlements may have an impact on a spouse's tax obligations.

¶16-410 What types of trusts are there?

The following are examples of the types of trusts a practitioner may come across when dealing with family law matters.

Constructive trusts

Such trusts arise by operation of law and are found to exist where the parties have a common intention or where there is no intention but it would be unconscionable for the legal owner to deny others a beneficial interest.[48] Where one or both parties claim a beneficial interest under a constructive trust where the legal owner to the property is a third party, proceedings can be commenced in the Family Court or the Federal Circuit Court for the determination of that issue. The third party then becomes a respondent in property proceedings.

Resulting trust or implied trust

Resulting trusts arise by operation of law where there is a failure to dispose of an entire beneficial interest in property so that the interest reverts back to the settlor of the trust.[49]

The Full Court's judgment in *Crafter and Ors & Crafter and Ors* (2012) FLC ¶93-523 provides an instructive example of the application of the law relating to resulting trusts. In this case, the Full Court discussed the various authorities relating to the establishment of the trust.

An implied trust arises where one person acquires a property in the name of another but where there was no intention to gift.[50]

Discretionary trusts

A trustee is provided with unfettered discretion to allocate the trust property which may consist of income and/or capital to a range of beneficiaries. Until such time as the trustee has distributed income and/or capital to the beneficiaries, no beneficiary has any entitlement to any part of the trust property. The most obvious advantage of a

discretionary trust is its flexibility.

A beneficiary of a discretionary trust has no proprietary right in the property of the trust.

Bare trust

A trustee of a bare trust is obliged to distribute the property of the trust as the beneficiaries request. The trustee does not possess any beneficial interest in the property and their only duty is the conveyance of the trust property.

Unit trusts

A manager directs a trustee how to deal with the trust property vested in them. The beneficial interest is divided into a number of units which may be granted or sold by the initial beneficial or unit holder.

A unit holder in a unit trust usually has a proprietary right in the property of the trust, though regard should be had to the trust deed of particular trusts on this issue.

Fixed trust

The beneficiary of such a trust has a fixed entitlement which may be, by way of example, a life interest followed by a remainder.

Footnotes

48 *Muschinski* v *Dodds* (1985) DFC ¶95-020; *Baumgartner* v *Baumgartner* (1988) DFC ¶95-058.

49 *Re Vandervell's Trust (No 2)* [1974] Ch 269.

50 See *Gray and Gray* (2005) FLC ¶93-228.

¶16-420 Trust principles

There will generally be a conflict between principles of trust and equity

and the court's aim to make orders that are just and equitable in accordance with s 79(2) of the *Family Law Act 1975* (Cth), particularly when it is obvious that a trust has been created to conduct a business or enterprise. The following are some of the basic principles of trusts.

A trust is not a separate entity

- one person (the trustee) is the owner of the trust property
- the trustee is bound to use their legal position as owner of the property for the benefit of the beneficiaries
- as the trust is not a separate entity it cannot be a party to legal proceedings
- the trustee is the appropriate person to sue or be sued
- a person cannot be a trustee for themselves alone, and
- there can be no trust where the trustee is given unlimited enjoyment of the trust property.

Fiduciary obligation

The trustee has a fiduciary relationship with the beneficiaries and a fiduciary obligation to them with respect to the property of the trust.

Rule against perpetuities

The corpus of a trust must be vested within the "perpetuity period". The perpetuity period is a life or lives in being at the time of the date of the instrument creating the entitlement plus 21 years. The rule against perpetuities restricts the extent to which future interests in property can be created by requiring them to take effect within a specified period of time.

Sui juris/the rule in *Saunders v Vautier*

In *Saunders v Vautier*,[51] it was held that where all possible beneficiaries under a trust are of full age and capacity, and are between them absolutely entitled to the full beneficial interest, they may collectively terminate the trust by calling for a transfer to them of

the trust property. The beneficiaries have a vested interest in the trust fund once the trustee has made a distribution in their favour.

The rule in *McPhail v Doulton*

Before the decision of *McPhail v Doulton*,[52] it was held that the only order by which a court could carry a trust power into effect was an order for equal distribution among the beneficiaries. Thereafter, the court held that it was sufficient for a settlor to describe beneficiaries so that where they are not individually named they constitute an identifiable class (and one that is not so wide as to be unworkable).

Footnotes

51 *Saunders* v *Vautier* (1841) 49 ER 282.

52 *McPhail* v *Doulton* [1971] AC 424.

¶16-430 Third parties

Under Pt VIIIAA of the *Family Law Act 1975* (Cth) (FLA), the court has power to bind third parties in property proceedings (see "Third party interests" above at ¶16-360–¶16-390). Section 90AC provides that Pt VIIIAA of the FLA has effect despite any contrary laws, or anything in a trust deed or other instrument.

Examples of laws or instruments within contemplation are employment contracts, family trust deeds, company constitutions and insurance policies expressed as non-transferable. Third parties are afforded protection by virtue of s 90AC(2), which states that nothing done in compliance with Pt VIIIAA of the FLA by a third party is taken to be a contravention of law or instrument referred to.

The plurality of the High Court in *Kennon and Spry* (2008) FLC ¶93-388 held that the husband's power as trustee to apply the assets of the trust to the wife, combined with the wife's equitable right to due consideration of the trust as a beneficiary was sufficient for the whole

of the trust fund to fall within the ambit of s 79 as property of the parties to the marriage.

The plurality (French CJ and the joint judgment of Gummow and Hayne JJ) discussed the basis upon which the assets of a discretionary trust where treated as property for the purposes of s 79 of the Family Law Act.

In his judgment, French CJ held:

> 77. The beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration and to due administration of the trust but it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.
>
> 78. Gummow and Hayne JJ, in their joint reasons, characterise Mrs Spry's right with respect to the due administration of the Trust as part of her property for the purposes of the Family Law Act. I respectfully agree with their Honours that prior to the 1998 Instrument the equitable right to due administration of the Trust fund could be taken into account as part of the property of Mrs Spry as a party to the marriage. So too could her equitable entitlement to due consideration in relation to the application of the income and capital. In so agreeing, however, I acknowledge, consistently with the observations of the Full Court in *Hauff* and *Evans*, that it is difficult to put a value on either of these rights though a valuation might not be beyond the actuarial arts in relation to the right to due consideration.
>
> 79. Dr Spry's power as trustee to apply assets or income of the Trust to Mrs Spry prior to the 1998 Instrument was, as pointed out by Gummow and Hayne JJ, able to be treated for the purposes of the Family Law Act as a species of property held by him as a party to the marriage, albeit subject to the fiduciary duty to consider all beneficiaries. This is so even though it may not be property according to the general law. So characterised for the purposes of the Family Law Act it had an attribute in common with

the legal estate he had in the assets as trustee. He could not apply them for his own benefit but that did not take them out of the realm of property of a party to the marriage for the purposes of s 79. Insofar as Gummow and Hayne JJ rely upon the property comprised by Dr Spry's power as trustee and Mrs Spry's equitable rights prior to 1998, I agree that these property rights were capable of providing a basis for the orders which Strickland J made. I do so, as already indicated, by considering that power and the equitable rights, in conjunction with Dr Spry's legal title to the Trust assets, without which the power and the rights were meaningless.

80. Mrs Spry's right to due consideration as an object of the Trust could also be taken into account in determining whether it was just and equitable to make an order under s 79 on the basis that the assets of the Trust were property of the marriage. As noted in the preceding section the equitable entitlement of the children and other existing beneficiaries to due consideration could also be taken into account in making that judgment. There is no reason to suggest that his Honour did not do so appropriately.

Arguably, a spouse whose only interest in a trust is as a discretionary beneficiary, may be sufficient to enliven the operation of Pt VIIIAA. It is submitted, however, (by Sarah Minnery) that such circumstances may not be sufficient for the court to exercise its discretion to make orders under Pt VIIIAA given the safeguards for third parties set out in s 90AE(3) and (4) and s 90AF(3) and (4).

¶16-440 When might the provisions of Pt VIIIAA be relied upon in relation to trusts?

The following are some of the circumstances in which Pt VIIIAA of the *Family Law Act 1975* (Cth) may be relevant to a case involving trust assets:

- transfer orders pursuant to s 90AE(1)(d) requiring a corporate trustee to register a transfer of shares in the trustee company from one party to the other despite purported restrictions on a

transfer of shares

- an order requiring a third party to “do a thing” in relation to the property of a party to the marriage or de facto relationship which may include a distribution of capital or income from a trust in a particular fashion (which may include adding a beneficiary or converting a discretionary trust into a fixed trust)

- an order altering the property interests of a third party (which can include altering the proportion of ownership of an asset held by a spouse and third party trustee)

- an order restraining, for example, a trustee from selling an asset pending resolution of the substantive proceedings, and

- an order dealing with loans and unpaid present entitlements between the parties to the marriage and the trust.

¶16-450 What constitutes a valid trust?

In order for a trust to be valid there must be:

- certainty of the intention of the person creating the trust (ie the settlor)[53]

- certainty as to the subject matter of the trust[54]

- certainty as to the objects of the trust (ie the beneficiaries),[55] and

- there must be a trust instrument in writing when the trust property is realty.[56]

Footnotes

53 *Re Armstrong* (1886) 17 QBD 521; *Paul* v *Constance* [1977] 1 WLR 527.

54 *Hunter* v *Moss* [1994] 1 WLR 452.

55 *Re Gulbenkian's Settlements* [1970] AC 508.

56 For more detailed consideration of drafting deeds and typical clauses that affect property settlements, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-525 and following.

¶16-460 Structure of trusts

When the court determines how it should treat spouses' interests in a family trust, the court identifies the roles and powers that each spouse has within the trust together with the indicia of control and influence which each spouse has by virtue of their individual interests in the trust.

Settlor

A settlor is the person responsible for establishing the trust fund. Usually, the settlor will relinquish their interest in the trust fund and assume no further involvement in the affairs of the trust. The Family Court usually finds that the settlor has no control over the trust. Practically, the settlor is usually the parties' solicitor or accountant at the time the trust is created.

Trustee

The trustee holds the legal title to the trust property, and owes a fiduciary duty to the beneficiaries of the trust.

The court is likely to find that a party to property settlement proceedings who is a trustee and the power of appointment to remove and replace the trustee has control of the trust.

While a trustee can exercise their discretion, they can also be compelled to undertake their duties, but must honestly and actively exercise their judgment when exercising their discretion. Beneficiaries generally do not have the power to compel a trustee to exercise a

discretion. A court has power to review a decision to determine that the discretion of the trustee has been exercised properly.

The trustee may be liable to the beneficiaries personally for any loss as a result of a breach of trust or errors. Trustees need to be aware of statutory obligations, their duty to beneficiaries, and the requirements of, for example, the Australian Securities and Investments Commission. A trust deed may indemnify a trustee from personal liability.

Appointors

A party with the power of appointment has effective control over the trust. The power of appointment is a fiduciary power that must be exercised for the benefit of the trust,[57] and not for the benefit of a particular beneficiary.

Subsequent decisions of the Family Court have developed the position further as regards the special nature of the power of appointment in property settlement proceedings as distinct from the general position in equity.[58]

The guardian

The guardian has broad powers of control over the activities of trustees. Under some trust deeds, the trustee is required to seek the guardian's consent before exercising their powers and discretions. The court is likely to find that a party who is appointed guardian has control of the trust for property settlement purposes.

The promoter

The promoter may be capable of controlling the trust even though they have no other interest in the trust. In the case of *Kelly and Kelly* (No 2),[59] the trustee of the family trust was a company directed by the wife, accountant and husband's brother. The husband was not a settlor, appointor or beneficiary but received indirect financial advances, and the court found he had actual control over the capital and income and could use the same to his advantage.

Beneficiaries

A beneficiary of a discretionary trust, does not have any proprietary interest in the trust property. The beneficiary's interest is a chose in action entitling the beneficiary to call upon the trustees to deal appropriately with the income and/or capital of the trust.

Test individuals

If the trust is a family trust and, as a consequence of a property settlement or other agreement between the parties, the spouse exiting from the trust is the nominated test individual, then any further distributions of income or capital to the remaining spouse will be taxed at the highest marginal tax rate.

Footnotes

57 *Re Skeats' Settlement: Skeats* v *Evans* (1889) 42 Ch D 522 at 526, per Kay J.

58 See the cases of *Goodwin and Goodwin Alpe* (1991) FLC ¶92-192; *Ashton and Ashton* (1986) FLC ¶91-777; *Davidson and Davidson* (1991) FLC ¶92-197; *Coventry, Coventry and Smith* (2004) FLC ¶93-184 and *Kennon and Spry* (2008) FLC ¶93-388.

59 *Kelly and Kelly* (No 2) (1981) FLC ¶91-108.

¶16-470 What approach does the Family Court take to trusts?

Allegations are sometimes made within property proceedings that a trust is a sham trust. A sham trust can only exist if it arises at the inception of the trust. For this reason, it is rare for an attack on a trust to be upheld on the basis that it is a sham.

The more popular argument raised within property proceedings is that a party to the proceedings has the control or influence over the trust

which, if proven, would lead to a finding that the property of the trust ought to be treated as property available for distribution between the parties in a property settlement.

In *Kennon* v *Spry* (2008) FLC ¶93-388, the High Court treated the property of the trust, of which at the time of trial neither the husband nor wife was a beneficiary, as property of the parties to the marriage capable of division. The court placed weight on the fact that the trust assets were built up over the length of a long marriage and by the contributions of the husband and the wife.

In *Stephens and Stephens and Ors* (2009) FLC ¶93-425 (which was enforcement proceedings in the case of Kennon and Spry, following the High Court decision above), the members of the Full Court concluded an order may be made that enables a party to the marriage who is in control of the trust to satisfy his or her personal liability to the other party to the marriage who is an object of the trust from the assets of the trust.

¶16-480 Trust property available for distribution

Position before Pt VIIIAA

Prior to the introduction of Pt VIIIAA of the *Family Law Act 1975* (Cth) (FLA), the court had to determine whether the trust:

- was a trust in which a party to the marriage had only a mere expectancy
- should be treated as the property of the parties (or either of them), or
- was a financial resource of the parties.

Where the court found that the property of the trust was in fact property of the parties, then it was directly available for distribution within the property proceedings.[60] Where trust property was found to be a financial resource, the property was not available for division within the proceedings but its existence could be taken into account

when considering a further adjustment of available property under s 75(2)/s 90SF(3).[61] Where it was only a mere expectancy, it was disregarded within the proceedings. These considerations are still important to those using Pt VIIIAA in contemplating whether a trustee must be joined as a third party.

Where the court determines that the trust property is property available for distribution between the parties, then the court has wide powers to make such orders as it deems fit.

The key question to ask is whether the pool of assets contains sufficient assets from which to obtain a settlement without the necessity for the making of an order against a third party.

Note

Remember that the nature of the parties' interests in the trust property is a question of fact to be determined by the court. Part VIIIAA of the FLA should not be expected to restrict any of the powers that the case law had previously established. Pre Pt VIIIAA cases are of assistance in setting out the, the factors that that the court may take into account, in determining what order is just and equitable in all the circumstances.[62]

Footnotes

60 *Duff and Duff* (1977) FLC ¶90-217.

61 *Kelly and Kelly (No 2)* (1981) FLC ¶91-108; *Essex and Essex* (2009) FLC ¶93-423 and *Keach and Keach* [2011] FamCA 192.

62 For a detailed analysis of cases decided before Pt VIIIAA, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-610 and following.

¶16-490 Should a trust be valued?

It may not be necessary to value a trust where the parties' interest in the trust is a financial resource.[63]

However, a failure to value the property of a trust, where the interest in the trust is a financial resource, may make it more difficult for the court to give appropriate weight on consideration of s 75(2) factors.

Footnotes

63 *Shaw and Shaw* (1989) FLC ¶92-030.

¶16-500 Control of the trust

The question of who has control of a trust is an essential factor for the court to consider when determining what orders should be made. Where a party is found to have the ability under the terms of the trust to distribute to themselves (or a person or entity of its choice) all of its income, then that party will usually be found to have control of the trust. Where a court finds that the trust is controlled by a party to the marriage or de facto relationship, the court can include the trust assets as part of the property to be divided between the parties.

The court will have regard to the following when considering how to treat the property of the trust in the proceedings:

- Terms of the Trust Deed
- Identity of the Trustee
- Control of the Trustee, if the Trustee is a company
- Identity of Appointor or Principal of the trust

- History of trust distributions from the trust
- Assets held within the trust
- How the assets in the trust were acquired and financed
- The class of beneficiaries within the trust
- The relationship between key individuals as defined in the Trust Deed
- Any relevant changes to the trustees or beneficiaries of the trust during the course of the marriage or since separation
- The benefits derived from the trust by the parties such as drawings, loans, salaries, payment of expenses, use of motor vehicle etc
- Capacity to borrow on trust funds
- Contributions by parties to marriage (financial and non-financial) to trust property, and
- If the appointor, or trustee is not a party to the marriage or de facto relationship, the degree of influence either or both parties have over that person or entity.

In *Coventry, Coventry and Smith* (2004) FLC ¶93-184, the Full Court held that the husband controlled the trust despite the fact that his mother was the trustee. The husband was the principal beneficiary of the trust and the appointor of the trust since the death of his father.

In *Davidson* (1991) FLC ¶92-197, the Full Court upheld the decision of the trial judge in holding that the husband controlled the trust despite his attempt to vary the trust deed and substitute a company he controlled in lieu of himself as the appointor of the trust.

In *Ashton* (1986) FLC ¶91-777, the Full Court also held that the trust was controlled by the husband and, therefore, property available to be distributed between the husband and wife despite the fact that the

trustee of the company was a company of which he and his cousin were trustees. The court held that the husband's power of appointment under the trust deed and all the attributes it carried with it amounted to de facto ownership of the property of the trust.

In the case of *Kelly and Kelly (No 2)*,[64] the Full Court found that the husband could arrange the funds of the trust as it pleased him and he could direct the affairs of the trust. Similarly, in the case of *Goodwin and Goodwin Alpe*,[65] the husband exercised his power to exclude the wife and her children as beneficiaries.

Footnotes

64 *Kelly and Kelly* (No 2) (1981) FLC ¶91-108.

65 *Goodwin and Goodwin Alpe* (1991) FLC ¶92-192.

¶16-510 What documentation should be requested?

In order for suitable advice to be given, the practitioner should at the very least request access to the following documentation:

- minutes of meetings of the trustees
- taxation returns and financial statements for the trust
- trust banking records, and
- documents relating to the trust structure (which would include trust deeds, deeds of variation, and the constitution of the corporate trustee).

Where such information is not forthcoming, consideration should be given to a third party production notice or order or a subpoena.

¶16-520 Can beneficiaries inspect documents?

Beneficiaries are entitled to inspect trust documents and trustees must keep records on behalf of the trust. The trustee must keep documents specifically referred to in the trust deed, by state and territory trusts legislation and by the *Income Tax Assessment Act 1936* (Cth) and the *Corporations Act 2001* (Cth).

¶16-530 Relevant provisions

The following provisions are relevant provisions property proceedings dealing with trust assets:

- s 75(2)(b) and s 90SF(3)(b) of the *Family Law Act 1975* (Cth) (FLA)
- s 80(1)(e) of the FLA (which empowers the court to remove and appoint trustees)
- s 106B of the FLA
- s 90AC, 90AE and 90AF of the FLA, and
- r 13.04(1)(f) and (g) of the *Family Law Rules 2004* (Cth).

¶16-540 Injunctive powers of the court

The Family Court has the power to direct a party to take a positive step which can include, for example, a direction to exercise the power of appointment and replace a trustee, or to exercise their power as trustee to utilise trust property to meet wholly or partially a property settlement obligation. Further, a prohibitory form of injunction may be sought in interim proceedings with a view to maintaining the status quo pending trial.

¶16-550 Available remedies

The following remedies are arguably available to an aggrieved party:

- injunction to prevent an anticipated breach

- a mandatory injunction requiring a party to exercise powers of control over a trust in a particular way or to protect the interests of the other spouse[66]
- compensation and account as personal remedies for breach of trust
- recovery of trust property and tracing
- setting aside transactions completed in breach of trust[67]
- appointment of receiver (if the trustee is a company)
- appointment or removal of trustee[68]
- obtaining the court's sanction to depart from the terms of the trust or other duties of the trustee
- seeking the advice and directions of the court,[69] and
- order payments to be made directly to a party to the marriage, to a trustee to be appointed or into court, or to a public authority for the benefit of a party to the marriage.[70]

Footnotes

66 *Tiley and Tiley* (1980) FLC ¶90-898.

67 *Gelley and Gelley* (No 2) (1992) FLC ¶92-291.

68 *Family Law Act 1975* (Cth), s 80(1)(e).

69 For regulation of corporate trustees, see Wolters Kluwer's *Australian Family Law and Practice* at ¶41-720.

70 *Family Law Act 1975* (Cth), s 80(1).

¶16-560 Practical points

The practitioner should bear the following in mind where trust assets exist and a spouse's interests or duties in relation to the trust need to be addressed or protected.

Power of appointment

Where an outgoing spouse has a power of appointment then that power ought to be renounced, for example, by the preparation of a deed poll. In the alternative an injunction restraining the appointor from exercising the power can be obtained.

Beneficiary

Where a beneficiary is to be removed from a trust, there may be taxation ramifications from a capital gains tax perspective. It may be sensible to injunct the outgoing spouse from exercising any of their latent rights.

Trust distributions between separation and property settlement

Since the decision in *Commissioner of Taxation* v *Bamford* [2010] HCA 10, it is important that trustees exercise their discretion to apply the income of the trust by 30 June each year. Trustees who backdate distributions to 30 June, after the fact and their financial advisors, risk sanction and penalties if this is not done.

It is therefore prudent to consider the issue of trust distributions prior to the end of the financial year and to seek consent as to those distributions as between the parties if possible. It is crucial, that the effect of trust distributions from a taxation and Centrelink perspective are understood.

"Paper distributions" (those contained in the records of the trust as a distribution, but where no money is actually received), can adversely impact Centrelink entitlements for parties and children of the marriage who are full-time students and result in Centrelink debts which must be repaid (often as a matrimonial liability). These paper distributions are routinely applied to reduce loans owed by the parties to an entity,

often for tax reasons, and can create an income tax liability for a party personally, notwithstanding that no income is actually received.

Financial and taxation advice should be obtained in relation to these issues, particularly where large sums of money are involved or where family members receive Centrelink entitlements.

Retirement

The retirement of an outgoing trustee might require an appropriate transfer of right, title and interest in the trust property to the other spouse.

Indemnities and releases

The outgoing spouse should seek releases from all liability in respect of the trust, or at least an indemnity in respect of trust liabilities (this will include personal guarantees and tax liabilities).

Resettlement

Amendment to trust deeds as part of a property settlement can sometimes give rise to a resettlement of the trust. Resettlement is where, for income tax purposes, tax legislation deems that one trust is ended and another has replaced it.

When a trust is resettled there are immediate capital gains tax and duty implications as there is deemed to be an ending of the old trust and creation of a new trust. This triggers CGT on the deemed disposal of the assets of the old trust and duty on the acquisition of those assets by the new trust. Resettlement can also cause the loss of carried forward tax losses in the old trust.

Advice should also be sought as to any duty and capital gains tax implications of orders sought in relation to the trust property.

TAXATION CONSIDERATIONS

Editorial information

Written by Wolters Kluwer Tax Team

¶17-000 Introduction

This chapter explains in broad terms the more significant taxation issues that can be involved where there is what may be called a family

property division, whether by agreement between the parties or as a result of the adjudication of a dispute between the parties.

This discussion does not consider the scope of the various provisions of the *Family Law Act 1975* (Cth) and other non-tax legislation that deal with property matters and which can be relied on by a court or other tribunal making an order, and the nature of orders that can be made. These provisions, and the scope of their operation, are discussed in other chapters.

The kinds of tax that most commonly are encountered are:

- ordinary income tax
- capital gains tax (CGT)
- goods and services tax (GST), and
- stamp duty.

Of these, CGT will usually be the most prominent. For this reason a brief description of the key elements of CGT that can be relevant is given at ¶17-060–¶17-070.

¶17-010 Specialist tax advice

It must be stressed that the material in this chapter is of a general nature only, and the way the various tax laws operate in some circumstances will inevitably raise difficult issues. The taxation laws are complex and are often subject to change. The circumstances of individuals will vary enormously and may raise tax issues not mentioned in this chapter.

It is prudent, except in the most straightforward of cases, to engage the services of a competent tax adviser to ensure that there will be no unexpected adverse ramifications from anything that is proposed to be done. In most cases, where substantial assets are involved, the parties may have their own tax advisers who would be able to give appropriate advice.

In some cases where federal tax is involved and certainty is desired, consideration could be given to applying to the Australian Taxation Office (ATO) for a binding private ruling.

¶17-020 Exposure of tax irregularities

Family law property proceedings, particularly disputed proceedings, are apt to expose tax delinquencies that may have occurred on the part of a party, or even both parties, or of some associated entity such as a trust or a company.

This has the potential, in some cases, to give rise to significant retrospective tax liabilities (with attendant penalties). If there is fraud or evasion involved, the Commissioner's power of amendment of an assessment is not restricted by any limitation period that might otherwise have applied. In blatant cases, of course, criminal proceedings are a possibility.

The fact that there may be a potential exposure to retrospective tax liabilities and penalties may, in some cases, need to be taken into account in determining the entitlements of the parties. For example, a spouse who may be visited with a retrospective tax liability arising out of the conduct of the other spouse should be appropriately protected, and professional tax advice will need to be obtained as to what disclosures may need to be made to the ATO. The Full Court of the Family Court of Australia has held that, while the question of innocence or ignorance in a spouse of the other spouse's tax avoidance may carry more weight in respect of penalties, there is no reason why that question might not also be relevant to the issue of unpaid primary tax, even if the "innocent spouse" has received a benefit from the failure to pay tax (*FC of T* v *Worsnop* (2009) FLC ¶93-392).

In certain cases, a court may report significant tax irregularities, for example, by directing that the Commissioner be provided with a copy of the court's judgment and have access to documents on the court file: *Malpass v Mayson*.[1]

The Commissioner may use the access powers in Div 353 of Sch 1 to

the *Taxation Administration Act 1953* (Cth) to gain access to admissions made in affidavits as to a taxpayer's assets and income given in *Family Law Act 1975* (Cth) proceedings. They may therefore be used as the basis for a default tax assessment and can be presented as evidence in court proceedings involving that assessment.[2] This means that taxpayers may find themselves in difficulties if they give different accounts of their financial position to the ATO and a family law court. They will bear the onus of showing that a default assessment based on the affidavits is wrong, and may also face the prospect of being charged with giving false testimony.

Footnotes

1 *Malpass* v *Mayson* (2000) FLC ¶93-061. See also *Commissioner of Taxation & Darling and Anor* (2014) FLC ¶93-583.

2 *Atkinson* v *FC of T* 2000 ATC 4332; [2000] FCA 552.

MAINTENANCE PAYMENTS

¶17-030 Exemption for maintenance payments

Periodic payments in the nature of maintenance made by, or attributable to payments made by, an individual (the "maintenance payer") are exempt from income tax in the hands of the recipient, if the payments are made:

- to an individual who is or has been a spouse of the maintenance payer
- to or for the benefit of a child of the maintenance payer, or
- to or for the benefit of a child of an individual who is or has been a spouse of the maintenance payer (s 51-50, *Income Tax*

Assessment Act 1997 (Cth) (ITAA 1997)).

A “spouse” of an individual is defined to include:

(a) another individual (whether of the same sex or a different sex) with whom the individual is in a relationship registered under a relevantly prescribed state or territory law, and

(b) another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple (s 995-1(1) ITAA 1997).

A child of an individual includes an adopted child, stepchild or ex-nuptial child, a child of the individual’s spouse and someone who is a child of the individual within the meaning of the *Family Law Act 1975* (Cth) (s 995-1(1) ITAA 1997).

The exemption extends to maintenance payments *attributable* to payments made by a maintenance payer, for example, where the payments are made through the Child Support Agency.

The exemption for maintenance payments is subject to the condition that the maintenance payer has not, for the purpose of making the payments or the payments to which they are attributable:

- divested himself/herself of income-producing assets (eg by assigning a partnership interest or settling assets on a trust — see ¶17-410 and ¶17-440 for discussion of potential tax advantages of settlement of a child maintenance trust), or

- diverted ordinary income or statutory income which would otherwise have been taxable to the maintenance payer (eg by alienating investment income).

¶17-040 No deduction for maintenance, etc

No deduction is allowable to a taxpayer for expenditure incurred for maintaining their spouse or a child of the taxpayer under the age of 16 years (s 26-40, *Income Tax Assessment Act 1997* (Cth)). “Spouse” and “child” have the meanings noted at ¶17-030, but “spouse” does

not include a spouse who is living separately and apart from the payer on a permanent basis.

The effect of s 26-40 is to prevent a deduction for salary or wages paid to a spouse or child under 16 years if it is for the maintenance of the spouse or child even if there is a proper employment relationship. However, if the payment is made to a spouse who is permanently living separately and apart, the payment may be deductible even if it is for the maintenance of that spouse provided that it was reasonable and met the other tests for deductibility. Generally, these tests require that the payment be incurred in gaining or producing assessable income or in carrying on business, and is not of a capital, private or domestic nature.

Expenditure or payments for the maintenance of children under 16 years of age are not deductible except if paid through a child support or child maintenance trust, so it is necessary to ensure that any salary or wages paid to such children are in addition to payments for their maintenance.

¶17-050 Child maintenance arrangements

The special higher rates of tax that are imposed (by Pt III, Div 6AA, *Income Tax Assessment Act 1936* (Cth)) on the unearned income of minors do not apply to income which is derived from the investment of property transferred to a child directly or to a trustee for the benefit of the beneficiary as a result of a family breakdown. For discussion, see ¶17-440.

CAPITAL GAINS TAX

¶17-060 How CGT works

Capital gains tax (CGT) is the tax that is likely to give rise to most difficulties in family law property matters. It is therefore necessary to have a broad understanding of how CGT works, as well as a more detailed understanding of the way specific CGT concessions can

apply in a family law property context.

Very broadly, CGT potentially applies to any CGT event that affects a CGT asset (including a disposal) that was acquired after 19 September 1985 (post-CGT). There are, however, CGT events which may generate a capital gain or capital loss even if the asset affected is a pre-CGT asset, for example, the grant of an easement over pre-CGT land or the grant of an option over a pre-CGT asset.

There are various exclusions, exemptions, relieving provisions and other modifications to the operation of CGT, but the operation of CGT does not depend on determining whether a gain or loss is of an income or of a capital nature.

However, if the happening of a CGT event gives rise to a capital gain, and also an amount which is assessable (for instance, as ordinary income), the non-CGT provisions take precedence. But if the amount of the capital gain under the CGT provisions exceeds the amount brought to account as assessable under the non-CGT provisions, the amount of the excess is a capital gain (s 118-20, *Income Tax Assessment Act 1997* (Cth)).

To illustrate, if the sale of an asset gives rise to an amount of $20,000 which is assessable as ordinary income and also to a capital gain of $22,000, the amount of $20,000 is taxed as ordinary income and the excess of $2,000 is treated as a capital gain. The capital gain may qualify for a CGT concession where applicable, for instance, the discount capital gain concession. On the other hand, if the amount assessable as ordinary income were $22,000 and the amount of the capital gain were $20,000, the amount of $22,000 would be brought into assessable income as ordinary income and the capital gain would be reduced to nil.

The interrelationship between the ordinary income tax provisions and the CGT provisions in the case of losses is achieved through the calculation of the “reduced cost base” of an asset. The reduced cost base is the amount by reference to which a capital loss on the disposal of the asset is calculated. Broadly, any deduction that has been allowed or is allowable in respect of amounts that form part of the cost base of an asset are deducted in calculating the reduced cost

base to the extent that the disposal of the asset does not give rise to an assessable recoupment and incidental costs of ownership are ignored.

Even though a transaction may be exempt under the CGT provisions, it does not mean the ordinary income tax provisions will not bring an amount into assessable income. For example, a spec builder may live in a home built by him or her with the consequence that the home qualifies for the CGT main residence exemption. However, they may well be assessable on any profit on the disposal of the home under the ordinary income tax provisions.

¶17-070 The basic requirements for CGT to apply

The capital gains tax (CGT) provisions only apply if a CGT event happens in the taxpayer's circumstances. Generally, if more than one CGT event can potentially apply, it is the most specific event that is relevant.

The events have various exceptions to their operation, for example, in the case of CGT event A1 (the disposal of a CGT asset, see ¶17-130), the capital gain or capital loss is disregarded if the taxpayer acquired the asset pre-CGT (ie before 20 September 1985).

In addition, it must always be remembered that there are specific rules that apply to particular kinds of assets, various deeming provisions and also a number of exempting or relieving provisions.

¶17-080 What is a "CGT asset"?

"CGT asset" is defined as any kind of property or a legal or equitable right that is not property (s 108-5, *Income Tax Assessment Act 1997* (Cth)). To avoid doubt, the following are capital gains tax (CGT) assets:

- part of, or an interest in, a CGT asset (as defined)
- goodwill or an interest in it

- an interest in an asset of a partnership, and
- any other interest in a partnership.

When the width of the definition of asset is considered in the context of other CGT provisions, particularly CGT events D1 (creating contractual or other rights) and H2 (receipt for event relating to a CGT asset), the potential scope of CGT is indeed very wide.

¶17-090 Excluded assets and transactions

The following are some instances where any capital gain or loss is disregarded:

- a CGT event happens to motor vehicles designed to carry a load of less than 1 tonne and fewer than nine passengers, motor cycles or similar vehicles (s 118-5(a), *Income Tax Assessment Act 1997* (Cth) (ITAA 1997))
- disposal of a life insurance policy by the original beneficial owner of the policy or a person who did not pay consideration for acquiring the rights and interests in the policy (s 118-300(1), ITAA 1997, and
- disposal of the whole or part of a right to payment out of a superannuation fund or an approved deposit fund or of an asset which belongs to such a fund other than by the trustee (s 118-305, ITAA 1997). Thus, an irrevocable direction to the trustee of a superannuation fund to make a payment or to transfer an asset to a former spouse (or an agreement to do so) in a family law property settlement would not be a disposal for CGT purposes.

In addition, an item of trading stock and a CGT asset that is within the capital allowances (depreciation) provisions are *usually* CGT exempt (s 118-24, 118-25, ITAA 1997).

Superannuation agreements under the Family Law Act

A capital gain or capital loss made from CGT event C2 or D1 (¶17-

130) relating directly to any of the following is disregarded:

- the making of a superannuation agreement (within the meaning of Pt VIIIB of the *Family Law Act 1975* (Cth))
- the termination, or setting aside, of such an agreement, and
- such an agreement otherwise coming to an end (s 118-313, ITAA 1997).

Roll-over relief for transactions pursuant to financial agreements and court orders is discussed at ¶17-250.

Marriage breakdown settlements

There is a specific exemption for capital gains and capital losses made relating to the breakdown of a marriage or de facto relationship. See ¶17-330.

¶17-100 Separate assets — when an asset is treated as comprising two or more separate assets for CGT purposes

In certain circumstances, an asset (such as land and improvements) which would be regarded as a single asset according to the general law is treated, for capital gains tax (CGT) purposes, as comprising two or more separate assets (Subdiv 108-D, *Income Tax Assessment Act 1997* (Cth)).

Situations in which this can be the case include:

- where a building or structure is constructed post-CGT on land acquired pre-CGT (ie before 20 September 1985)
- where a building or structure that is on post-CGT land is potentially subject to capital allowance (depreciation) or certain other balancing adjustment provisions on disposal, and
- an improvement is effected post-CGT to a pre-CGT asset (which need not be land) and the cost base of the improvement (as

indexed if appropriate) at the time of the disposal exceeds both the improvement threshold for the income year in which the CGT event happens ($150,386 for the 2018/19 income year) and 5% of the capital proceeds from the particular CGT event. Capital improvements to a pre-CGT asset are treated as a single improvement for the purposes of applying the improvement threshold if the improvements are "related" to each other.

In the event that a composite asset is disposed of, the consideration in respect of the disposal must be apportioned between the deemed separate assets.

¶17-110 The importance of the CGT events

The concept of a CGT event is central to the operation of the capital gains tax (CGT) provisions. This is because a capital gain or capital loss can only be made by a taxpayer if a CGT event happens (s 102-20, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)). A capital gain or loss is made at the time the event happens.

The full list of CGT events is specified in s 104-5 of the ITAA 1997. There are at present over 50 CGT events, ranging from the disposal of a CGT asset (CGT event A1) through CGT events for specific situations (eg the grant of an option or lease) to the residual catch-all CGT events which apply where a contractual or other right is created (CGT event D1) and where an amount is received as a result of an act, transaction or event occurring in relation to a CGT asset (CGT event H2).

Some of the events are discussed in ¶17-130.

¶17-120 Order in which the CGT events apply

As noted at ¶17-110, a capital gain or capital loss can only be made if a CGT event happens. In any particular situation, it is necessary to first determine whether a CGT event or events other than CGT events D1 and H2 (defined below) happen. If only one CGT event happens, this is the relevant CGT event for the situation.

If more than one CGT event potentially happens, then the CGT event that is "most specific" to the taxpayer's situation is ordinarily used (s 102-25(1), *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)). If no CGT event other than CGT events D1 and H2 happens, it is then necessary to consider whether those "catch all" events may apply:

- CGT event D1 happens where contractual or other rights are created, and
- CGT event H2 happens where there is a receipt of money or other consideration as a result of an act, transaction or event occurring in relation to a CGT asset.

These events are applied as follows:

- CGT event D1 is first considered and if it happens that event is used, and
- if CGT event D1 does not happen and CGT event H2 happens, it is used (s 102-25(3), ITAA 1997).

¶17-130 Some CGT events

The following CGT events are most likely to be encountered in a family law situation.

CGT event A1 — disposal

CGT event A1 happens if a CGT asset is disposed of by a taxpayer (s 104-10, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)).

There is a disposal of a CGT asset if a change of ownership occurs from the taxpayer to another entity, whether because of some act or event or by operation of law. However, a change of ownership does

not occur if the taxpayer continues to be the beneficial owner of the asset or if there is a mere change of trustee.

CGT event A1 happens when the contract for the disposal of the asset is entered into or, if there is no contract, when the change of ownership occurs. (Special rules apply where there is a compulsory acquisition.)

A capital gain is made from the happening of CGT event A1 if the capital proceeds from the disposal are more than the asset's cost base, and a capital loss is made if the capital proceeds are less than the asset's reduced cost base.

A capital gain or capital loss made from the happening of CGT event A1 is disregarded if the taxpayer acquired the asset pre-CGT (ie if it is acquired before 20 September 1985).

CGT event C2 — cancellation, surrender and similar endings

CGT event C2 happens if the taxpayer's ownership of an intangible CGT asset ends by the asset (among other things):

- being redeemed or cancelled
- being released, discharged or satisfied
- expiring, or
- being abandoned, surrendered or forfeited (s 104-25(1), ITAA 1997).

CGT event C2 happens when the taxpayer enters into the contract that results in the asset ending or, if there was no contract, when the asset ends. A capital gain is made from the happening of CGT event C2 if the capital proceeds from the ending are more than the asset's cost base, and a capital loss is made if those capital proceeds are less than the asset's reduced cost base.

A capital gain or capital loss is disregarded if the asset was acquired pre-CGT.

CGT event D1 — creating contractual or other rights

CGT event D1 happens if the taxpayer creates a contractual right or other legal or equitable right in another entity (s 104-35(1), ITAA 1997). CGT event D1 happens when the taxpayer enters into the contract or creates the other right.

A capital gain is made from the happening of CGT event D1 if the capital proceeds from creating the right exceed the incidental costs incurred that relate to the event happening. A capital loss is made if those capital proceeds are less.

CGT events E1 to E10 — trusts

There are 10 CGT events that specifically apply in certain trust situations. Briefly, the events relate to the following:

- the creation of a trust over a CGT asset (CGT event E1)
- transferring a CGT asset to a trust (CGT event E2)
- the conversion of a trust to a unit trust (CGT event E3)
- a capital payment made for a trust interest (CGT event E4)
- a beneficiary becoming absolutely entitled to a trust asset (CGT event E5)
- the disposal of an asset to a beneficiary to end an income right (CGT event E6)
- the disposal of an asset to a beneficiary to end a capital interest (CGT event E7)
- the disposal by a beneficiary of a capital interest (CGT event E8)
- the creation of a trust over future property (CGT event E9), and
- the annual reduction in cost base exceeds cost base of interest in an attributed managed investment trust (AMIT) (CGT event E10).

¶17-140 Main residence exemption

There is a full or partial capital gains tax (CGT) exemption for a person's main residence (Subdiv 118-B of the *Income Tax Assessment Act 1997* (Cth)). The special considerations that can arise in a family law situation are briefly considered at ¶17-270.

¶17-150 Discount capital gain concession

If an individual or the trustee of a trust (but not a company) has owned a CGT asset for at least 12 months, any capital gain that arises on the disposal of the asset will potentially qualify for a capital gains tax (CGT) discount which is applied after capital losses have been offset.

Broadly speaking, the discount percentage is:

- 50% if the gain is made by a resident individual, but is reduced for periods in which a taxpayer is a foreign resident or a temporary resident during the ownership period from 9 May 2012 (see below)

- 50% if the gain is made by a trust (other than a trust that is a complying superannuation entity), or

- 33⅓% if the gain is made by a complying superannuation entity, or made by a life insurance company from a complying superannuation asset.

The discount percentage is reduced for individuals for any period from 9 May 2012 in which the individual has been a foreign resident or a temporary resident during the ownership period. This reduction applies irrespective of whether the individual makes the capital gain for an asset owned directly or a discount capital gain received through a trust. Depending on the circumstances, different formulae apply to calculate the discount percentage (s 115-115 of the *Income Tax Assessment Act 1997* (Cth)). To illustrate, if an individual who owned a CGT asset between 1 July 2017 and 31 July 2018 was a foreign individual during that entire ownership period, then the discount percentage would be zero (ie the foreign resident would not be entitled to a discount, see s 115-115(2)).

If a CGT asset was acquired before the September 1999 quarter, then indexation can, as an alternative to the discount concession, be taken up to but not beyond the September 1999 quarter.

Companies are not entitled to the CGT discount concession and so will claim indexation up to the September 1999 quarter if available.

¶17-160 Small business concessions

Subject to a $6m maximum net asset value test or a CGT small business entity test being met and the CGT asset meeting an active asset test, a capital gain from the happening of a CGT event in relation to the asset may qualify for specific small business CGT concessions. (Note that additional basic conditions in s 152-10 of the *Income Tax Assessment Act 1997* (Cth) must be satisfied if the CGT asset is a share in a company or interest in a trust.) These concessions are:

- a 15-year exemption (which applies in priority to the other concessions)
- a general 50% reduction
- retirement relief, and
- roll-over relief.

These concessions may be able to be utilised in a family law property settlement where the CGT asset involved satisfies the active asset test and the relevant taxpayer satisfies the maximum net asset value test or the CGT small business entity test. When persons cease to be spouses (by divorce or by separation in the case of de facto spouses), the persons cease to be affiliates of each other for the purpose of applying the special rule in s 152-47 *Income Tax Assessment Act 1997* (spouses or children taken to be affiliates for certain passively held CGT assets). Spouses are not otherwise automatically treated as affiliates. Any potential application of the CGT small business concessions should, if possible, be considered at an early stage. It is advisable that appropriate professional advice be obtained (see ¶17-

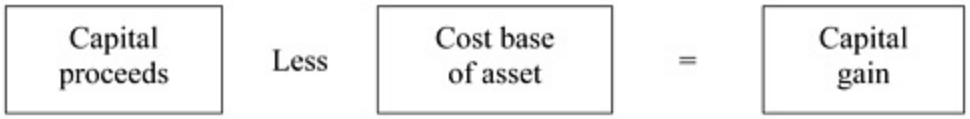
010).

¶17-170 Calculation

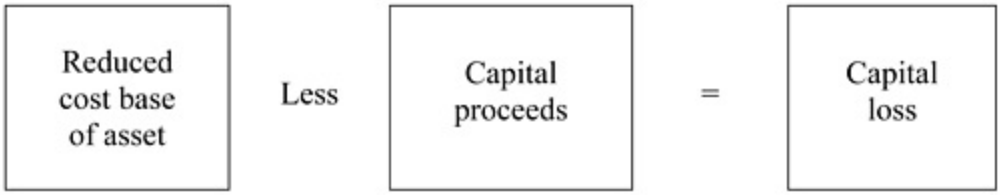
Calculation of a capital gain or capital loss

If a CGT event happens, the capital gain, or the capital loss that is made, is calculated as follows:

Capital gain



Capital loss



Cost base and reduced cost base

Cost base

Subject to any provision governing the cost base of some particular kind of asset, the cost base of a CGT asset includes (s 110-25, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)):

(1) *acquisition costs* — the consideration in respect of the acquisition of the asset (ie the money paid and/or the value of property given for the acquisition)

(2) *incidental costs* — non-deductible incidental costs incurred by the taxpayer to acquire a CGT asset or that related to a CGT event (eg estate agent's fees, legal fees, stamp duty and registration fees)

(3) *ownership costs* — if the asset was acquired after 20 August

1991 and is not a personal use asset or a collectable, the cost of owning the CGT asset incurred by the taxpayer, including interest on money borrowed to acquire the asset, costs of maintaining, repairing or insuring it, rates or land tax, interest on money borrowed to refinance the money borrowed to acquire the asset, and interest on money borrowed to finance the capital expenditure incurred to increase the asset's value

(4) *enhancement costs* — except in the case of goodwill, capital expenditure incurred for the purpose or the expected effect of which is to increase or preserve the asset's value or that relates to installing or moving the asset, and

(5) *title costs* — expenditure incurred to establish, preserve or defend the taxpayer's title to the asset, or a right over the asset.

The cost base is reduced by net GST input tax credits (s 103-30, ITAA 1997).

For assets acquired after 7.30 pm AEST on 13 May 1997, the capital expenditure which would otherwise be included is excluded from the cost base to the extent that it is deductible to the taxpayer and is not the subject of an assessable recoupment (s 110-45, ITAA 1997). This exclusion from the cost base extends to deductions allowed to the taxpayer in respect of the capital expenditure incurred by another taxpayer. For example, deductions allowable to the taxpayer for expenditure on capital works, whether incurred by the taxpayer or by a previous owner, would reduce the cost base of land or buildings acquired by the taxpayer after 7.30 pm AEST 13 May 1997. (Note that some transitional provisions apply in relation to land and buildings owned at 13 May 1997.)

The rules for assets acquired after 13 May 1997 also apply to expenditure incurred after 30 June 1999 to increase the value of land or buildings acquired on or before 13 May 1997.

For assets acquired before 11.45 am AEST on 21 September 1999, the elements of the cost base (other than non-capital costs of ownership) can be indexed (up to but not beyond the September 1999

quarter) if the asset has been owned by the taxpayer for at least 12 months. Resident individuals, complying superannuation entities and trusts will usually not apply indexation but apply the CGT discount concession (¶17-150).

Reduced cost base

The reduced cost base ordinarily comprises the amounts that qualify as part of the cost base (*excluding* ownership costs in item (3) above), reduced by so much of those amounts as is allowable as a deduction but increased by any amount referable to any such deduction that is assessable on the disposal (s 110-55, ITAA 1997).

Capital proceeds

The capital proceeds from a CGT event comprises the money (and the market value of any property) the taxpayer receives, or is entitled to receive, in respect of the event happening (s 116-20, ITAA 1997).

If a payment relates to more than one CGT event, or to a CGT event and something else, the capital proceeds from any CGT event is so much of the payment as is reasonably attributable to the event (s 116-40, ITAA 1997).

If the whole, or a part, of the consideration in respect of the disposal of an asset has not been, and is not likely to be, received, the consideration in respect of the disposal is reduced by the whole or that part (s 116-45, ITAA 1997). The non-receipt, or likely non-receipt, must not be attributable to any act or omission of the taxpayer or an associate, and the taxpayer must have taken all reasonable steps to secure payment. If the consideration is subsequently received, the relevant assessment is amended.

The capital proceeds from a CGT event are reduced by any part of them the taxpayer repays, or any compensation the taxpayer pays that can reasonably be regarded as repayment of part of them (s 116-50(1), ITAA 1997). Any part of such a payment that is deductible is, however, ignored.

If the CGT event constitutes a GST taxable supply, then the GST payable is excluded from the capital proceeds (s 116-20(5), ITAA 1997).

¶17-180 Deemed market value consideration

Market value consideration is deemed to be given or received in respect of the disposal or acquisition of an asset if, *very broadly*:

- there is no consideration for the disposal or acquisition
- the consideration, either wholly or in part, cannot be valued, or
- the parties to the acquisition and disposal are not dealing with each other at arm's length, and the consideration is either less than, or exceeds, the market value of the asset (s 112-20 and 116-30, *Income Tax Assessment Act 1997* (Cth)).

If an asset is acquired without a disposal by another person (eg an acquisition of a share by its issue by the company), market value acquisition consideration is only deemed to be given under the above rules if the consideration for the acquisition of the asset exceeds its market value.

¶17-190 Part disposal — calculation of cost base

If there is a part disposal of an asset, each amount that enters the cost base of the asset is apportioned, unless the amount is wholly attributable either to the part of the asset disposed of or to the part that is not disposed of (s 112-30, *Income Tax Assessment Act 1997* (Cth)).

The part of the cost base that is attributable to the part disposed of is calculated as follows:

$$\text{Cost base of asset} \times \frac{\text{capital proceeds}}{\text{disposal consideration + market value of part not disposed of}}$$

The balance of the cost base is attributable to the part of the asset

that is not disposed of.

¶17-200 Netting of capital gains and losses

The capital gains and capital losses that arise to a taxpayer in an income year are netted (s 102-5, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)).

Treatment of net capital gain

If the net result is a net capital gain, this is simply included in the assessable income of the taxpayer for the income year (s 102-5, ITAA 1997). A net capital gain is not treated in any different way to any other item of assessable income, for example, prior year losses or current trading losses may be set off against it.

Treatment of net capital loss

On the other hand, if a net capital loss results this is *not* allowed as a deduction. Instead, it is carried forward for the purpose of calculating the amount of the net capital gain of the taxpayer for subsequent income years. Thus, a capital loss incurred by a taxpayer may only be offset against a capital gain that arises to the taxpayer in the same or a subsequent income year (s 102-5 and 102-15, ITAA 1997).

A company must meet certain tests to be able to carry forward a net capital loss.

Offsetting capital losses and net capital losses

The discount capital gain and various capital gains tax (CGT) small business concessions (other than the small business 15-year exemption) are applied after capital losses and net capital losses of the taxpayer have been applied against capital gains. However, capital losses and net capital losses can be offset against capital gains in the order chosen by the taxpayer to give the taxpayer the maximum advantage from the concessions.

Example

X, an individual resident in Australia, makes capital gains of $26,000 and $10,000 during an income year. The $26,000 capital gain, but not the $10,000 capital gain,

qualifies for the discount capital gain concession. Neither capital gain qualifies for the CGT small business concessions. X has a capital loss of $12,000 for the income year, and has no net capital loss carried forward.

X can offset the capital loss of $12,000 against the $10,000 capital gain (reducing it to nil) and then offset the balance of the capital loss ($2,000) against the other capital gain (reducing this to $24,000). The discount capital gain concession then applies to the $24,000 capital gain, reducing it to $12,000.

Assuming X has other assessable income for the income year of $40,000, allowable deductions of $16,000 and a carry-forward income loss of $27,000, X's taxable income for the year would be:

Assessable income		
Net capital gain		$12,000
Other assessable income		$40,000
.....		
		$52,000
Less: Allowable deductions	$16,000	
.....		
Carry-forward income loss	$27,000	$43,000
.....		
Taxable income		$ 9,000

If X were to offset the capital loss against the $26,000 capital gain, X would have a net capital gain of $17,000. As a rule of thumb, a capital loss or a net capital loss should be offset first against any capital gain(s) that do not qualify for any of the CGT concessions, and the balance to the greatest extent possible against capital gains that qualify for the least CGT concessions.

¶17-210 Personal use assets and collectables

A personal use asset is, broadly, a CGT asset (other than land or a collectable) that is used or kept mainly for the taxpayer's (or an associate's) personal use or enjoyment, or any option or debt relating to such a CGT asset. Examples include furniture, household appliances, boats, sporting equipment and livestock (eg a thoroughbred horse which is not trading stock of the taxpayer).

A collectable is any of the following if it is used or kept mainly for the taxpayer's (or an associate's) personal use or enjoyment:

- artwork, jewellery, an antique, or a coin or medallion
- a rare folio, manuscript or book, and
- a postage stamp or first day cover (s 108-10(2), *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)).

Any interest in, or debt or option or right relating to, such assets is a collectable.

Special rules apply to the treatment of gains and losses on each category.

Collectables

If a collectable has an acquisition cost of $500 or less, no capital gain or capital loss can be made from it. If an interest in a collectable is the relevant CGT asset, a capital gain or capital loss from the interest is only disregarded if the market value of the asset at the time the *interest* was acquired is $500 or less, unless the interest was acquired before 16 September 1995 (s 118-10, ITAA 1997). Capital gains and losses from collectables for an income year are netted. If this results in a net capital gain from collectables, this is treated as an ordinary capital gain but, if there is a net capital loss from collectables, this is carried forward to the next income year to determine the net capital gain from collectables in that next income year.

There is a special provision which is designed to prevent the $500 cost base threshold being exploited where there is a set of items that would ordinarily be disposed of as a set (s 118-15, ITAA 1997).

Personal use assets

There are no capital gains tax implications on the disposal of a post-CGT personal use asset which has a cost of $10,000 or less (s 118-10(3), ITAA 1997). It is not possible to break up sets of articles to take multiple advantage of this threshold.

No capital loss can ever be recognised on the disposal of a personal

use asset.

As seen above, it is only if the consideration for the disposal of a personal use asset and the cost of the asset *both* exceed $10,000 that there is the possibility of a capital gain. Any such gain is treated the same as any other capital gain.

¶17-220 Roll-over relief

A number of provisions provide for what is commonly called “roll-over” relief. The broad effect of roll-over relief is that:

- where there would otherwise be a capital gains tax (CGT) liability on the disposal of an asset (ie if the asset is a post-CGT asset), this liability is, in effect, deferred until a subsequent disposal of the same or some other asset, and

- if the asset disposed of is a pre-CGT asset, any substituted asset received is also treated as a pre-CGT asset.

The most significant CGT roll-overs in marriage breakdown situations are:

- where there is a disposal of an asset by a taxpayer to his/her spouse or former spouse or by a company or a trustee to a spouse or former spouse pursuant to certain court orders, awards or agreements — see ¶17-260 and ¶17-310, and

- where an interest in a small superannuation fund is subject to a payment split — see ¶17-350.

In most instances, roll-over relief is optional (ie a choice for it to apply must be made). However, the family law roll-over relief is automatic, that is, if the preconditions for roll-over relief to apply are satisfied the relief applies.

¶17-230 Anti-avoidance provisions

The capital gains tax (CGT) provisions contain a number of what

might be called anti-avoidance provisions.

Commonly applied provisions are the provisions which deem the consideration for the acquisition or disposal of an asset to be market value consideration in certain circumstances, for example, if there is no consideration or the parties to the transaction are not dealing with each other at arm's length. Other examples are the share value shifting provisions, and various conditions that govern the availability of certain of the roll-over relief measures.

Changes in majority underlying beneficial interests of pre-CGT assets

An asset in fact acquired pre-CGT (ie before 20 September 1985) is treated as having been acquired post-CGT unless the Commissioner of Taxation is satisfied (or considers it reasonable to assume) that there has been a continuity in the majority underlying beneficial interests of natural persons in the asset post-CGT (Div 149, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)).

This provision has particular relevance to companies and trusts and must always be taken into account when dealing with interests in companies and trusts that have pre-CGT assets.

If there is a cessation of the required continuity, the company or trust is deemed to acquire any pre-CGT asset on the date of the cessation for market value consideration.

Disposal of pre-CGT interest in underlying post-CGT assets

There is also a provision which broadly applies where there is a disposal of a pre-CGT share in a private company, or of a pre-CGT interest in a private trust, and there has been a major change in the assets owned by the company or trust post-CGT (s 104-230, ITAA 1997).

Under this provision, CGT event K6 happens if there is a disposal of a share in a private (unlisted) company, an interest in a private trust or a unit in an unlisted unit trust, which was acquired pre-CGT. A capital gain may be made where 75% or more of the net worth of the company or trust is represented by assets (other than trading stock) acquired post-CGT. The provision may also apply where the interest

in the trust estate, the unit in the unit trust or the share in the company gives a more indirect interest in assets acquired post-CGT.

General anti-avoidance provision

In addition to any specific anti-avoidance provisions contained in the CGT provisions themselves, it must always be remembered that the Commissioner may seek to rely on the general anti-avoidance provisions (Pt IVA, ITAA 1936) where there is a tax avoidance scheme.

¶17-240 Record keeping

There are specific capital gains tax (CGT) record-keeping requirements (Div 121, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)). Typically, a person who owns an asset after 19 September 1985 must keep records in English language (or be readily accessible and convertible into English) to enable the ascertainment of:

- the date of acquisition of the asset
- any amounts that entered into the calculation of the cost base of the asset (this may include market valuations in certain circumstances), and
- on the disposal of the asset, the date of the disposal and the capital proceeds from the disposal (this again may involve market valuations in certain circumstances).

The record-keeping requirements do not, however, generally apply if the asset is an exempt asset, that is, where the CGT provisions did not, or could reasonably be expected to apply. There are also record-keeping requirements in a number of specific situations.

Where records are required to be kept they must, broadly, be kept for five years after the disposal of the asset. In practical terms, records may need to be kept for a longer period, for example where a capital loss is not recouped until a later income year (see TD 2007/2). Records need not be kept if the Commissioner has notified that they are not required or the taxpayer concerned is a company which has

been wound up and finally dissolved.

Asset registers

In some circumstances entries made in an asset register may meet the CGT record-keeping requirements. The original source documents must be retained for five years after the entry in the asset register is made (s 121-35, ITAA 1997).

Getting information

A party to a family law property settlement or proceedings who is to receive a CGT asset under CGT marriage breakdown roll-over (and who therefore will take over the transferor's cost base) should ensure that they obtain the necessary records to enable the calculation of the cost base and reduced cost base of the asset.

MARRIAGE BREAKDOWN ROLL-OVER

¶17-250 CGT roll-overs potentially available

In a marriage (including a de facto relationship) context, the two capital gains tax (CGT) roll-over reliefs that will most commonly need to be considered are:

(1) relief which can apply where the transaction involves an individual and their spouse or former spouse (¶17-260), and

(2) relief which can apply where the transaction involves a company or trust and an individual's spouse or former spouse (¶17-310).

Both of these roll-overs operate automatically, that is, if the relevant conditions are met, they operate without any election or choice being made by the taxpayer. There may be circumstances in which roll-over relief will not be desired, and in such a situation steps would need to be taken to ensure that, for the particular asset or assets, the conditions for roll-over relief to apply are not met.

There is also roll-over relief for asset transfers in certain superannuation payment splits, which is noted at ¶17-350.

¶17-260 Roll-over for transfers between spouses

As presently enacted, automatic capital gains tax (CGT) roll-over relief applies to the disposal of a CGT asset from a person to his/her spouse or former spouse (including de facto spouse) because of:

(1) a court order under the *Family Law Act 1975* (Cth) (FLA) or a corresponding foreign law

(2) a court order under a state, territory or foreign law relating to breakdowns of relationships between spouses

(3) a maintenance agreement approved by a court under s 87 of the FLA or a corresponding foreign law. (It is, of course, no longer possible to obtain such an approval under s 87 of the FLA (see s 87(1A))

(4) subject to the conditions noted below, something done under a financial agreement made under Pt VIIIA of the FLA which is binding because of s 90G of that Act or a corresponding written agreement that is binding because of a corresponding law

(5) subject to the conditions noted below, something done under a Pt VIIIAB financial agreement (within the meaning of the FLA) that is binding because of s 90UJ of that Act or a corresponding written agreement that is binding because of a corresponding foreign law

(6) something done under an arbitral award made in an arbitration referred to in s 13H of the FLA or a corresponding arbitral award made under a corresponding state, territory or foreign law, and

(7) subject to the conditions noted below, something done under a written agreement that is binding because of a state or foreign law relating to breakdowns of relationships between spouses and that, because of such a law, a court is prevented from making an order about matters to which the agreement applies, or that is inconsistent with the terms of the agreement in relation to those

matters, unless the agreement is varied or set aside. For example, Western Australia falls within this category (see the *Family Court Act 1997* (WA)) (s 126-5(1), *Income Tax Assessment Act 1997* (ITAA 1997)).

While the most common CGT event that will activate CGT marriage breakdown roll-over relief is CGT event A1 (the disposal of a CGT asset), the roll-over relief can extend to a situation in which certain other CGT events happen, including CGT event D1, where a contractual or other right is created (see further below).

A "spouse" of an individual includes:

(a) another individual with whom the individual is in a relationship that is registered under a relevantly prescribed state or territory law, and

(b) another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple (see s 995-1, ITAA 1997).

Conditions for (4), (5) and (7)

CGT roll-over relief only applies to a binding financial agreement ((4) and (5) above) or a binding written agreement relating to a relationship breakdown ((7) above) where the CGT event happens after 12 December 2006 and:

- at the time of the CGT event, the spouses or former spouses involved are separated and there is no reasonable likelihood of cohabitation being resumed, and

- the CGT event happened because of reasons directly connected with the breakdown of the relationship between the spouses or former spouses from and including the 2009/10 income year (s 126-5(3A) and 126-25, ITAA 1997).

Whether spouses have separated is determined in the same way as it is for the purposes of s 48 of the FLA (as affected by s 49 and 50 of that Act). This does not introduce a requirement that the parties are

separated for 12 months.

Operation of roll-over relief

The effect of the roll-over relief is that the transferee takes the asset with the CGT attributes that it had in the hands of the transferor. In practical terms, this means that:

- if the asset was acquired by the transferor pre-CGT, the transferee is regarded as having acquired it pre-CGT, and

- if the asset was acquired by the transferor post-CGT, the first element of the transferee's cost base and reduced cost base is the transferor's cost base and reduced cost base (as appropriate) when the transferee acquired it (s 126-5(5) and (6), ITAA 1997).

If the CGT asset was acquired by the transferor post-CGT, the roll-over relief provisions do not provide for the transferee's date of acquisition of the asset. The transferee's date of acquisition is not entirely clear but could be, for example, the date of the relevant court order or, in the case of a maintenance agreement, the date of the agreement. However, for the purposes of the 12 months qualifying period for the CGT discount capital gain concession to apply (¶17-150), the date of the transferor's acquisition of the CGT asset is relevant (s 115-30(1), ITAA 1997).

If the CGT asset was acquired by the transferor before the September 1999 quarter then, in calculating the cost base of the asset for the purposes of roll-over, the transferee would have the option of either indexing the cost base of the asset up to (but not beyond) the September 1999 quarter or taking the unindexed cost base and applying the CGT discount capital gain concession. Which course should be adopted will depend upon all the circumstances, including in some instances whether the transferee has a capital loss or carried forward net loss for the income year in which the transferee disposes of the CGT asset.

Consent orders can give rise to roll-over relief applying (*Taxation Determination* TD 1999/47), and a court order includes the order as subsequently varied (TD 1999/50). Where a court order is

subsequently varied, the variation would (unless the court otherwise directs) operate prospectively (TD 1999/51).

The relevant CGT events

Only specified CGT events are relevant to the marriage breakdown roll-over relief. The most important of these are CGT event A1 (disposal of assets) and CGT event D1 (creation of contractual or other legal or equitable rights (s 126-5(2), ITAA 1997). The significance of CGT event D1 is that roll-over relief may be obtained, for example, where a spouse who has been engaged in a business and is ceasing to be so engaged enters into a restrictive covenant and is paid an amount of consideration for this. It seems that in such a case the consideration would be CGT-free but the payer could incur a capital loss when the covenant expired.

Personal use asset or collectable

If an asset that is subject to roll-over relief was a personal use asset or collectable of the transferor, it is taken to be a personal use asset or collectable of the transferee. Special rules apply to the calculation of capital gains on personal use assets and collectables (see ¶17-210).

ATO rulings

The following Taxation Determinations (TDs) provide useful guidelines on the marriage breakdown roll-over relief.

- CGT roll-over relief can apply both to an order relating to the transfer of a specific CGT asset and also to a transfer of non-specific property (TD 1999/52). For example, if a court were to make an order directing an individual to transfer 60% of their shares, or shares to a value of $100,000, to their spouse or former spouse, the individual may choose which shares to transfer and, on the transfer, CGT event A1 would happen because of the court order.

- If a CGT asset is transferred by agreement between spouses and a court order later sanctions its transfer, the transfer of the asset will not be made “because of” the court order and, so, CGT roll-over relief will not be available (TD 1999/53). In some cases,

there may be a disposal by virtue of agreement, and a court order may merely reflect this, and the disposal may not be able to be said to have been made "because of" a court order. An agreement to transfer made subject to court approval also may not be a disposal because of the court order if the legal effect of the agreement flows from the contract rather than the court's order. To ensure availability of roll-over relief, it should be made clear that the parties are bound by the order of the court rather than by their contract. A binding private ruling could be sought from the Commissioner in any case where there is doubt.

- There may be a CGT roll-over even if the CGT asset is transferred after the time limit specified in the court order (TD 1999/54).

- If a CGT asset other than the one specified in a court order is transferred between spouses, the asset transferred is not transferred "because of" the court order and CGT roll-over relief would not apply (TD 1999/55). In these circumstances, the parties should obtain a variation to the court order if roll-over relief is desired.

¶17-270 Dwellings

Particular care will be necessary if the land on which the main residence is situated is also used for business purposes (eg a doctor's surgery or a farm), or if the land can be subdivided.

Spouses (as defined, see ¶17-260) living together with more than one dwelling can specify which of them they choose to be their main residence (s 118-170, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)).

Spouses living apart on a permanent basis are treated as spouses for capital gains tax (CGT) purposes (except for the purpose of the CGT main residence exemption). This means that permanently separated spouses can each nominate a dwelling as their main residence. If spouses who are not permanently separated nominate different dwellings as a main residence, an apportionment formula applies so

that, in effect, each spouse gets the benefit of approximately half the value of the exemption (s 118-170, ITAA 1997).

It is possible to choose that the CGT main residence exemption continues to apply even though the dwelling has ceased to be the taxpayer's main residence. However, if the dwelling is rent-producing, the maximum period the main residence exemption may continue to apply while it is so used is six years. It is not necessary that the taxpayer moves back into the home provided the other requirements are met (s 118-145, ITAA 1997). If the choice is not available for some period (eg because six years of income-producing use have elapsed), or if the property was put to an income-producing use before being used as a main residence, the capital gain is apportioned on a time basis.

If a main residence commences to be used for income-producing purposes after 20 August 1996, there can be a deemed reacquisition at market value (s 118-192, ITAA 1997).

Effect of roll-over relief

Where a dwelling is an asset to be considered in a marriage breakdown settlement, care needs to be taken to ensure that the main residence exemption is utilised to the greatest possible extent. If the particular dwelling was acquired by the transferor spouse pre-CGT, and roll-over relief under s 126-5 of the ITAA 1997 (¶17-260) applies, no great difficulty arises as the transferee would be deemed to have acquired the dwelling pre-CGT. This means, of course, that no CGT liability can arise on the disposal of the dwelling by the transferee, regardless of what use is or was made of the dwelling by either the transferor or transferee, assuming there are no post-CGT improvements which constitute a deemed separate post-CGT asset under the "separate asset" rules (¶17-100).

If an ownership interest in a post-CGT dwelling is acquired from another individual as a result of a CGT event to which marriage breakdown roll-over relief applies, the CGT main residence exemption operates on the basis that the transferee's ownership interest in the dwelling commenced when the transferor's ownership interest commenced, and that, from the time the transferor's ownership

interest commenced, the transferee had used the dwelling in the same way as the transferor, and the dwelling had been the transferee's main residence for the same number of days as it was the transferor's main residence (s 118-178, ITAA 1997).

Example 1

C (the transferor spouse) is the 100% owner of a dwelling that she used only as a rental property for five years before transferring it to D (the transferee spouse). The transfer happens after 12 December 2006, and CGT marriage breakdown roll-over relief applies. D uses the dwelling only as a main residence for five years before selling it.

D will be eligible for a 50% main residence exemption having regard to how C and D used the dwelling.

Example 2

P (the transferor spouse) is the 100% owner of a dwelling that he used as a rental property for three years, then as his main residence for three years before transferring it to S (the transferee spouse). The transfer happens after 12 December 2006 and CGT marriage breakdown roll-over relief applies. S uses the dwelling only as a rental property for six years before disposing of it.

S will be eligible for a 25% main residence exemption having regard to how both P and S used the dwelling.

Example 3

G and N are each 50% owners of a dwelling that they used only as a rental property for two years before G transferred his 50% interest to N. The transfer happens after 12 December 2006, and CGT marriage breakdown roll-over relief applies. N uses the dwelling as her main residence for four years from the date of transfer until she sells it.

N is entitled to a 66⅔% main residence exemption on the 50% interest that she originally owned. She is entitled to a 66⅔% main residence exemption on the 50% interest that was owned by G and transferred to her, having regard to how both N and G used the dwelling.

Where a dwelling that is used as a main residence from the time of acquisition is later used to produce income and is transferred to the transferee spouse, the special rule for when a dwelling is first used to produce income applies if the first income-producing use was after 20 August 1996. That is, under s 118-192 of the ITAA 1997 discussed

above, the transferee spouse is taken to have acquired the ownership interest in the dwelling at the time it was first used to produce income for its market value at that time.

Example 4

H (the transferor spouse) is the 100% owner of a dwelling that he acquired for $200,000 in 1999, and used as his main residence for three years. In April 2002, he commenced to use the dwelling to produce assessable income; it was valued at $550,000 at this time. He later transferred the dwelling to A (the transferee spouse). The transfer happens after 12 December 2006, and CGT marriage breakdown roll-over relief applies.

A is taken to have acquired the ownership interest in the dwelling in April 2002 for its market value at that time of $550,000.

Making of choices

An important point is that the changes to the main residence exemption rules discussed above do not prevent the making by the transferor of available choices under the CGT main residence exemption.

Such choices are not required to be made by the transferor spouse where marriage breakdown roll-over relief applies because the transferor spouse will not make a capital gain or capital loss. However, the making of a main residence choice by the transferor may affect the operation of the CGT main residence exemption for the transferee. Accordingly, the possibility of the transferor making a choice or choices should be addressed in the negotiations with the transferee spouse, and the transferee spouse's advisers, about the transfer of an ownership interest in a dwelling.

For instance, if there was a period when the transferor and the transferee spouses had different main residences before they separated, they need to make a choice under s 118-170 of the ITAA 1997 to:

- treat one of the dwellings as the main residence of both of them for the period, or
- nominate the different dwellings as their main residences.

For the practical reasons of negotiating a property settlement, any choices the transferor spouse decides to make would generally be expected to be made before they transfer their ownership interest to the transferee spouse. For example, a signed statement could be provided by the transferor spouse to the transferee spouse in these circumstances as evidence of the making of a choice. Once a choice is made, it is binding and cannot be changed.

Also, if the transferor ceased to use the dwelling as his/her main residence, a choice to continue to treat it as a main residence may be advantageous. If the dwelling has been constructed, renovated, etc, a choice may enable the dwelling to be treated as the transferor's main residence during a period (eg of construction). It must be kept in mind that, while the choice has effect, no other dwelling can be treated as the main residence of the person making the choice.

¶17-280 Personal use assets and collectables

If the capital gains tax (CGT) asset disposed of by the transferor spouse under a s 126-5 marriage breakdown roll-over relief (¶17-260) to the transferee spouse is a collectable or personal use asset, the transferee is taken to acquire a collectable or personal use asset (s 126-5(7), ITAA 1997). For the CGT rules that apply to personal use assets and collectables, see ¶17-210.

¶17-290 Business goodwill and other business assets

The disposal of an interest in a business (including goodwill) or of a capital gains tax (CGT) asset used in a business can be eligible for concessional treatment for CGT purposes under the CGT small business concessions provided by Div 152 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997), if marriage breakdown roll-over relief does not apply.

An important point is that if the status of a CGT asset as an "active asset" for the purposes of the CGT small business concessions depends on its use in a business carried on by an entity connected with the entity owning the asset, or carried on by a small business

CGT affiliate of the entity owning the asset, there will be circumstances in which a divorce or de facto relationship break up will cause the asset to cease to be an active asset.

Depreciable property

There is automatic depreciation roll-over relief on the disposal of depreciable property if CGT marriage breakdown roll-over relief under s 126-5 or s 126-15 of the ITAA 1997 applies (see s 40-340, ITAA 1997).

Although CGT marriage breakdown roll-over relief does not apply to motor vehicles (because capital gains or capital losses from these assets are disregarded), there can be roll-over relief for depreciation purposes.

Other business assets

It is advisable to consider all business assets which may be transferred in a family law context to determine the appropriate treatment, whether or not it is desired to seek CGT marriage breakdown roll-over relief (including assets such as industrial and intellectual property rights, rights under contracts, rights in respect of leased property or property held under licence).

Trading stock of a business is generally excluded entirely from the CGT provisions (s 118-25, ITAA 1997).

¶17-300 Disposal of interests in family entities

Pre-CGT assets held in family entities, like a company or a trust, may lose their pre-CGT status if the ownership of those entities changes in a way that triggers Div 149 of the *Income Tax Assessment Act 1997* (ITAA 1997). If Div 149 is triggered, any pre-capital gains tax (CGT) assets held by such entities become post-CGT assets, with an acquisition consideration equal to the market value of the asset at that time.

If marriage breakdown roll-over relief under s 126-5 of the ITAA 1997 (¶17-260) applies, a pre-CGT interest held by the transferor spouse in a company or trust will be treated as a pre-CGT asset in the hands of

the transferee, so that Div 149 of the ITAA 1997 would not be triggered.

If the s 126-5 marriage breakdown roll-over relief does not apply (eg the disposal does not occur because of a relevant court order, etc), the potential for Div 149 to apply is real. In such a case, provided the spouses both continue to hold interests, though their relative proportions may change, the Commissioner will treat them as continuing to hold majority underlying beneficial interests (*Taxation Ruling* IT 2530).

Example 1

Assume there is a family company with 100 shares (all of one class) issued pre-CGT, 50 shares to the husband and 50 shares to the wife. If the husband acquires the 50 shares held by his wife under a s 126-5 ITAA 1997 roll-over relief, Div 149 would not apply and the pre-CGT assets of the company would not be deemed to have been reacquired by the company post-CGT at the time the husband obtains the extra 50 shares.

However, if the husband acquires the 50 shares from the wife and a s 126-5 roll-over does not apply for some reason (eg there is no relevant court order, etc), Div 149 of the ITAA 1997 will operate. However, if the husband were to acquire 49 of the wife's shares and she were to retain one share beneficially, Div 149 would not operate.

Example 2

Assume that in Example 1 there were only two issued shares of $1 fully paid up and of the one class, one held beneficially by the husband and the other held beneficially by the wife. If s 126-5 CGT roll-over relief does not apply for some reason, it may be possible to avoid the operation of Div 149 by splitting each issued share (eg into 20 shares of 5 cents each) and the husband acquiring 19 of the wife's shares with the wife continuing to beneficially hold one share. The Commissioner regards a share split as, in effect, a subdivision so that if the original share was acquired pre-CGT, each of the split shares will also be acquired pre-CGT by the original shareholder (*Taxation Determination* TD 2000/10).

Disposals of pre-CGT interests in private companies or trusts

CGT event K6 may happen if there is a disposal of a pre-CGT interest in private (unlisted) companies, private trust estates or unlisted unit trusts (s 104-230, ITAA 1997). See ¶17-230.

If the s 126-5 marriage breakdown roll-over relief (¶17-260) applies, CGT event K6 does not happen.

¶17-310 Roll-over relief on disposal of asset by company or trustee

There is automatic capital gains tax (CGT) roll-over relief where a company or trust transfers an asset to a person who is the spouse (as defined, see ¶17-260) or former spouse of another person because of an order, agreement, etc that if the transfer were between spouses or former spouses it would attract the roll-over relief (s 126-15, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)). For s 126-15 to apply, the transferee must be the spouse or former spouse (*Ellison & Anor v Sandini Pty Ltd & Ors; FC of T v Sandini Pty Ltd & Ors* 2018 ATC ¶20-651). The Family Court had made an order directing that the corporate trustee of the family trust of one of the separating spouses transfer mining shares to the other spouse, Ms Ellison. After the Family Court order, but before the transfer, Mr Ellison agreed to arrange instead for the shares to be transferred to Ms Ellison's family trust. The Full Federal Court held by majority that s 126-15 could not be engaged because the transferee was not the former spouse but her family trust.

As under the s 126-5 marriage breakdown roll-over (¶17-260), the transferee inherits the CGT treatment of the asset in the hands of the company or trustee, that is, if the transferred asset is:

- pre-CGT in the company's or trustee's hands, it will be a pre-CGT asset in the transferee's hands, and
- a post-CGT asset, the transferee inherits the cost base or reduced cost base (as appropriate) of the transferor company or trust.

For discussion of the circumstances in which a transfer of an asset will be "because of" a relevant court order, or maintenance or financial agreement, see ¶17-260.

If the asset is a personal use asset or collectable (¶17-210) of the company or trust, then it takes that character in the transferee's hands.

As the value of the assets of the company or trust will be reduced by the transfer, there is a requirement for a proportionate reduction in the cost base or reduced cost base of post-CGT interests in, or post-CGT loans to, the transferor company or trust. The interests in, or loans to, the company or trust which must be adjusted can be owned by any taxpayer (including the spouse or former spouse who continues as a shareholder, beneficiary or creditor).

Ordinary income tax consequences to transferee

It is also important to consider that the ordinary income tax consequences of a transfer of property by a company or trust to the transferee that may qualify for CGT roll-over relief under s 126-15, ITAA 1997. For example, if a spouse or former spouse were to receive an asset from a trust or company in lieu of a distribution or dividend, the recipient may still be assessable under the ordinary income tax rules. For further discussion, see ¶17-400 (companies) and ¶17-410 (trusts).

,

Main residence

Special provision is made in relation to a transfer of a main residence by a company or trustee to a taxpayer where the dwelling was acquired post-CGT and s 126-15 roll-over relief applies (s 118-180, ITAA 1997). In that event, the transferee is treated as having owned the dwelling from the time that the company or trustee acquired it. However, it cannot be treated as the transferee's main residence during that period. This has the result that the transferee will be liable to CGT in relation to the period during which the dwelling was owned by the company or trust.

This provision would also appear to apply where the asset transferred is land on which the transferee erects a main residence: any election to treat the land as the transferee's main residence could not include any period the land was owned by the transferor company or trust.

¶17-320 Some further points about roll-over relief

Transferee accepts accrued capital gain on post-CGT asset

If a post-capital gains tax (CGT) asset transfer obtains the benefit of CGT marriage breakdown roll-over relief under either s 126-5 or s 126-15 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997), the transferee generally assumes liability for any accrued capital gain if the asset is later disposed of.

In negotiating a property settlement, the potential tax liabilities will be relevant.

Example

Pursuant to a Family Court order, X transfers to his former spouse (Y) post-CGT land which has a market value of $240,000 and a cost base to X of $85,000. If the roll-over relief provided by s 126-5, ITAA 1997 (¶17-260) is attracted, Y is acquiring an asset with, in effect, a latent capital gain of $155,000.

Assume that Y disposes of the asset for $290,000, at which time the cost base is $92,500. Y will derive a capital gain of $197,500. If this is a CGT discount capital gain and Y has no other capital gains or capital losses for the year and is otherwise on a 45% marginal rate, tax (excluding Medicare levy) on the net capital gain would be $44,438, of which $34,875 is effectively attributable to the capital gain that accrued during X's ownership of the asset.

Roll-over relief may not be desired in some cases

The s 126-5 and 126-15 marriage breakdown roll-over reliefs are automatic, that is, they apply if their literal terms are met and do not require the making of an election.

In certain circumstances, however, it may be desirable to deliberately structure transfers so that the roll-over relief does not apply and there is deemed market value consideration. For example, if the asset is a post-CGT asset and the transferor has capital losses to utilise, it may be advantageous to realise a capital gain by transferring the asset in such a way that roll-over relief does not apply.

Further, if the transferor spouse has used a dwelling as his/her main residence but the transferee spouse does not intend to use it in that way, where marriage breakdown roll-over relief does not apply to the transfer of the dwelling, the transferor will not be subject to CGT as a result of the disposal of the dwelling but the transferee spouse should

get a stepped up market value cost base.

No roll-over relief for transfer otherwise than to spouse

No CGT roll-over is available if the asset is transferred to a person other than the spouse or former spouse (see ¶17-260 for the definition of "spouse"). Thus, no roll-over relief is available, for example, if an asset is transferred to children of a marriage or to the trustee of a child maintenance trust, and the transferor would be potentially liable to CGT if the disposal involved any post-CGT assets.

Similarly, no CGT roll-over relief was available under s 126-15 where the separating spouses agreed that shares should be transferred not personally to the spouse but to the trustee of the spouse's family trust (*Sandini Pty Ltd* v *FC of T* 2018 ATC ¶20-651: ¶17-310).

OTHER CGT ISSUES

¶17-330 Recipient of family law settlement does not make a capital gain

For capital gains tax (CGT) events happening after 12 December 2006, special rules ensure that a capital gain or capital loss that is made on a right ending (ie on the happening of CGT event C2 to a right) is disregarded if the following conditions are met:

- the capital gain or capital loss is made in relation to a right that directly relates to the breakdown of a marriage or de facto relationship (or from and including 2009/10, a relationship between spouses (as defined, see ¶17-260))

- at the time of the trigger event, the spouses involved are separated (as defined) and there is no reasonable likelihood of cohabitation being resumed, and

- the trigger event happened because of reasons directly connected with the marriage or de facto relationship breakdown (s 118-75(1), *Income Tax Assessment Act 1997* (Cth)).

¶17-340 Legal expenses as part of cost base

Legal costs relating to a property settlement and maintenance agreement, financial agreement or arrangements as to maintenance on marriage breakdown may form part of the cost base (¶17-170) of a capital gains tax (CGT) asset, being incidental costs of disposal or acquisition, or incurred in establishing, preserving or defending title to, or rights over, an asset. Registration and valuation fees and stamp duty are other examples of incidental costs of acquisition.

Legal costs incurred by the transferor may be title establishment expenditure or incidental expenditure relating to the disposal of the asset. If the transfer is from a company or trust pursuant to a s 126-15 marriage breakdown roll-over relief (¶17-310) then, unless costs are incurred by the trustee or company, they would not form part of the cost base or reduced cost base of an asset transferred by the company.

Legal costs related to property matters should be separately identified and may need to be apportioned among the assets.

Legal and other expenses incurred to a "recognised professional tax adviser" for tax advice may be deductible under s 25-5 of the *Income Tax Assessment Act 1997* (ITAA 1997) or, possibly, in some circumstances under s 8-1 of the ITAA 1997.

¶17-350 Superannuation and life policies

The capital gains tax (CGT) provisions do not apply if a person disposes of a right to payment out of a superannuation fund or approved deposit fund, or a fund asset (s 118-305, *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)). Similarly, they do not apply if a person disposes of a right to a retirement savings account (s 118-310, ITAA 1997). For example, if as part of a settlement a person gives an irrevocable direction to a superannuation fund trustee to make a pay-out to a former spouse, CGT will not apply.

Splitting of superannuation

For discussion of the tax implications of the splitting of superannuation

interests on marriage breakdown in accordance with an agreement or a court order under Pt VIIIB of the *Family Law Act 1975* (Cth), see ¶19-270.

Various capital gains tax concessions also apply to payment splits, including roll-over relief when assets are transferred to another superannuation fund to satisfy the non-member spouse's entitlement (s 118-305, ITAA 1997).

Life policies

The CGT provisions in the ITAA 1997 do not apply if the original beneficial owner of a life policy disposes of it. Similarly, a transferee who receives it as part of a settlement, and provides no consideration, will be exempt from CGT on a subsequent disposal (s 118-300, ITAA 1997).

¶17-360 Forgiven debts

If a debt is forgiven as part of a family settlement, there may be a capital loss to the lender to the extent that the market value of the debt is less than the amount of the debt. The borrower will generally not incur any capital gain (*Taxation Determinations*TD 2 and TD 3). However, if the debt is a "commercial debt", the amount forgiven will be applied in progressive reduction of the borrower's prior revenue losses, prior net capital losses, deductible expenditure and cost bases of capital assets. For these purposes, a commercial debt is one where the interest is deductible to the borrower, for example, where the amount is used to acquire an income-producing asset (Div 245, *Income Tax Assessment Act 1997*).

If a loan to a spouse is forgiven by a family company, the Commissioner may seek to treat it as a deemed dividend under Pt III, Div 7A of the ITAA 1936. Failing that, if the spouse is an employee, the forgiveness could potentially be treated as a debt waiver fringe benefit for fringe benefits tax (FBT) purposes if it is provided in respect of the employment. In such a case, however, it may be argued that the benefit is provided in respect of the spouse's shareholding, not the spouse's employment, with the result that it is not treated as a fringe

benefit. To establish that a debt forgiveness was a fringe benefit, it would be necessary to consider factors such as whether similar benefits were provided to arm's length employees and whether there has been inadequate remuneration for services rendered.

PROPERTY POWERS OF THE FAMILY COURT

¶17-370 Consequences of exercising power to alter interests

Under s 79 (or s 90SM in relation to de facto relationships) of the *Family Law Act 1975* (Cth) (FLA), the court has jurisdiction in property settlement proceedings to make such order as it considers appropriate altering the interests of the parties in property. Importantly, the court has power under Pt VIIIAA of the FLA to make orders binding third parties (eg a company or trust) and such an order will override anything in a trust deed or other document.

The court will usually take into account any capital gains tax (CGT) liability and realisation costs if a particular asset must be disposed of to comply with the court's order.'[3] If disposal of property is not required under the orders, the court will usually only take account of potential tax liabilities and other realisation costs if a sale is likely to occur in the foreseeable future. In *Rothwell and Rothwell*,[4] for example potential CGT was taken into account in relation to certain assets of the husband.[5]

For marriage breakdown roll-over relief to be available where an order is made, one or other of specified CGT events must happen. This, typically, is a CGT event A1 which happens where there is a disposal of an asset by a taxpayer. By virtue of s 104-10(2) of the ITAA 1997 where a change has occurred in the ownership of an asset, there is a disposal of the asset by the person who owned it immediately before the change, and an acquisition of the asset by the person who owned it immediately after the change. Roll-over relief under s 104-10(2) also applies for transactions pursuant to financial agreements and arbitral awards under the FLA.

Roll-over relief may also arise where a company or a trust transfers an asset to a spouse or former spouse. This is discussed at ¶17-310.

Accordingly, where a court order is made under s 79 or s 90SM of the FLA altering the interests of parties in property, there is a change in the ownership of that interest in the property. This results in a disposal of the interest by the person who owned the interest immediately before the change, and an acquisition of the interest by the person who owns it immediately after the change. Because this means that CGT event A1 happened, marriage breakdown roll-over relief (¶17-260) is potentially applicable.

If an order under s 79 or s 90SM is set aside or varied pursuant to s 79A or s 90SN, by parity of reasoning there will be a change of ownership of interests in property with marriage breakdown roll-over relief potentially applicable.

Injunction power

Exercise of the injunction power under s 114 of the FLA would not seem to effect an alteration in the property interests of the parties[6] and thus should not be regarded as resulting in a disposal. If the power was used to restore property to a spouse to whom it undoubtedly belongs[7] it may be necessary to examine the past tax positions of the parties and seek amended assessments where necessary.

Footnotes

3 *Kelly and Kelly (No 2)* (1981) FLC ¶91-108.

4 *Rothwell and Rothwell* (1994) FLC ¶92-511.

5 See also *Rosati* v *Rosati* (1998) FLC ¶92-804 and *IABH and HRBH* [2006] FamCA 379.

6 *Mullane* v *Mullane* (1983) FLC ¶91-303.

7 *Burridge* v *Burridge* (1980) FLC ¶90-902.

¶17-380 Implications of a s 78 or s 90SL declaration of interests in property

Under s 78 (or s 90SL in relation to de facto relationships) of the *Family Law Act 1975* (Cth), the court has power to declare the title or rights, if any, that a party to a marriage has in respect of particular property. This power of declaration is designed to settle existing title and rights, rather than to create new title and rights. In exercising this jurisdiction, the court must apply the normal rules of common law and equity.[8]

It would seem that if the court were to exercise its power under s 78 or s 90SL there would be no acquisition or disposal for capital gains tax purposes, even if the parties had been acting on the assumption that the title or rights were otherwise than as declared (*Taxation Determination* TD 1999/48). A re-examination of the past tax position of a party may be needed if the s 78 or s 90SL declaration changes that party's assumptions about his/her title or rights to property.

Taxation Determination TD1999/48 is being reviewed following *Ellison v Sandini Pty Ltd* [2018] FCAFC 44. In *Sandini*, the court order provided that the shares be transferred from a trust to the wife. However, at the wife's request the transfer was from that one trust to another trust controlled by the wife. The ATO treated the transfer as a CGT event, which caused a taxation liability for the transferring trust. At first instance, the Federal Court found that Sandini (the transferor) was entitled to CGT roll-over relief, thus widening the circumstances in which it was previously understood that roll-over relief could be granted. An appeal to the Full Court of the Federal Court by the ATO was successful. The fact that the parties may have believed they were correctly giving effect to the order was held to be immaterial to the satisfaction of s 126-1 of ITAA 1997. There was a dissenting judgment so the rejection of a broader interpretation of the CGT roll-over provisions was not unanimous. Leave to appeal to the High Court was sought by the wife, but refused in *Sandini Pty Ltd v Ellison* [2018] HCA

Trans190.

It may be noted that the situations in which proceedings under s 78 or s 90SL for declarations of interests in property are instituted are limited having regard to the power of the court under s 79 or s 90SM (¶17-370) to alter property interests.

Footnotes

8 *Cantarella* v *Cantarella* (1976) FLC ¶90-056.

¶17-390 Implications of the court's power to set aside transactions under s 106B

Section 106B of the *Family Law Act 1975* (Cth) (FLA) enables the court to set aside transactions which may frustrate the operation of the FLA.

Broadly, the court has power, in proceedings under the FLA, to set aside an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made to defeat an existing or anticipated order in the proceedings or which, irrespective of intention, is likely to defeat any such order.

In the exercise of its power, the court is directed by s 106B(3) to have regard to the interests of, and to make any order for the proper protection of, a bona fide purchaser or other person interested.

It would appear that the exercise of the court's power under s 106B could potentially have income tax, capital gains tax (CGT), stamp duty and land tax implications which should not be overlooked in considering the position, not only of the parties to the proceedings but also of any person to whom the disposition which is set aside was made.

By way of illustration, if the disposition sought to be set aside is a distribution of income by the trustee of a discretionary trust,[9] issues as

to the proper person to be assessed on the amount the subject of the distribution will arise. Thus, if the distribution is set aside the beneficiary to whom the distribution was made may need to lodge an amended return, and the trustee or, depending on the terms of the trust and the court order, default beneficiaries may become liable to tax on the amount.

By way of further illustration, if a disposition of an income-producing asset is set aside a number of revenue issues may arise. If the setting aside is ab initio (ie from the date of the disposition), there would be the question as to how the income produced by the asset after the disposition and before the making of the order should be dealt with. The income tax position may depend on the form of the order; but, if the order required the income to be disgorged, this would presumably require the person to whom the asset was disposed of to lodge amended returns excising the income, and for the person who had disposed of the asset to lodge amended returns to include that income.

Moreover, any capital gain or capital loss that arose in the income year in which the disposal occurred would need to be reversed.

Finally, if a stamp duty liability arose as a result of the disposition, there may be grounds to obtain a refund of duty and, if the asset disposed of was land, there may be grounds for a refund of any land tax referable to the land.

Further, even if the setting aside order were to take effect from, say, the date of the order, this could raise difficulties. Thus, for instance, if the disposal that is set aside occurred post-CGT, the making of the order would result in a change in the ownership of the asset and, hence, the happening of CGT event A1, which could give rise to either a capital gain or a capital loss to the person to whom the asset had been disposed of.

In view of the above, care should be taken to ensure that, if necessary, the order of the court takes into account any potential tax consequences.

The court also has power under s 106B of the FLA to prevent a

disposition from being made, but it would seem that the making of such an order would not usually have any tax implications.

Section 85A of the FLA contains a power for the court to set aside pre and post-nuptial settlements. Ordinarily one would expect that the order would take effect from the date it is given, but this may give rise to the problems outlined earlier.

The court can, under r 10.13 of the Family Court Rules 2004, make a separate decision with respect to s 106B prior to the determination of the s 79 proceedings. The process was set out by the Full Court in *VC & GC and Ors* (2010) FLC ¶93-434.

Footnotes

9 *Gelley and Gelley (No 2)* (1992) FLC ¶92-291.

¶17-400 Companies

Frequently, one or both parties to a marriage or de facto relationship may be shareholders in a private company. There are a number of issues that need to be kept in mind if it is contemplated that changes be made in relation to the parties' interest in the company or of the assets in the company itself. The court's powers under Pt VIIIAA of the *Family Law Act 1975* (Cth) (FLA) to make orders which bind third parties should be noted.

A transfer of a capital gains tax (CGT) asset from a company to a spouse or former spouse (including a de facto) can attract CGT marriage breakdown roll-over relief (¶17-310).

Perhaps the most significant source of difficulty is Div 7A of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) under which a private company can be deemed to pay an assessable dividend to a shareholder or associate of a shareholder or, importantly, to a former shareholder or associate of a shareholder if a reasonable person would conclude that the transaction that results in Div 7A applying

occurred because of the entity being a shareholder or an associate of a shareholder at some time.

Subject to exceptions and exclusions, the provisions of Div 7A of the ITAA 1936 can deem an assessable distribution to be paid:

- where a company makes a payment that is not a dividend (for instance, a payment that is made to an associate of a shareholder)
- where a company makes a loan, and
- where a company forgives a debt.

Where a s 79 order is made requiring a private company to pay money or transfer property to a shareholder of the private company, the payment or transfer is an ordinary dividend to the extent paid out of the private company profits and is assessable income of the shareholder under s 44 of ITAA 1936. Where a s 79 order requires a private company to pay money or transfer property to an associate of a shareholder of property in compliance with the order, the payment or transfer is a payment and may be treated as a deemed dividend under Div 7A (*Taxation Ruling* TR 2014/5).

As a result of amendments made in 2007, a private company can frank a deemed Div 7A dividend that is taken to be paid because of a family law obligation whether the recipient of the deemed dividend is a shareholder or not (s 109RC, ITAA 1936). A family law obligation is effectively defined to mean an order, agreement or award that is relevant to CGT marriage breakdown roll-over relief, other than an agreement within (5) at ¶17-260. If a deemed dividend is franked it must be franked at the company's benchmark franking percentage for the income year or, if the company does not have a benchmark franking percentage, the dividend must be franked to 100%.

For discussion of the consequences of the forgiveness of a debt, see ¶17-360.

Value shifting

Where transactions affecting companies give rise to internal "value

shifts", attention needs to be given to the special rules in Div 725–727 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997).

Other issues

Where shares in a company are transferred, CGT event A1 would happen and, if the shares are pre-CGT and the s 126-5 marriage breakdown roll-over relief does not apply, Div 149 of the ITAA 1997 potentially may apply to convert pre-CGT assets of the company into post-CGT assets, or to give rise to a capital gain from the happening of CGT event K6 if the company has post-CGT assets (¶17-260).

If the company has undistributed profits and franking credits, consideration may need to be given to whether franked dividends should be paid.

Also, if a company has made an interposed entity election in relation to a trust, care will need to be taken in relation to any distribution that may occur to a person who is no longer in the relevant family group (for instance, because a person has ceased to be a spouse of the test individual or some individual otherwise within the family group). See ¶17-420.

¶17-410 Trusts

A number of taxation issues can arise where assets or the income of a trust or an interest in a trust is involved directly or indirectly in an asset distribution.

It may be noted, however, that the decision of the Full Court of the Family Court in *Coventry & Coventry and Smith*,[10] and the orders made by the court in that case, demonstrate how, in a family law property proceedings, a court can deal with matters arising in relation to a discretionary trust.

The two most common kinds of trust that are encountered, discretionary trusts (¶17-420) and unit trusts (¶17-430) are dealt with below.

Trusts commonly called child maintenance trusts can provide a useful way to meet maintenance obligations in respect of minor children

without attracting the penalty rate of tax that normally applies to the unearned income of minors. To be tax effective, a child maintenance trust must satisfy certain requirements (¶17-440).

A transfer of a capital gains tax (CGT) asset from a trust to a spouse or former spouse (including a de facto spouse) can attract CGT marriage breakdown roll-over relief (¶17-310).

Footnotes

10 *Coventry & Coventry and Smith* (2004) FLC ¶93-184.

¶17-420 Discretionary trusts

If a distribution out of a discretionary trust is being contemplated, whether of income or capital, it will be important to identify whether the intended recipient is in fact a beneficiary.

For example, the definition of the beneficiary class may include an individual and his/her spouse, but the definition may not be wide enough to include his/her former spouse. This would mean that, if the parties divorced, the parties would no longer be spouses, and the former spouse would cease to be a beneficiary.

In that event, if there were a distribution to the former spouse (no longer a beneficiary), an issue would arise whether the distribution, for the purposes of taxation, would be taken to be a distribution for the benefit of the individual who was a beneficiary, which would be passed on to the former spouse.

If the beneficiary class is defined so as to include former spouses, the fact that a person ceases to be a spouse could, in the past, nevertheless have significant consequences if the trust has made a family trust election or an interposed entity election because of a potential liability to family trust distribution tax. Currently, a person who was a spouse of either the primary individual or of a member of the primary individual's family before a breakdown in the marriage or

relationship is treated as part of the primary individual's family group (s 272-90(2A) Sch 2F, *Income Tax Assessment Act 1936*). In addition, a person, who was a child of the spouse of either the primary individual or of a member of the primary individual's family before a breakdown in the marriage or relationship of the primary individual or the member of the primary individual's family, is treated as a member of the primary individual's family group.

The way the provisions of the *Income Tax Assessment Act 1936* (Cth) attribute liability between beneficiaries and/or the trustee can give rise to substantial difficulties if care is not taken. These provisions bring to tax what might be called the net tax income of the trust for an income year, which is basically the trust's assessable income for the income year less allowable deductions. The basis on which net tax income is brought to tax to a presently entitled beneficiary is by reference to the beneficiary's "share" (proportion) of the "income" of the trust. The beneficiary is taxed on that share of the net tax income of the trust for the income year. It should be noted that as a consequence of the High Court decision in *Commissioner of Taxation v Bamford* [2010] HCA 10 ¶20-170 the income of a trust for this purpose is the distributable trust income determined according to general trust principles and the trust deed.

This may mean that a beneficiary is in fact taxed on more than the beneficiary is entitled to. Depending on the terms of the trust deed, if the trust has amounts included in its net tax income that do not fall within income (eg an assessable capital gain), an income beneficiary may end up being taxable on part of the capital gain, even though the beneficiary has no entitlement to any benefit from the amount. Of course, what is to be included in the net tax income of a trust for an income year will not be known until the end of the income year. This suggests that, if possible, it may be prudent to get some form of indemnity against possible extra tax. It should be noted that amendments made in June 2011 have the effect of ensuring that, provided the trust deed confers an adequate power on the trustee, assessable capital gains and franked distributions can be streamed by the trustee for the 2010/11 and later income years. This is achieved by making a beneficiary or beneficiaries "specifically entitled" to the

capital gain or franked distribution.

If there is a distribution of a capital gains tax (CGT) asset in specie by a discretionary trust, then this will cause CGT event A1 to happen for the trust, so a capital gain or a capital loss will arise.

The interest of a discretionary object under a discretionary trust is not a CGT asset and this is also the case with the interest of a default capital beneficiary in a discretionary trust (unless, perhaps, the interest has been acquired by assignment): see *Taxation Determination* TD 2003/28.

¶17-430 Unit trusts

The ordinary trust provisions of the *Income Tax Assessment Act 1936* (Cth) that govern the calculation of the net tax income, and the way that the net tax income is taxed, operate in much the same way in relation to a unit trust and its beneficiaries (ie the unitholders) as they operate in the case of a discretionary trust and beneficiaries of the trust.

For capital gains tax (CGT) purposes, however, a unit in a unit trust is a separate CGT asset. This means that if a CGT event happens in relation to a unit in a unit trust, a capital gain or capital loss may arise. Typical CGT events that can happen in relation to a unit are:

- CGT event A1 if the unit is disposed of to another entity
- CGT event C2 if the unit is redeemed or otherwise cancelled
- CGT event E4 if a non-assessable amount is distributed to the unitholder and CGT event C2 does not happen.

In the case of a pre-CGT asset, a capital gain or capital loss from the happening of any of these events is disregarded but, in the case of a post-CGT asset, any capital gain will potentially qualify for the discount capital gain concession if the unit has been owned for 12 months and the unitholder is not a company. In some circumstances, a capital gain may qualify for the CGT small business concessions.

A unit in a unit trust, being a CGT asset, can qualify for CGT marriage breakdown roll-over relief if that relief applies. See ¶17-260.

¶17-440 Child maintenance trusts

Where the maintenance of minors is involved, the establishment of what is often referred to as a child maintenance trust can be a useful mechanism, as the income of such a trust to which a minor becomes entitled is not subject to the penal rate of tax that normally applies to the unearned income of a minor under Pt III, Div 6AA of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936).

A minor (an individual who is less than 18 years on the last day of the income year) who is not an excepted person will be taxed at special rates of tax on income that is not excepted assessable income or excepted trust income. An excepted person includes a minor who is engaged in a full-time occupation (as defined) on the last day of the income year.

The categories of excepted assessable income and excepted trust income broadly correspond to, and include, employment income or business income and income derived from the investment of property transferred to satisfy certain kinds of compensation payments or that devolved from a deceased estate.

Excepted assessable income includes income to the extent that the amount is derived by the minor from the investment of any property transferred to the minor as a result of a family breakdown (as defined) (s 102AE(2)(b)(viii), ITAA 1936). Correspondingly, excepted trust income includes trust income to the extent to which the amount is derived by the trustee for an investment of any property transferred to the trustee for the benefit of the beneficiary as a result of a family breakdown (as defined) (s 102AG(2)(c)(viii), ITAA 1936).

Importantly, in the case of excepted trust income, the beneficiary of the trust must, under its terms, acquire the trust property (other than as a trustee) when the trust ends (s 102AG(2A), ITAA 1936).

There are provisions which apply to non-arm’s length transactions to prevent excessive income being generated by an investment (s

102AE(6) and 102AG(3), ITAA 1936).

There is also an anti-avoidance provision which applies to exclude income from being excepted assessable income or excepted trust income if it is derived as a result of an agreement entered into or carried out to ensure that the assessable income is excepted assessable income or excepted trust income (s 102AE(7) and 102AG(4), ITAA 1936). Where the trust is a discretionary trust, the provisions of s 102AG(8) should be noted.

In *Taxation Ruling* TR 98/4, an example is given where distributions from an existing discretionary trust are made, or could be made, directly to a child, but, following a family breakdown, distributions are made instead from the discretionary trust to a child maintenance trust, or to a unit trust or other entity in which the child maintenance trust has an interest. Another example given in TR 98/4 is where income is to be paid, and the trustee received property but must use it only in the purchase of an annuity producing income of the agreed amount.

Family breakdown

Property is to be taken to have been transferred to a minor or to a trustee as a result of a family breakdown (s 102AGA, ITAA 1936) if:

(a) a person ceases to live with another person as the spouse (as defined) of that person

(b) at least one of the persons

(i) is the parent (as defined), or

(ii) has legal custody or guardianship

of the minor or the beneficiary

(c) an order, determination or assessment of a court, person or body (whether or not in Australia) is made wholly or partly because the person has ceased to live as the spouse of the other person

(d) the effect of the order, determination or assessment is that a

person (whether one of the spouses, the transferor or any other person) becomes subject to a legal obligation to maintain, transfer property to, or do some other thing for the benefit of, the minor or beneficiary or one of the spouses, and

(e) the transferor transfers the subject property to the minor, or to the trustee for the benefit of the beneficiary, in giving effect to the legal obligation (including in discharging the legal obligation if it falls on someone else, and whether or not the legal obligation could have been given effect in some other way).

Corresponding rules apply where the natural parents are not living together as spouses at the time the child is born.

¶17-450 Goods and services tax

Introduction

Although most transfers of assets as a result of a matrimonial or relationship breakdown property distribution will not be subject to goods and services tax (GST), there are a number of potential issues that can arise.

The ATO has issued a ruling (GSTR 2003/6) on the GST implications of a transfer of an asset used in an enterprise or business to a spouse as a result of a matrimonial property distribution under the *Family Law Act 1975* (Cth) (FLA). The ruling also applies to property distributions between de facto or same sex couples made upon a relationship breakdown.

In most cases, the transfer of property as a result of a matrimonial or relationship breakdown will not be a taxable supply for GST purposes, but there may be circumstances in which an increasing adjustment for GST purposes will arise.

Taxable supply

Broadly speaking, GST is payable when an entity makes a “taxable supply”. The main requirements for a taxable supply are that the supplier is registered and makes the supply in connection with its

business. In addition, the supply must be made for consideration and it must be connected with Australia (the “indirect tax zone”). A taxable supply does not arise if the asset involved was a purely private asset, even if the asset is transferred by an entity that is GST registered.

If, however, the asset is an asset of an enterprise (eg a motor vehicle of a business or real property used in a business or rented out), then there will be a supply for GST purposes, but whether the supply is a taxable supply will usually depend on whether the supply is made in the course or furtherance of an enterprise that the entity making the supply carries on and whether the supply is made for consideration.

If a supply is not made in the course or furtherance of an enterprise or is not made for consideration, the supply is not a taxable supply.

Generally, in a marriage or relationship breakdown property distribution context, there is no payment and, even where money is included as part of the property distribution arrangement, the payment is not made in connection with or for the inducement of a supply. This is because the purpose of a marriage or relationship breakdown property distribution is not an exchange or barter of assets, but a redistribution of assets in accordance with the parties’ entitlements. Accordingly, even if there is a transfer of money, it is not consideration for a supply.

Whether a supply is made in the course or furtherance of an enterprise that the supplier carries on will depend on the circumstances of each case. However, the ATO takes the view that there must be a “discernible relationship” between the supply and the activity carried on and that there is no “discernible relationship” between the supply of an asset under a matrimonial property distribution and the enterprise (GSTR 2003/6). This view is based on a combination of factors, the main one being the private nature of a marriage breakdown. Other factors include the binding nature of a FLA order or agreement and the lack of commercial flavour in the absence of consideration.

Where the overriding essential character of the supply is that of something being disposed of due to the personal circumstances of the spouse, upon marriage breakdown or otherwise, rather than the

business circumstances of the enterprise, the supply is not made in the course or furtherance of the enterprise. Moreover, even where an asset of an enterprise is supplied to a spouse by a related party (eg a company or trust) under a marriage property distribution, the transaction does not have a business or commercial flavour.

If a supply is not made in the course or furtherance of the carrying on of an enterprise, it will, by definition, not be a taxable supply, and the fact that there may be deemed consideration under special rules where there is a supply to an associate will be irrelevant.

Adjustments

When an asset of an enterprise is transferred under a marriage breakdown property distribution there will be an application of the asset of a "private nature" for the purposes of Div 129 of the *A New Tax System (Goods and Services Tax) Act 1999* (GSTA) which will lead to an increasing GST adjustment where the adjustment periods for the particular asset have not expired. GSTR 2003/6 provides detailed information on how to calculate the adjustment.

Division 130 of the GSTA is an adjustment provision that can result in an increasing adjustment of an amount equal to the input tax credits that were claimable upon acquisition or importation of goods. Whether there is an increasing adjustment under this Division depends on whether the goods were acquired or imported solely for a creditable purpose and they are now applied solely to private or domestic use.

The ATO takes the view in GSTR 2003/6 that, while Div 130 is not confined in its operation to trading stock, in practice items of trading stock are the goods most likely to fall within the scope of Div 130. Where trading stock is set aside and removed for private consumption, then an adjustment under Div 130 may be required.

Cancellation of registration

In some cases, as a result of a matrimonial property distribution, a GST registered entity may cease to exist. A typical example would be a husband and wife partnership (either a general law or a tax law partnership) which is simply dissolved (for instance, by the interests of one spouse being transferred to the other). In that case, if the

partnership is GST registered, the registration will, of course, be cancelled. This could, in turn, lead to GST increasing adjustments under Div 138 of the GSTA. Unfortunately, this issue is not considered in GSTR 2003/6.

STAMP DUTY

¶17-460 Family Law Act exemptions

Under s 90 of the *Family Law Act 1975* (Cth) (FLA), a deed or other instrument executed by a person for the purposes of, or in accordance with, an order made under Pt VIII of the FLA is not subject to any duty or charge under any law of a state or territory or any law of the Commonwealth that applies only to, or in relation to, a territory.

Sections 90L and 90WA specifically provide that state or territory duties or charges do not apply to:

- financial agreements
- termination agreements, and
- deeds or other instruments executed by a person for the purposes of, or in accordance with, an order or financial agreement under Pt VIIIA.

There has been contention over the constitutional validity of the FLA exemptions from stamp duty. However, the various jurisdictions have stamp duty exemptions or concessions which apply in family breakdown situations. The broad effect of these exemptions or concessions is outlined below. The exemptions or concessions also usually extend to motor vehicle registration duty. The exemptions and concessions in some instances extend to agreements registered or approved under the FLA.

¶17-470 New South Wales

Under s 68 of the *Duties Act 1997* (NSW), no duty is chargeable on a

transfer (or an agreement for the sale or transfer) of matrimonial property if:

(1) the property is transferred, or agreed to be sold or transferred, to the parties to a marriage that is dissolved or annulled, or in the opinion of the Chief Commissioner has broken down irretrievably, or to either of them, or to a child or children of either of them or to a trustee of such a child or children, or to a trustee under the *Bankruptcy Act 1966* (Cth) of the estate of either of the parties to the marriage, and

(2) the transfer or agreement is effected by or in accordance with:

(a) a financial agreement made under s 90B, s 90C or s 90D of the *Family Law Act 1975* (Cth) (FLA) that, under the FLA, is binding on the parties to the agreement, or

(b) an order of a court under the FLA, or

(c) an agreement that the Chief Commissioner is satisfied has been made for the purpose of dividing matrimonial property as a consequence of the dissolution, annulment or breakdown of the marriage, or

(d) a purchase at public auction of property that, immediately before the auction, was matrimonial property where the public auction is held to comply with any such agreement or order.

If ad valorem duty has been paid, provision is made for a refund of the duty if there is a transfer or agreement that was effected as referred to in (2) above, and subsequently the marriage has been dissolved or annulled or has broken down irretrievably (s 68(4)).

For this purpose, “matrimonial property” of a marriage is property of the parties to the marriage or of either of them.

There is a corresponding exemption in respect of a transfer, or an agreement for the sale or transfer, of relationship property of the parties to a de facto relationship that has, in the Chief Commissioner’s

opinion, broken down irretrievably and the transfer or agreement is effected by or in accordance with a financial agreement made under s 90UB, s 90UC or 90UD FLA, an order of a court under the FLA or a purchase at public auction of property that, immediately before the auction, was relationship property, where the auction was held to comply with any such agreement or order (s 68(1A)). Provision is made for the refund of duty in appropriate cases (s 68(4AA)). "Relationship property" of a de facto relationship means property of the parties to the relationship or of either of them.

There is a further exemption (and provision for a refund) that applies in relation to relationship property where there is a break up of a domestic relationship (s 68(2)). More particularly, no duty is chargeable on a transfer, or an agreement for the sale or transfer, of "relationship property" if the property is transferred, or agreed to be sold or transferred, to the parties to a domestic relationship that has, in the Chief Commissioner's opinion, been terminated or to either of them, or to a child or children of either of them or a trustee of such child or children and the transfer or agreement is effected by or in accordance with:

- an order of a court made under the *Property (Relationships) Act 1984* (NSW), or

- a termination agreement within the meaning of s 44 of that Act that has been certified in accordance with s 47 of that Act, or

- a purchase at public auction of property that, immediately before the auction, was relationship property where the public auction is held to comply with any such order or agreement.

For this purpose, "relationship property" of a domestic relationship means property of the parties to the relationship or of either of them.

¶17-480 Queensland

Under s 420 and 424 of the *Duties Act 2001* (Qld), a transaction is exempt from duty to the extent that it gives effect to a matrimonial

instrument. A matrimonial instrument is an instrument that provides for the transfer of matrimonial property (as defined) from one party to a marriage to only the other party to the marriage on the dissolution or annulment of the marriage and is:

- an agreement registered or approved under the*Family Law Act 1975* (Cth) (FLA)
- an order of a court under the FLA
- an instrument to give effect to either of the above, or
- an instrument made after the start of proceedings for the dissolution or annulment of the marriage.

For this purpose, “matrimonial property” includes property of the parties to a marriage or of either of them that is residential land, the residence on which is for use as the principal residence of the party to whom it is to be or is being transferred (s 421).

In the case of de facto relationship breakdowns, there is an exemption from duty of any of the following instruments to the extent to which it deals with de facto relationship property:

- a recognised agreement under the s 266 of the *Property Law Act 1974* (Qld)
- an order of a court under Pt 19 of that Act, or
- an instrument made under such a recognised agreement or order (s 422 and 424).

For this purpose, de facto relationship property is property of the de facto partners of a de facto relationship or of either of them (s 423).

¶17-490 South Australia

Under s 71CA of the *Stamp Duties Act 1923* (SA), the following instruments are exempt from stamp duty:

- a family law agreement (defined to mean a maintenance agreement, a financial agreement or a splitting agreement (all defined by reference to the *Family Law Act 1975* (Cth) (FLA)))

- a deed or other instrument to give effect to, or consequential on, a family law agreement or a family law order (defined to mean an order of a court under Pt VIII, Pt VIIIA, Pt VIIIAB or Pt VIIIB of the FLA) provided that:

  – the marriage to which the agreement or order relates has been dissolved or annulled (or the Commissioner is satisfied that the marriage or de facto relationship to which the agreement or order relates has broken down irretrievably)

  – the instrument provides for the disposition of property between the parties to the marriage (or former marriage) or former de facto relationship and no other person other than the trustee of a superannuation fund (if relevant), takes or is entitled to take an interest in property pursuant to the instrument

  – at the time of the execution of the instrument the parties were, or had been, married to, or in a de facto relationship with, each other, or

- a deed or other instrument executed by a trustee of a superannuation fund to give effect to, or consequential on, a family law agreement, a family law order or the provisions of any Act or law relating to the transfer or disposition of property or any entitlements on account of a family law agreement or family law order.

Provision is made for a refund of duty where the only reason an instrument was not exempt was that the marriage was not dissolved or annulled and the Commissioner was not satisfied that the marriage had broken down irretrievably and the marriage is subsequently dissolved or annulled or the Commissioner subsequently becomes so satisfied (s 71CA(3)).

Also exempt from duty is a certified domestic partnership agreement and a deed or other instrument to give effect to, or consequential on, a certified domestic partnership agreement or a property adjustment order, provided the Commissioner is satisfied that the domestic relationship to which the agreement or order relates has broken down irretrievably and that the domestic partners lived together continuously as domestic partners for at least three years (s 71CBA). To be exempt, an instrument must provide for the disposition of property between the parties to the former domestic relationship and no other person other than a trustee of a superannuation fund (if relevant) must take, or be entitled to take, an interest in property in pursuance of the instrument. A deed or other instrument executed by the trustee of a superannuation fund to give effect to, or consequential on, a certified domestic partnership agreement or a property adjustment order is also exempt. For the purposes of these exemptions, “certified domestic partnership agreement” and “domestic partner” have the same meanings as in the *Domestic Partners Property Act 1996* (SA) and “domestic relationship” means the relationship between domestic partners.

Provision is made for a refund of duty where the only reason an instrument was not exempt was that the Commissioner was not satisfied that the domestic relationship had broken down irretrievably and the Commissioner subsequently becomes so satisfied (s 71CBA(3)).

Further, provided the Commissioner is satisfied that the instrument has been executed as a result of the irretrievable breakdown of the parties’ marriage or domestic relationship, an instrument to transfer an interest in a shared residence (as defined) between the parties who are spouses or domestic partners or former spouses or domestic partners is exempt (s 71CB). A transfer of registration of a motor vehicle is also exempt in similar circumstances.

If an instrument is not exempt by reason only that the Commissioner was not satisfied that the instrument had been executed as a result of the irretrievable breakdown of the parties’ marriage or domestic relationship, the party by whom stamp duty was paid on the instrument is entitled to a refund of duty if the Commissioner is

subsequently so satisfied (s 71CB(4)).

¶17-500 Victoria

Under s 44(1) of the *Duties Act 2000* (Vic), no duty is chargeable on a transfer of dutiable property if the Commissioner is satisfied that the transfer has been made solely because of the breakdown of a marriage or domestic relationship, and the transferor is a party (or both parties) to the marriage or domestic relationship, or a trustee of a trust of which a party (or both parties) to the marriage or domestic relationship is a beneficiary (or are beneficiaries).

The transferee must also be a party (or both parties) to the marriage or domestic relationship, or a dependent child of a party (or both parties) to the marriage or domestic relationship. Transfers to two such persons are also allowed, as is a transfer to a trustee of a trust of which no person is a beneficiary other than such a person.

No other person must take, or be entitled to take, an interest in the property under the transfer.

In addition, if the transferor is a corporation, the dutiable value of the transfer must not exceed the value of the interests of the parties to the marriage or domestic relationship in the corporation and, as a result of the transfer, the value of the interests in the parties to the marriage or domestic relationship in the corporation must be reduced by the same amount as the dutiable value of the property transferred (s 44(3)).

Declaration of trust

A declaration of trust over dutiable property by a party (or both parties) to a marriage or domestic relationship is exempt from duty if the Commissioner is satisfied that:

- the declaration of trust has been made solely because of the breakdown of a marriage or domestic relationship, and
- the only persons who are beneficiaries of the trust are a party (or both parties) to the marriage or domestic relationship or a dependent child of a party (or both parties) to the marriage or

domestic relationship (s 44(2)).

The entity declaring the trust must be a party (or both parties) to the marriage or domestic relationship or a corporation. However, if the person declaring the trust is a corporation, at the time of the declaration of trust, the dutiable value of the trust property must not exceed the value of the interests of the parties to the marriage or domestic relationship in the corporation and, as a result of the declaration of trust, the value of the interests of the parties to the marriage or domestic relationship in the corporation must be reduced by the same amount as the dutiable value of the trust property (s 44(4)).

There is effectively a pro rata exemption where a corporation is the transferor entity or the entity that declares a trust and the dutiable value of the transfer or of the property over which the trust is created exceeds the value of the interests of the parties to the marriage or domestic relationship in the corporation (s 44(5)).

The value of the interest of a party to a marriage or domestic relationship in a corporation is determined on a winding up basis (s 44(6)).

¶17-510 Western Australia

In Western Australia, nominal duty is chargeable on a dutiable transaction to the extent that it is effected by, or in accordance with, a matrimonial instrument (as defined) provided:

- the parties to the marriage are separated or divorced from each other or the marriage has irretrievably broken down, and
- under the transaction, the matrimonial property (as defined) is, or is to be, transferred to:
  - either, or both, of the parties to the marriage
  - a child, or children, of either of the parties to the marriage, or a trustee of such a child or children, or

– a trustee of a superannuation fund (s 131(1), *Duties Act 2008* (WA)).

There is a similar provision for nominal duty to be chargeable on a dutiable transaction to the extent that it is effected by, or in accordance with, a de facto relationship instrument (as defined) where the de facto relationship between the de facto partners has ended (s 131(2), *Duties Act 2008* (WA)).

There is provision for reassessment of duty under these provisions where a relevant matrimonial or de facto instrument comes into existence within 12 months after the day liability to duty arose (s 132, *Duties Act 2008* (WA)).

¶17-520 Tasmania

There is an exemption from duty under s 56 of the *Duties Act 2001* (Tas) in respect of a transfer, or an agreement for the sale or transfer, of matrimonial property (basically property of the parties to a marriage or either of them, or property held by a related person of the parties to a marriage or either of them) if:

(1) the property is transferred (or agreed to be sold or transferred) to the parties to a marriage that is dissolved or annulled (or, in the opinion of the Commissioner, has irretrievably broken down) or to either of them, or to a child of the marriage under 18 years, and

(2) the transfer or agreement is effected by or in accordance with a document registered or approved under the *Family Law Act 1975* (Cth), a relevant financial agreement made under that Act, an order of a court under that Act, or a purchase at public auction of property that, immediately before the auction, was matrimonial property where the public auction is held to comply with any such document or order.

If ad valorem duty is paid on a transfer or an agreement that falls within (2) above, provision is made for a refund of duty where (1) above is subsequently satisfied.

There are broadly corresponding exemptions in the case of a transfer (or an agreement for the sale or transfer) of de facto relationship property (s 56A) or of property of a personal relationship as defined in the *Relationships Act 2003* (Tas) (s 57).

¶17-530 Australian Capital Territory

Under s 232F of the *Duties Act 1999* (ACT), no duty is payable in relation to a transaction made under:

- an order of a court made under the *Family Law Act 1975* (Cth) (FLA) or the *Married Persons Property Act 1986* (ACT) or any other order of a court for the distribution of property consequent on the end of the relationship between partners (as defined in the *Domestic Relationships Act 1994* (ACT)), or

- any other order of a court for the distribution of property consequent on the end of a relationship between partners.

- Exemption also applies under s 232G to a transaction made under a binding financial agreement made under s 90B, s 90C or s 90D of the FLA, provided the Commissioner is satisfied that the transaction transfer is consequent on the dissolution, annulment or irretrievable breakdown of a marriage, the property is matrimonial property, and the transfer is to the parties to the marriage (or to either of them) or to a child or children of either of them, or to a trustee for the child or children.

Similar exemptions apply to transactions under a Pt VIIIAB of the FLA financial agreement made under s 90UB, s 90UC or s 90UD of the FLA and a transaction made under a domestic relationship agreement, or a termination agreement, under the *Domestic Relationships Act 1994* (ACT).

¶17-540 Northern Territory

In the Northern Territory, a conveyance of dutiable property is exempt from duty if:

- the parties to the conveyance are or were parties to a marriage or de facto relationship under the *Family Law Act 1975* (Cth) (FLA)
- within 12 months after the date of the conveyance, an order is made by the Family Court for the distribution of property between the parties to the conveyance under Pt VIIIA or Pt VIIIAB of the FLA, and
- the terms of the conveyance are consistent with the order (s 91(1), *Stamp Duty Act 2007* (NT)).

A similar exemption applies in the case of a binding financial agreement for the distribution of property between the parties to the conveyance made under Pt VIIIA or VIIIAB of the FLA

PROPERTY ORDERS

Editorial information

Written by Chris Othen

VARYING OR SETTING ASIDE PROPERTY ORDERS

¶18-000 Process and who may apply

The provisions in the *Family Law Act 1975* (Cth) (FLA) dealing with the court's power to set aside or vary consent orders for property settlement made under s 79 and 90SM are contained at s 79A and 90SN in contested matters and at s 79A(1A) and 90SN(2) in matters by consent.

Steps of the process

1. Is the party a person affected by a s 79 or s 90SM order? (If not, they cannot apply.)

2. If so, do they have the consent of all other parties to that order? (If so, go to step 4.)

3. If there is no consent, can the party establish any of the grounds under s 79A(1) or s 90SN(2) (see Checklist box below)? If not, the s 79 or s 90SM order cannot be varied or set aside.

4. If one or more grounds exist, or if the parties consent, the court has the discretion whether or not to vary the order, set it aside, and make a new order in substitution.

Checklist

Who may apply?

Under s 79A(1) and 90SN(2) of the FLA, “a person affected by” an order under s 79 or s 90SM may apply for an order under s 79A or s 90SN.

☐ **Parties**

Any party to the original s 79 or s 90SM orders can apply.

☐ **A child of the marriage or de facto relationship**

Under s 79A(1)(d) or s 90SN(1)(d), a child of the marriage or de facto relationship (or a person on the child’s behalf) can apply, provided that:

- there are circumstances which have arisen since the original s 79 or s 90SM orders were made relating to the child’s care welfare or development
- the circumstances are exceptional
- the child will suffer hardship if a s 79A or s 90SN order is not made (see ¶18-020).

☐ **A person with caring responsibilities for a child**

The ground at s 79A(1)(d) or s 90SN(1)(d) extends to include a person with caring responsibility for a child of the marriage or de facto relationship. Not only can they apply on behalf of the child, but, if they themselves will suffer hardship, they can apply on their own behalf for the s 79 or s 90SM order to be set aside or varied.

A person with caring responsibilities for a child is defined by s 79A(1AA) or s 90SN(1)(d) as:

- a parent with whom a child lives, or
- where a parenting order has been made, a person:
  - with whom a child lives, or
  - who has parental responsibility for a child.

There is no requirement that the person with caring responsibilities for a child be a party to the original s 79 or s 90SM orders.

☐ **Creditors**

It is sufficient that a creditor may not be able to recover a debt due to a s 79 or s 90SM order having been made for that creditor to be a “person affected” (s 79A(4) or s 90SN(4)).

☐ **Insolvent parties to the marriage**

If a party to the marriage is bankrupt, and an order is made under s 79 or s 90SM relating to vested bankruptcy property, then the bankruptcy trustee is a person affected by the order (s 79A(6) or s 90SN(6)).

If a party to the marriage is bankrupt (s 79A(5) or s 90SN(5)) or the subject of a personal insolvency agreement (s 79A(7) or s 90SN(7)) either at or after the time the s 79 or s 90SM order was made, the trustee can apply under s 79A or s 90SN.

☐ **Personal representatives**

If a party to the marriage dies after s 79A or s 90SN proceedings have been commenced, that party’s personal representatives can be substituted as parties in the deceased party’s place (s 79A(1B)or s 90SN(5)(a)).

The court can go on to make an order under s 79A or s 90SN in these circumstances if:

- it would have made a s 79A or s 90SN order had the party survived, and

- it is still appropriate to make the order.

Section 79A or s 90SN orders are enforceable by or against the estate of a deceased party to a marriage (s 79A(1C) or s 90SN(4)).

☐ **Other interested parties**

Under s 79A(2) or s 90SN(2), the court is directed to have regard to the interests of and to make orders protecting *bona fide* purchasers and other interested parties. This applies whether or not such persons have or could have applied for orders under s 79A or s 90SN.

¶18-010 Consent orders

Under s 79A(1A) or s 90SN(2) of the *Family Law Act 1975* (Cth), a s 79 or s 90SM order may be varied or set aside if:

- a party affected by a s 79 or s 90SM order applies, and
- all parties to the proceedings in which the s 79 or s 90SM order was made consent.

It is sufficient that there is consent to the order being set aside. The parties do not have to consent to any new s 79 or s 90SM order being made for the consent to have effect.[1]

The consent does not have to be express. The court has held that, under the principles in *McCabe and McCabe*,[2] the conduct of the parties may lead it to imply their consent to the setting aside or variation of orders.[3]

The court's discretion under s 79A(1) or s 90SN(1) whether or not to accept the consent application and vary or set aside the s 79 or s 90SM order remains.

Procedural issues

If the procedural or non-substantive provisions of orders are being varied by consent, the court may not require Financial Statements or an Application for Consent Orders before making the s 79A or s 90SN orders. An Application in a Case with a brief supporting affidavit by the client or the solicitor may suffice. It is worth checking what the local registry requires.

If the substance of the property adjustment order is being varied or the order set aside, then the parties are required by the court to make full and frank financial disclosure as if it were a new matter, so that the court can exercise its discretion. Usually, an Application for Consent Orders will be the most appropriate form to use.

All Family Court forms can be downloaded from the Family Court website, www.familycourt.gov.au and the Federal Circuit Court of Australia website, www.federalcircuitcourt.gov.au. Court forms can also be found at the Forms tab of Wolters Kluwer's *Australian Family Law Handbook*.

Footnotes

1 *Bourke* v *Bourke (No 2)* (1994) FLC ¶92-479.

2 *McCabe and McCabe* (1995) FLC ¶92-634.

3 *Sommerville and Sommerville* (2000) FLC ¶93-042; [1999] FamCA 958.

¶18-020 Contested matters

The court has a duty under s 81 or s 90ST of the *Family Law Act 1975* (Cth) (FLA) to make property adjustment orders which as far as practicable finally determine the financial relationship between parties, and avoid further proceedings between them.

As an extension of this principle, the power of the court to vary or set

aside s 79 or s 90SM orders in the absence of consent is heavily circumscribed, and the grounds on which it may exercise its power are limited. The court has a further unfettered discretion not to use its power even if a ground is made out.

The practitioner should therefore ensure that detailed instructions are taken from the client prior to beginning s 79A or s 90SN proceedings sufficient to advise in detail about the client's prospects of success. The client also needs to be informed of the risk that should their application be dismissed, a costs order against them is considerably more likely than in s 79 proceedings. The rule remains that each party pays their own costs unless circumstances exist to justify another order being made (s 117 FLA). That said, failing in s 79A or s 90SN proceedings is often treated as such a circumstance.

As such, practitioners should, where possible, identify and gather the evidence to support the ground or grounds to be relied upon prior to beginning the process.

Summary of the law

Under s 79A(1) or s 90SN(1) of the FLA, on application by a person affected by an order under s 79 or s 90SM (see ¶18-000), if the court is satisfied that one of the prescribed grounds exists, it may in its discretion set aside or vary a s 79 or s 90SM order, and if it finds it appropriate, make a new s 79 or s 90SM order in substitution. The preferred approach is not to bifurcate the proceedings into s 79A and s 79 proceedings, but to hear them together (see *Patching & Patching* (1995) FLC ¶92-585 and *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* (2018) FLC ¶93-824).

The prescribed grounds are (s 79A(1) or s 90SN(1)):

- there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance (s 79A(1)(a) or s 90SN(1)(a))

- in the circumstances that have arisen since the order was made it is impracticable for the order … or impracticable for part of the order to be carried out (s 79A(1)(b) or s 90SN(1)(b))

- a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result, it is just and equitable to vary the order or to set aside the order and make another order in substitution for the order (s 79A(1)(c) or s 90SN(1)(c))

- in circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage or de facto relationship, the child or, where the applicant has caring responsibility for the child (as defined in s 79A(1AA)), the applicant, will suffer hardship if the court does not vary or set aside the order and make another order in substitution for the order (s 79A(1)(d) or s 90SN(1)(d)), or

- a proceeds of crime order has been made covering property of the parties to the marriage or de facto relationship or either of them, or a proceeds of crime order has been made against a party to the marriage or de facto relationship (s 79A(1)(e) or s 90SN(1)(e)).

Miscarriage of justice (s 79A(1)(a) or s 90SN(1)(a))

The expression “miscarriage of justice” is not interpreted narrowly in the decided cases. It does, however, mean a miscarriage of justice according to the law. It is related to the integrity of the judicial process, and has been held to exclude miscarriages of justice for reasons unrelated to the judicial process.[4] Within this restriction, the number of possible circumstances should not be limited or defined.[5]

The circumstances under which the miscarriage of justice is alleged to have taken place must be from the time the original s 79 order was made or from before it was made.[6]

In cases under s 79A(1)(a), the court follows a three step process (*Lane & Lane* (2016) FLC 93-699; *Suiker and Suiker* (1993) FLC 92-436):

- Is a reason for a miscarriage of justice established?

- If so, does it amount to a miscarriage of justice?
- If, in the exercise of its discretion, should the court vary or set aside the order, or make another order?

There are five grounds for a miscarriage of justice under s 79A(1)(a) or s 90SN(1)(a).

1. *Fraud*

   "Fraud" means a conscious wrongdoing or some form of deceit.[7]

2. *Duress*

   Duress is a familiar concept in criminal law and equity. In *Pelerman and Pelerman*,[8] the Full Court referred to the "*equitable concept*" of duress with reference to this ground.

   In *SH and DH*,[9]

   Ryan FM (as she then was) referred to the equity case of *Crescendo Management Pty Ltd* v *Westpac Banking Corporation*[10] and McHugh JA's formulation of the equitable concept of duress, at [59] and [60] of the Federal Magistrate's judgement. Her Honour quotes McHugh JA in full:

   > "A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed".[11]

3. *Suppression of evidence*

   > "'Suppression of evidence' … must go beyond the mere giving of one-sided evidence and amount to wilful concealment of matters which it was [here the appellant's] duty to put to the Court".[12]

This definition of what amounts to the suppression of evidence for the purpose of s 79A or s 90SN represents the current law. That there must be "wilful" concealment has, however, not yet been reviewed in the light of the amendment to s 79A(1)(a) made in December 2000 by the *Family Law (Amendment) Act 2000*, which inserted the words "including the failure to disclose relevant information".

In *Official Trustee in Bankruptcy* v *Bryan, AJ and The Estate of Christine Ann Gatenby (Deceased)*,[13] there was wilful failure to disclose relevant information, which meant that the court could rely on the existing definition of the suppression of evidence. However, Young J distinguished between the concepts of wilful concealment and a failure to disclose relevant information:

> "I find that the facts of this case support a finding of a deliberate and intentional suppression of evidence and its wilful concealment was considerably more than a failure to disclose relevant information. I therefore do not have to concern myself with the December 2000 amendment to s.79A".[14]

It may be, following the amendment, that a failure to disclose relevant information need not be deliberate in order to amount to a miscarriage of justice. In a number of cases, it is the effect on the judicial process — the miscarriage of justice — which has been emphasised over the intention of the non-disclosing party, usually in consideration of the reason "any other circumstance".

In *Barker* v *Barker* [2007] FamCA 13 the Full Court quoted with approval the following statement by Brandon LJ from the British case of *Livesey* v *Jenkins* [1985] 1 All ER 106:

> "It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a

case for setting aside can possibly be made good".

In *Pelerman* v *Pelerman* [2000] FamCA 881, another case decided prior to the December 2000 amendment, the Full Court quoted with approval from the case of *Suiker* (1993) FLC ¶92-436:

> "The consent to the order is itself part of the judicial process on which the Court process relies. If that consent is based on misleading or inadequate information, then there may be, in our opinion, a miscarriage of justice either by reason of the 'suppression of evidence' or by reason of 'any other circumstance'".

The Full Court quoted further in *Pelerman* from the case of *Krebs v Krebs*, regarding the central importance to the judicial process of a full and frank disclosure:

> "It is essential in a case of that sort that there be a full and frank disclosure by the applicant of all relevant facts and circumstances so as to enable a Court to make an order which is proper and just in the circumstances".

In *Pearce & Pearce* [2016] FamCAFC 14 the Full Court decided (in the context of a consent order made where there was a failure to make a full and frank disclosure) it was not necessary in all cases, including that particular case, to make findings as to what order the court would have made, had the court been in possession of all the facts at that time, when considering whether there had been a miscarriage of justice. This was because the orders were made by consent, and the failure to make a full and frank disclosure meant the consent was not a "free and informed consent". The question of whether the court would have made a different order would be a relevant consideration as to the exercise of discretion, *after* the court had found there was a miscarriage of justice.

The obligation of the parties to make full and frank disclosure to the court is dealt with in detail in Chapter 24.

4. *Giving of false evidence*

In the High Court, in *Taylor v Taylor*,[15] Mason J said:

> "In my opinion, the words 'false evidence' in s. 79A(1) do not mean evidence which is wilfully false. The subsection should be read according to its terms. To say that 'false evidence' should be read as 'wilfully false evidence' is to introduce a qualification not expressed by the provision".[16]

Gibbs J agreed with him that it is sufficient that the evidence is false, regardless of intention.

5. *Any other circumstance*

While the expression "any other circumstance" is not to be read as relating only to fraud, duress, suppression of evidence or the giving of false evidence, it is limited in scope by the words "miscarriage of justice". The circumstance relied upon must have resulted in a miscarriage of justice to come within the scope of the subsection.[17]

The most common circumstances relied upon in the decided cases are the incompetence of advisers and hearings in the absence of a party.

Incompetent advisers

> "Thus, there will be no miscarriage simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted. The accused, nevertheless, will have had a fair trial".[18]

In *Clifton and Stuart*,[19] with reference to that statement, it was said:

> "Our conclusion therefore is that a miscarriage of justice must arise out of the judicial process and that the incompetence of legal representatives … does not by itself affect the judicial process or the fairness of the trial even though the result may be unjust to the party concerned".[20]

The incompetence of counsel could conceivably affect the integrity of the judicial process, and therefore lead to a miscarriage of justice:

> "if the representation was so bad as to be the equivalent to no representation at all or if the representation was perverse; for example if the representative was in league with the other side".[21]

Failure to appear

An order made in the absence of a party is not automatically a miscarriage of justice.

For example, a party may have been served in accordance with the relevant regulations (including substituted service, or dispensation with service) and still not have been aware of the hearing. A miscarriage of justice has not necessarily occurred.

Further, the decided cases have held that a party must show that they would have presented evidence at the hearing which might have led to a different outcome, for natural justice to be seen to have been denied.

There needs to be an untoward circumstance beyond the control of the party who failed to attend. A mistake by a lawyer or the court registry are examples.

Impracticable for order to be carried out due to circumstances arisen after order was made (s 79A(1)(b) or s 90SN(1)(b))

There are very few reported cases on s 79A(1)(b) of the FLA.

The law was reviewed by the Full Court in the case of *Cawthorn v Cawthorn*.[22] The leading authority at the time was *La Rocca and La Rocca*,[23] and the Full Court in *Cawthorn* quoted extensively from Kay J's judgment in the latter case.

Kay J in *La Rocca* likened s 79A(1)(b) to the doctrine of frustration in contractual matters:

> "In standard contractual doctrine, I think that is as comfortably as anywhere described by Russell J. in *Re Badische Co. Ltd.* (1921) 2 Ch. 331 at 379, where his Honour said:

> ‘The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances’.

> Now, in my view, what the appropriate application of s 79A(1)(b) ought to be is that circumstances that have arisen in which it becomes impracticable to carry out the orders are circumstances that could not reasonably have been contemplated and that in such circumstances, whilst impossibility is not the test and impracticability is, it may then become just and equitable to change the orders”.[24]

The Full Court in *Cawthorn* agreed with this approach, although it noted:

> “On a case by case basis, reliance upon authority relating to the contractual doctrine of frustration in its various facets may at times prove to be of assistance. In so doing however, care must be taken and it must remain at all times in the forefront of the Court’s deliberations that the task before the Court is to interpret and administer a section of the Act”.[25]

The meaning of the word “impracticable” is something different from “impossible”:

> “(a) It is not enough that circumstances have arisen since the order was made which make it unjust for the order or part of the order to be carried out; the onus is upon the applicant to establish to the reasonable satisfaction of the Court, that in the circumstances that have arisen it is impracticable for the order or part of the order to be carried out.
>
> (b) The word ‘impracticable’ means gleaning a definition from the Shorter Oxford Dictionary, ‘not practicable’, ‘that cannot be

carried out or done'; 'practicably impossible'; 'unmanageable'; 'intractable'".[26]

Unless due to circumstances beyond that party's control, the default by one party cannot be relied upon by that party to support an argument that it is now impracticable to carry out the order.[27]

Default in carrying out an obligation (s 79A(1)(c) or s 90SN(1)(c))

There are two "limbs" to this ground:

- a person must have defaulted in carrying out an obligation in the original s 79 or s 90SM order, and
- it must be just and equitable for the order to be varied, or set aside and another order made in substitution in circumstances which have arisen by reason of the default.

The circumstances relevant to the enquiry about whether it is just and equitable to vary or set aside the orders must have arisen by reason of the default. As such a focus on causation is crucial (see as an example, *Blackwell & Scott* (2017) FLC 93-775).

Generally, a party's own default will not lead to success under this ground,[28] unless the court can be persuaded that it is just and equitable.

Exceptional circumstances relating to care, welfare and development of a child (s 79A(1)(d) or s 90SN(1)(d))

To succeed on this ground there must be exceptional circumstances relating to the care welfare and development of a child of a marriage or de facto relationship, and either the child or the applicant will suffer hardship if the orders are not varied or set aside.

The court retains the discretion whether or not to vary or set aside the original s 79 or s 90SM order:[29]

> " …the court must consider in the exercise of its discretion whether [the] hardship is of such a serious nature and results in such inequity that it can only be rectified by the extreme step of setting aside or varying an existing order of the court".

In considering the phrase “exceptional circumstances”, the Full Court decided that the circumstances had to be “outside the normal vicissitudes of life”. A change in a child’s residence following the making of orders would not usually be seen as an exceptional circumstance.[30]

In *Fewster v Drake* (2016) FLC ¶93-745 the Full Court explained (in the context of a financial agreement sought to be set aside under s 90K(1)) it is the changed circumstances which must give rise to the hardship, because in s 90K(1)(d) the section specifically uses the words “as a result of that change”, not the terms of the agreement itself.

Section 79A(1)(d) does not use those words, but instead uses the expression “in the circumstances that have arisen since the making of the order…the child or…the applicant will suffer hardship if the court does not vary the order or set the order aside…”

Another important difference is that under s 90K(1)(d) it must be established that there has been a “material change of circumstances” whereas at s 79A(1)(d) the circumstances must be “exceptional.” However, it is plain enough from the words of the sub-section that exceptional circumstances must arise after the orders were made, and it is those circumstances, not the terms of the order itself, which cause hardship to be suffered if the orders are not varied or set aside.

Footnotes

4 *Clifton and Stuart* (1991) FLC ¶92-194.

5 *Suiker and Suiker* (1993) FLC ¶92-436.

6 *Molier and Van Wyk* (1980) FLC ¶90-911.

7 *Taylor* v *Taylor* (1979) FLC ¶90-674.

8 *Pelerman and Pelerman* (2000) FLC ¶93-037; [2000] FamCA 881 at p 87,589.

9 *SH and DH* (2003) FLC ¶93-164; [2003] FMCAfam 330.

10 *Crescendo Management Pty Ltd* v *Westpac Banking Corporation* (1989) NSW ConvR ¶55-476; (1988) 19 NSWLR 40.

11 *SH and DH* (2003) FLC ¶93-164; [2003] FMCAfam 330 at p 78,666.

12 Stated by the Full Court in *Taylor* v *Taylor* (1977) FLC ¶90-226 at p 76,197.

13 *Official Trustee in Bankruptcy* v *Bryan, AJ and The Estate of Christine Ann Gatenby (Deceased)* (2006) FLC ¶93-258; [2005] FamCA 1163.

14 Ibid, at p 80,385.

15 *Taylor* v *Taylor* (1979) FLC ¶90-674.

16 Ibid, at p 78,594.

17 *Gebert and Gebert* (1990) FLC ¶92-137; *Clifton and Stuart* (1991) FLC ¶92-194.

18 *Ratten* v *The Queen* (1974) 131 CLR 510 at p 517.

19 *Clifton and Stuart* (1991) FLC ¶92-194.

20 Ibid at p 78,338.

21 Ibid at p 78,335.

22 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805; [1998] FamCA

37.

23 *La Rocca and La Rocca* (1991) FLC ¶92-222.

24 Ibid at p 78,538.

25 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805; [1998] FamCA 37 at p 85,060.

26 *Rohde and Rohde* (1984) FLC ¶91-592 at p 79,768.

27 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805; [1998] FamCA 37.

28 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805; [1998] FamCA 37; *Monticone and Monticone* (1990) FLC ¶92-114.

29 *Simpson and Hamlin* (1984) FLC ¶91-576 at p 76,759, reiterated by the Full Court in *Public Trustee (as executor of the estate of Gilbert)* v *Gilbert* (1991) FLC ¶92-211 at p 78,429.

30 *Simpson and Hamlin* (1984) FLC ¶91-576.

¶18-030 Exercise of discretion

The Full Court considered the issue of the court's discretion under s 79A of the *Family Law Act 1975* (Cth) in the case of *Prowse v Prowse*:[31]

> " …we do not think it would be correct to say that there is even a prima facie entitlement to have the consent orders set aside once a miscarriage of justice has been established, because to do so would be to limit the discretion of the Court and to place an onus

> upon the respondent to show circumstances why the order should not be made. The better view, in our opinion, is that an applicant for an order under s 79A(1) bears the onus of satisfying the Court that the original orders should be set aside or varied, and that includes the onus of satisfying the Court not just that there has been a 'miscarriage of justice' but also that the appropriate exercise of the discretion is to so order".[32]

There is no limit on the matters which could impact on the court's decision whether or not to exercise its discretion.

Footnotes

31 *Prowse* v *Prowse* (1995) FLC ¶92-557.

32 Ibid, at p 81,566.

ENFORCEMENT OF PROPERTY ORDERS AND FINANCIAL AGREEMENTS

¶18-040 The source of jurisdiction

The court's power to enforce its own decrees in financial matters derives from Pt XIII of the *Family Law Act 1975* (Cth) (FLA).

Section 105(1) provides that any court having jurisdiction under the FLA may enforce an order, regardless of where it was made.

This is subject to a requirement that, if the order was made in a different court, it must be registered in the enforcing court in accordance with the Family Law Regulations 1984 (Cth).[33]

The power to enforce the court's decrees against the estate of a deceased party to orders is contained in s 105(3).

Further powers include s 106A, which gives an officer of the court the

power to sign a deed or document on behalf of a party if that party is required to do so under an order made under the FLA.

From s 109A, the court derives its power to put in place the particular enforcement regime it chooses through the Family Law Rules 2004 (Cth) (FLR). The equivalent power for the Federal Circuit Court is in s 109B.

A party cannot be imprisoned because of a failure to pay money, unless the failure is found to be a contravention or contempt under Pt XIIIA and XIIIB of the FLA (s 107).

Note

Who can apply?

Rule 20.04 of the FLR provides that any party to an order can apply to enforce it.

This extends to any person entitled to apply on behalf of a person or a child to enforce an obligation on their behalf.

Footnotes

33 *Family Law Act 1975*, s 105(2).

¶18-050 Discretion to enforce

Sections 105(1) and 106A of the *Family Law Act 1975* (Cth) are both expressed in discretionary terms. The Full Court allowed an appeal where the trial judge had considered the court's power to enforce to be mandatory, on the basis that the power was discretionary, and where there was argument about whether the discretion ought be exercised, evidence in support of such an argument ought be

allowed.[34]

Circumstances where the discretion not to enforce has been exercised against the enforcer include where it would be “inequitable” to do so, and where parties had agreed on changes to orders and one party had acted to their detriment as a result.

The conduct of parties since the orders were made, including agreements effectively varying the orders, is therefore relevant in contested enforcement situations, and can lead to orders being unenforceable.

Footnotes

34 *Ramsey and Ramsey* (1983) FLC ¶91-301.

¶18-060 General powers and remedies

Note

All references in this chapter are to Pt 20 of the Family Law Rules 2004. All of the enforcement provisions referred to are reproduced in the Federal Circuit Court Rules 2001 at Pt 25B Div 25B.2.

Rule 20.01 sets out the obligations which can be enforced under Ch 20 of the Family Law Rules 2004 (Cth).

Rule 20.05 sets out the particular remedies (“enforcement orders”) available to the enforcing party, namely, being an order:

- for seizure and sale of real or personal property, including under an enforcement warrant

- for the attachment of earnings and debts, including under a third party debt notice
- for sequestration of property, and
- appointing a receiver (or a receiver and manager).

General powers to make orders for enforcement and related orders (such as requiring the attendance of parties, requiring the filing of Financial Statements and so on) are contained in r 20.07, and are dealt with at ¶18-090.

¶18-070 Need for r 20.06 affidavit

For many enforcement orders, an affidavit must be filed setting out the following information: (r 20.06):

- if the affidavit is not required to be filed with an application, state the orders sought
- attach to it a copy of the order or agreement to be enforced
- name and address of the payee
- name and address of the payer
- that the payee is entitled to proceed to enforce the obligation
- that the payer is aware of the obligation and is liable to satisfy it
- that any condition has been fulfilled
- details of any dispute about the amount of money owed
- total amount of money currently owed and any details showing how the amount is calculated, including interest, if any, and the date and amount of any payments already made
- what other legal action has been taken in an effort to enforce the

obligation

- details of any other current applications to enforce the obligation, and
- the amount claimed for costs, including costs of any proposed enforcement.

The r 20.06 affidavit must be sworn no more than two days before it is filed.

TYPES OF ENFORCEMENT ORDERS

¶18-080 Administrative procedures

The methods of enforcement contained at Ch 20 of the Family Law Rules 2004 (Cth) (FLR) can be distinguished between those which have an administrative procedure, and those which require an enforcement hearing.

Obtaining information to aid enforcement

Rule 20.10 provides two options for obtaining financial information from a defaulter. It provides for written notice to be sent by the enforcing party requiring the defaulter to complete and serve a Financial Statement within 14 days.

As an alternative, an application for an order for the filing of a Financial Statement can be made using an Application in a Case with a r 20.06 affidavit. The application can also be for specific documents to be produced.

It is an offence to fail to comply either with the written notice or any order made for the filing of a Financial Statement (r 20.14).

Enforcement warrant

The purpose of an enforcement warrant is to appoint an enforcement officer to sell real estate or to seize and sell personal property. The process is administrative and straightforward, and in appropriate

cases, a potent way to enforce an order.

Basic procedure

Rule 20.16 sets out the procedure for applying for an enforcement warrant.

The completed enforcement warrant and a copy for service need to be filed at court with the necessary fee, and an affidavit in support which complies with r 20.06.

In addition to the details required by r 20.06, the affidavit must include further details about the property the enforcement officer is to sell. In the case of real estate, the defaulter's title needs to be proved, and details of encumbrances and interests of other people in the property need to be included.

For items of personal property, the affidavit must set out where each item is located, and details of anyone else with an interest or lien (eg under a hire purchase agreement).

The costs of issuing and carrying out the enforcement warrant are recoverable from the payer directly from the proceeds of sale of the property dealt with under the enforcement warrant. The payee nonetheless must undertake to pay all reasonable fees and expenses not able to be recovered from the sale proceeds of the property sold, and, where required by the enforcement officer, make payments on account of the enforcement officer's costs (r 20.16(3)).

Carrying out the enforcement warrant

In some cases, issuing the enforcement warrant and serving a copy on the payer will suffice. The payer will meet his or her obligations under the order before further action is taken. This is one of the strengths of the process — the threat is a very real one.

Where there is a risk that the payer will abscond on receiving notice of the enforcement warrant in relation to personal property, consider applying for a warrant of seizure and detention first (r 20.56). This will allow the enforcement officer to seize the items without prior notice to the payer (see further below).

If the payer remains recalcitrant, r 20.23 sets out the payee's

obligations in having the enforcement officer carry out the enforcement warrant.

At least 28 days before the enforcement officer sells real property under the enforcement warrant, the payee must send a notice to the payer, and any other person with a claim against the property of higher priority than the enforcement warrant. The notice must state:

- that the warrant has been registered on the title to the property
- that the enforcement officer intends to sell the property to satisfy the obligation if the total amount owing is not paid, or arrangements considered satisfactory to the payee have not been made by a date specified in the notice, and
- the enforcement officer's name and address.

The payee must also provide the enforcement officer with:

- evidence of compliance with the notice requirement
- evidence that the warrant has been registered on the land titles register
- details of the real property proposed to be sold including the address and description of the land title of the property
- details of all encumbrances registered against the real property on the date of registration of the enforcement warrant
- the costs incurred to register the enforcement warrant, and
- the current value of the real property, as stated in a real estate agent's market appraisal.

The payee remains liable for the enforcement officer's costs, unless they can be recovered from the sale proceeds.

Other provisions

The enforcement warrant remains in force for 12 months (r 20.17).

Details of the enforcement officer's role can be found at r 20.18.

If the enforcement officer needs procedural orders to carry out the enforcement warrant, the procedure for the officer to do so is set out at r 20.19. The application is made on notice to all parties, and can be determined in chambers by a registrar.

The effect of the warrant is similar to a charge (real estate) or lien (personal property). Until the debt is satisfied, the property remains subject to the warrant. The enforcement officer has the power to sell the property if necessary to recover the debt (r 20.20).

Rules 20.21, 20.21A and 20.21B have detailed sale provisions for the enforcement officer to follow, and the way to deal with any proceeds (including priority to be given) is set out at r 20.22.

Orders relating to real property under enforcement warrants

Rule 20.24 gives the court power to make orders about real property subject to enforcement warrants. The payer, payee or enforcement officer can apply for orders under r 20.24. The orders available under r 20.24(1) are:

> "(a) that the real property be transferred or assigned to a trustee;
>
> (b) that a party sign all documents necessary for the transfer or assignment;
>
> (c) in aid of or relating to the sale of the real property, including an order:
>
> (i) about the possession or occupancy of the real property until its sale;
>
> (ii) specifying the kind of sale, whether by contract conditional on approval of the court, private sale, tender or auction;
>
> (iii) setting a minimum price;
>
> (iv) requiring payment of the purchase price to a trustee;

(v) settling the particulars and conditions of sale;

(vi) for obtaining evidence of value; and

(vii) specifying the remuneration to be allowed to an auctioneer, estate agent, trustee or other person;

(d) about the disposition of the proceeds of the sale of the real property; or

(e) in relation to the reasonable fees and expenses of the enforcement".

Any such application is to be made by way of an Application in a Case.

Objection process

Any person affected by the enforcement warrant may object to it by filing a Notice of Claim.

Rules 20.25 to 20.29 set out details of the process to be followed.

The claim is made against the enforcement officer, who is responsible for service of it (r 20.25).

It is taken that if the payee does not admit the claim within seven days of service, it is disputed (r 20.26 and 20.27).

The claim can then be determined on application for a hearing by a party to the enforcement warrant, the person affected, or the enforcement officer (r 20.28).

The court can either allow the claim, or order that the person affected cannot prosecute the claim against the enforcement officer or payee (r 20.29).

Third party debt notice

Better known in other jurisdictions as garnishee orders, or attachment of earnings orders, third party debt notices compel third parties holding money on behalf of the payer to divert some or all of that money to the payee, whether or not the third party has the payer's

authority.

Bank accounts and earnings are the most common subjects of third party debt notices, although anyone owing money to the payer at the date of issue of the notice can be the subject of one (r 20.30).

Attaching earnings is generally successful where a payer has good reason to stay in a particular job (eg a long-term government or company employee who stands to lose out on superannuation benefits by leaving).

Some payers will be willing to take steps to avoid the impact of a third party debt notice. For example, a payer might find it easy to leave their job, and become self-employed, or might be unlikely to inform the court of their new employment or whereabouts. In this sort of situation, attaching earnings by way of a third party debt notice should be seen as the last resort, or even discounted as a method of enforcement.

Basic provisions

Rule 20.32 deals with the process of issuing a third party debt notice. Three copies of the debt notice need to be filed with an affidavit. The affidavit must comply with r 20.06, and, in addition, include the name and address of the third party, details of the debt owed by the third party to the payer (including the amount), and the information relied on to show the debt is owed by the third party.

If earnings are sought to be attached, the affidavit must include details of the payer's earnings, living arrangements, and dependants. It must set out the protected earnings rate, the amount sought to be deducted each payday, and sufficient information to enable the employer to identify the payer.

The protected earnings rate means the actual threshold income amount that would apply to a payer under Pt VI Div 4B of the *Bankruptcy Act 1966* (Cth) (BA) if the payer were a bankrupt (Dictionary, FLR).

In practice, this means a lengthy calculation needs to be carried out. The "actual income threshold amount" is defined in the BA as 3.5 times the sum resulting from applying the "pension rate calculator A" at the end of s 1064 of the *Social Security Act 1991* (Cth). That

amount is then increased by specified percentages depending on the number of the payer's dependants.

Service and carrying out the third party debt notice

A copy of the notice and the brochure "Third party debt notices" must be served on the payer and the third party by the payee (r 20.33).

The effect of service of the notice on the third party is to attach and bind the debt owed by the third party to the payer in the amount on the notice. It comes into force at the end of seven days after service on the third party (r 20.34).

It is an offence if a third party does not comply with the notice, or discriminates against the payer as an employee because of the notice (r 20.41).

The notice lasts until the amount due to the payee has been paid, or the notice is set aside (r 20.36).

Employer's obligations under r 20.35

The employer is obliged to deduct the amount specified in the notice each payday until the amount owed to the payee is discharged. The employer must give notice to the payer of each and every deduction.

The employer can also deduct $5 per contribution as an administrative charge. The amounts deducted each payday must not leave the payer with less than the protected earnings amount.

The deductions satisfy the employer's obligations to pay earnings to the payer.

If a third party debt notice is in force, and the payer ceases employment, under r 20.40, the payer is obliged to inform the court of specified details relating to the new employment, and the third party is obliged to inform the court that the payer has ceased employment.

Objection processes

Rule 20.39 of the FLR provides that any person affected by the third party debt notice can make a claim, using an Application in a Case.

The third party can respond to the notice, or seek procedural orders

about it, using the procedure at r 20.37.

Warrant of possession

An enforcement officer may need to repossess property in order to sell it under an enforcement warrant.

An order for possession will first need to be made. Rule 20.24 gives the court the power to make orders about the possession of real property prior to sale, for which either the enforcement officer or the payee can apply.

Once the order has been made, the court can issue a warrant for possession without notice to the payer, as long as the payer has had at least seven days notice of the original order for possession (r 20.54).

The application for the warrant of possession is by way of an Application in a Case with supporting affidavit (r 20.53, in accordance with Ch 5 procedure).

Warrant of delivery

If an order is made for an item to be delivered to a party, and the delivering party fails to comply, a warrant for delivery can be issued, without notice to the defaulting party, using an Application in a Case with a supporting affidavit (r 20.53 and 20.55).

The effect of the warrant of delivery is to authorise the enforcement officer to seize the item and deliver it to the receiving party (r 20.55).

Warrant of seizure and detention

If an order is made for specifying a time for compliance, and a party fails to comply, a warrant for seizure and detention of all the non-complying party's real and personal property can be issued, without notice to the defaulting party, using an Application in a Case with a supporting affidavit (r 20.53 and 20.56).

The effect of the warrant is that the property is seized and detained by the enforcement officer until compliance with the order. Once the order is complied with, the enforcement officer must return the items to the non-complying party, after that party has paid the enforcement

officer’s costs (r 20.56).

Warning

Enforcement warrants (see above) are only effective once they have been served on the defaulter. If it is anticipated that the payer might abscond once they are served with an enforcement warrant, consider applying for a warrant of seizure and detention first. The payer will have no notice of the application, and the first time they know of it is when the enforcement officer is at their door about to take possession of their items.

An enforcement warrant can then be issued (if the payer still does not comply), authorising the enforcement officer to sell the items.

An order that the registrar sign documents

Under s 106A of the *Family Law Act 1975* (Cth) (FLA), the Family Court has the power to appoint an officer of the Family Court to sign a deed or document on behalf of a party if that party is required to do so under an order made under the FLA.

This power has not been delegated to deputy registrars; the officer must be at the level of registrar or above (r 18.05 and 18.06).

The procedure is to use an Application in a Case with a supporting affidavit (r 20.53). As this power is not an “enforcement order”, the affidavit does not need to comply with r 20.06. There are no specific requirements regarding the supporting affidavit, beyond those contained in Ch 5 of the FLR.

The application is made without notice to the defaulting party (r 20.53).

¶18-090 Enforcement hearings

Certain enforcement orders can be made only at an enforcement

hearing. Rule 20.07 of the Family Law Rules 2004 (Cth) (FLR) sets out the orders the court can make at an enforcement hearing. The court can make an order:

- declaring the total amount owing under an obligation
- that the total amount owing must be paid in full or by instalments, and when the amount must be paid
- for enforcement (r 20.05)
- in aid of the enforcement of an obligation
- to prevent the dissipation or wasting of property
- for costs
- staying the enforcement of an obligation (including an enforcement order)
- requiring the payer to attend an enforcement hearing
- requiring a party to give further information or evidence
- that a payer must file a Financial Statement
- that a payer must produce documents for inspection by the court
- dismissing an application, and/or
- varying, suspending or discharging an enforcement order.

The payer, or if the payer is a corporation, an officer of the corporation, must be served by special service with an Application in a Case with a supporting affidavit which complies with r 20.06. If the payee requires documents to be produced at the enforcement hearing, a list of the documents and a written notice requiring production must be served at the same time (r 20.11).

The hearing is listed within 28 days (with no case assessment

conference).

The payer must come to the hearing to answer questions. Rule 20.12 requires the payer to file a Financial Statement at least seven days prior to the hearing, and produce any documents sought (provided that the r 20.11 procedure has been followed).

It is an offence for the payer not to come to the hearing, not to file a Financial Statement, and not to produce documents (r 20.14).

There are also two more involved enforcement procedures available to the court to enforce its orders, which require enforcement hearings: sequestration of property and receivership.

As with a creditor weighing up whether or not to make a debtor bankrupt, a payee needs to consider carefully whether the cost and time involved in the procedures of sequestration and receivership are proportionate to the measure of likely success.

Sequestration

The act of sequestration is to seize property belonging to the payer and hold it until its profits pay the full amount due. This includes rents from real estate and profits from business interests.

The application is by way of an Application in a Case, supported by an affidavit which complies with r 20.06 (r 20.42). Details of the sequestrator proposed, their fees, and evidence of their consent to act need to be attached to the affidavit.

The court must first decide if the sequestration order should be made. The factors for it to consider are at r 20.43(1).

The court must be satisfied that:

- if the obligation to be enforced arises under an order, the payer has been served with the order to be enforced
- the payer has refused or failed to comply with the obligation, and
- an order for sequestration is the most appropriate method of enforcing the obligation.

On appointing a sequestrator, the court may, under r 20.43:

- authorise and direct the sequestrator:
  - to enter and take possession of the payer's property or part of the property
  - to collect and receive the income of the property, including rent, profits and takings of a business, and
  - to keep the property and income under sequestration until the payer complies with the obligation or until further order
- fix the remuneration of the sequestrator.

Under r 20.44 and 20.45, the court can make orders relating to the sequestration, including controlling the activities of the sequestrator, and removing the sequestrator, or procedural orders for the conduct of the sequestration.

Receivership

A payee can apply for the assets of the payer to be placed into the hands of a receiver.

The application is by way of an Application in a Case accompanied by a supporting affidavit compliant with r 20.06. In addition, details of the proposed receiver, the fees the receiver intends to charge, and evidence of the receiver's consent to the appointment must also be included (r 20.46).

Appointing the receiver (r 20.47)

The court must consider the amount owed, the amount likely to be recovered by the receiver, and the costs of the receiver before appointing the receiver.

This will entail including detailed evidence of the payer's affairs in the supporting affidavit. It may be necessary to obtain financial information about the payer (using the procedures at r 20.10, or applying for an enforcement order regarding disclosure under r 20.07), prior to or simultaneously with the application to appoint a receiver.

If the receiver is appointed, the court must make orders about the receiver's remuneration (if any), the receiver's security, and the receiver's powers.

The receiver may be authorised by the court to do everything the payer could, and the receiver's powers will operate to the exclusion of the payer's during the receivership.

Any interested party may apply for procedural orders about the receivership.

Other matters

Rules 20.49 and 20.50 deal with receivership accounts, and how to object to them. Under r 20.51, the receiver can be removed at any time by the court, and changes to the arrangements for the receiver's remuneration can be made.

Where a receiver breaches orders or the FLR, the court has a range of sanctions, including removing the receiver's remuneration, removing the receiver, appointing a new receiver, and ordering the receiver to repay any remuneration already received.

¶18-100 Financial agreements

Financial agreements can be made by married couples under Pt VIIIA, *Family Law Act 1975* (Cth) (FLA) and by de facto couples under Div 4 of Pt VIIIAB.

Under s 90KA or s 90UN of the FLA, financial agreements can be enforced as if the provisions were orders of the court. An application must be made under s 90KA or s 90UN for the provisions of the financial agreement to be so treated.

All of the enforcement methods contained in Ch 20 to the Family Law Rules 2004 (FLR) are therefore available to parties to a financial agreement.

If the financial agreement is made prior to marriage pursuant to s 90B or s 90UB of the FLA, it is not enforceable unless and until the parties marry or begin living together.

If it is made during the marriage or de facto relationship pursuant to s 90C or s 90UC or after the breakdown of the de facto relationship pursuant to s 90UD, the financial agreement is not enforceable until one party has signed and served a separation declaration in accordance with the provisions of those sections (unless one of the parties or both of them has passed away after separation but prior to executing a separation declaration). Pursuant to s 90D, financial agreements made after divorce do not require separation declarations for their operative parts to become enforceable.

The Family Court can also apply all the remedies available to the High Court in relation to breaches of contract to breaches of the financial agreement (s 90KA or s 90UN). See Chapter 20 for a full discussion of principles relevant to determining whether a financial agreement is enforceable.

As well as specific enforcement of the terms of the financial agreement (eg to transfer property or pay a lump sum), a party may be entitled to contractual damages.

SUPERANNUATION

INTRODUCTION

Editorial information

Written by Jacqueline Campbell[1]

INTRODUCTION

¶19-000 Superannuation and amendments to the *Family Law Act 1975*

In the nearly 20 years since superannuation has been treated as property for family law purposes, parties, practitioners and the courts continue to grapple with the significance of those changes, along with new challenges. At the end of 2002, the law in relation to superannuation and family law changed dramatically. Amendments to the *Family Law Act 1975* (Cth) (FLA) by the *Family Law Legislation Amendment (Superannuation) Act 2001* commenced on 28 December 2002. Superannuation is treated as property, and separating couples may split and flag superannuation by agreement or court order.

Before 28 December 2002, the options under the FLA were limited to:

- deferring the application until the member's superannuation became payable. This was often difficult to monitor or enforce, and courts were reluctant to do so as it was contrary to the s 81 "clean break" philosophy, and

- calculating the present value of the superannuation interest as a "financial resource" and adjusting the non-superannuation between the spouses. This often left the member asset-poor for the short- to medium-term and the non-member without any retirement savings.

Part VIIIB FLA affects the following couples:

- married couples who are separating

- couples in de facto relationships (other than those in Western Australia) who separated after 1 March 2009 (or 1 July 2010 in South Australia)

- couples entering de facto relationships, or getting married or who are in one of those relationships or at the end of one, who want to finalise their financial relationship using a financial agreement (including a superannuation agreement), and

- where one or both parties want to protect their future claim against the other party's superannuation entitlements by flagging it (which is effectively an injunction).

In 2018, the Federal Government indicated that it will accept the referral of powers passed by the Western Australian Government in 2006, so that the Federal government will have power to legislate with respect to the superannuation of separated de facto couples in Western Australia, but not with respect to property generally. It is not certain as at 1 May 2019 when this legislative change will be implemented.

From 23 November 2018, the whole of Pt VIIIB FLA was re-numbered to make the numbering of s 90 (which covers a number of different Parts) truly consecutively alphanumeric. Care should be exercised in reading cases and commentary written prior to that date, as the section references will be incorrect. A table listing the former provisions and the current provisions is provided:

		Renumbering	
Item	**Column 1 Provision**	**Column 2 Renumber as**	**Column 3 Explanation of section**
		Division 1 — Preliminary	
1	s 90MA	s 90XA	Objects of this part
2	s 90MB	s 90XB	This Part overrides other laws, trust deeds, etc
3	s 90MC	s 90XC	Extended meaning of matrimonial cause and de facto financial cause
4	s 90MD	s 90XD	Definitions
5	s 90MDA	s 90XDA	Extended

			meaning of *trustee*
6	s 90ME	s 90XE	Splittable payments
7	s 90MF	s 90XF	Reversionary interest
8	s 90MG	s 90XG	Meaning of *in force*
	Division 2 — Payment splitting or flagging by agreement		
9	s 90MH	s 90XH	Superannuation agreement to be included in financial agreement if about a marriage
10	s 90MHA	s 90XHA	Superannuation agreement to be included in Pt VIIIAB financial agreement if about a de facto relationship
11	s 90MI	s 90XI	Operative time for payment split
12	s 90MJ	s 90XJ	Payment splits (including types of payment splits) under

			superannuation agreement or flag lifting agreement
13	s 90MK	s 90XK	Operative time for payment flag
14	s 90ML	s 90XL	Payment flag
15	s 90MLA	s 90XLA	Some splittable payments payable if payment flag operating
16	s 90MM	s 90XM	Payment flag may be terminated by court
17	s 90MN	s 90XN	Flag lifting agreement
18	s 90MO	s 90XO	Limitations on making a s 79 or s 90SM order with respect to a superannuation interest
19	s 90MP	s 90XP	Separation declaration
20	s 90MQ	s 90XQ	Superannuation interests in excess of low-rate cap amount

21	s 90MR	s 90XR	Enforcement by court order of payment split or payment flag in agreement

Division 3 — Payment splitting or flagging by court order

22	s 90MS	s 90XS	Section 79 or s 90SM order may include order in relation to superannuation interests
23	s 90MT	s 90XT	Splitting order including types of splitting order and requirement to make a determination before making a splitting order
24	s 90MU	s 90XU	Flagging order

25	s 90MUA	s 90XUA	Some splittable payments may be made without leave of the court
	Division 4 — General provisions about payment splits		
26	s 90MV	s 90XV	Court may cancel a payment split in certain circumstances
27	s 90MW	s 90XW	Deductions from splittable payment before calculating payment split
28	s 90MX	s 90XX	Multiple payment splits applying to the same splittable payment
29	s 90MY	s 90XY	Fees payable to trustee
30	s 90MZ	s 90XZ	Superannuation preservation requirements
31	s 90MZA	s 90XZA	Waiver of rights under payment split
32	s 90MZB	s 90XZB	Trustee to provide information to

			eligible person
33	s 90MZC	s 90XZC	Death of non-member spouse
		Division 5 — Miscellaneous	
34	s 90MZD	s 90XZD	Orders binding on trustee
35	s 90MZE	s 90XZE	Protection for trustee
36	s 90MZF	s 90XZF	Service of documents on trustee
37	s 90MZG	s 90XZG	False declarations
38	s 90MZH	s 90XZH	Employment cannot be terminated because of payment flag or superannuation split

¶19-010 Glossary

Some of the important terms and definitions are set out in the Glossary below. Further definitions are in s 90XD (formerly s 90MD) of the *Family Law Act 1975* (Cth) and reg 3 of the Family Law (Superannuation) Regulations 2001 (FLS Regulations).

Glossary

accumulation interest is a superannuation interest, or a component of a superannuation interest, that is not a *defined benefit interest* or a *small superannuation account interest*. The member's statement will

provide the value of the interest for family law purposes.

base amount is an important concept for creating a new interest. It is not, though, defined in the legislation. A set sum is allocated to the non-member.

defined benefit interest is a superannuation interest, or a component of a superannuation interest, in an eligible superannuation plan in which the benefits are defined by reference to one or more of:

(a)

(i) the member's salary at the date of the termination of the member's employment, the date of the member's retirement, or another date, or

(ii) the member's salary averaged over a period

(b) the amount of salary, or allowance in the nature of salary, payable to another person (eg a judicial officer, a member of the Commonwealth or a state parliament, a member of the Legislative Assembly of a territory)

(c) a specified amount, and

(d) specified conversion factors (FLS Regulations, reg 5(1A)).

The member's statement may not reflect the value of the interest for family law purposes.

eligible superannuation plan is any of:

- a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act)
- an approved deposit fund within the meaning of the SIS Act
- a retirement savings account (RSA), or
- an account within the meaning of the *Small Superannuation Accounts Act 1995* (Cth).

growth phase for interests in regulated superannuation funds, approved deposit funds and retirement savings accounts occurs if:

- a condition of release has not been satisfied, or
- a condition of release has been satisfied but no benefit has been paid in relation to that interest, and no action has been taken by the member spouse under the governing rules of the fund to cash in the benefit.

operative time determines when a trustee must recognise the non-member's interest. The operative time is defined in s 90XI (formerly s 90MI) in relation to a payment split under a superannuation agreement or flag lifting agreement, in s 90XK (formerly s 90MK) in relation to a payment flag under a superannuation agreement or is the time specified in the order in relation to a payment split under a court order.

relevant date is the date used in the FLS Regulations at which the value of a superannuation interest that is subject to a payment split (prior to creating a new interest for the non-member) is determined.

payment phase is defined in reg 8 of the FLS Regulations as an interest which is not in the *growth phase*.

payment split refers to the court's power to split superannuation. It can only split the payment of an interest in the payment phase. The court cannot split an interest in the fund although this will often occur due to the operation of the Superannuation Industry (Supervision) Regulations 1994, the FLS Regulations, and the governing rules of the fund. A payment split is defined as either:

- the application of s 90XJ (formerly s 90MJ) in relation to a splittable payment, or
- the application of a splitting order in relation to a splittable payment.

percentage-only interest is a prescribed superannuation interest under reg 9A FLS Regulations. Most judges' pension and parliamentary schemes are prescribed.

preserved benefits are superannuation entitlements to which the member cannot gain access until they meet a condition of release. Conditions of release are listed in ¶19-280.

superannuation interest means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest. A "member spouse", in relation to a superannuation interest, means the spouse who has the superannuation interest, and a "non-member" spouse, in relation to a superannuation interest, means the spouse who is not the member spouse in relation to that interest.

splittable payment is defined in s 90XE (formerly s 90ME) as a payment in respect of a superannuation interest of a member (see ¶19-100).

unflaggable interest is a superannuation interest of a member that is in the payment phase (FLS Regulations, reg 10A: ¶19-110).

unsplittable interest means a superannuation interest of a member with a withdrawal value under $5,000 (FLS Regulations, reg 11: ¶19-110).

¶19-020 What is a superannuation fund?

A "superannuation fund" means a fund that is an indefinitely continuing fund and is a provident, benefit, superannuation or retirement fund, or a public sector superannuation scheme (s 6(1), *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act)).

Private sector superannuation funds are created as trusts for the purpose of providing retirement and other benefits to their beneficiaries (called members). Each fund is administered in accordance with a trust deed, and the trustees are subject to the general law regarding trustees' obligations and liabilities to beneficiaries. Public sector funds are usually created by statute.

A private sector fund which elects to be "regulated" under the SIS Act, and which has not been the subject of a substantial breach of that Act, is regarded as a "complying superannuation fund" for the purposes of

the *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth). This entitles the fund to receive various forms of concessional tax treatment, for example, in respect of earnings of fund assets.

In *Hayton & Bendle* [2010] FamCA 592, the court had to consider whether the husband's NSW judicial pension was "an eligible superannuation plan" within the meaning of s 90MD (now s 90XD). The court held that the Pension Act was a scheme for the payment of "retirement or death benefits" and therefore was a public sector superannuation scheme. This meant it was a superannuation fund within the meaning of the SIS Act and an "eligible superannuation plan" within s 90MD (now s 90XD).

An eligible superannuation plan is defined in s 90XD (formerly s 90MD) *Family Law Act 1975* (Cth) (FLA) as any of:

- a superannuation fund within the meaning of the SIS Act
- an approved deposit fund within the meaning of the SIS Act
- a retirement savings account (RSA), or
- an account within the meaning of the *Small Superannuation Accounts Act 1995* (Cth).

The fund must be an Australian fund to be covered by the superannuation splitting scheme under the FLA.

An example of an overseas fund arose in *Forster & Forster* [2015] FamCA 57. The husband's pension was found not to be property but was a valuable financial resource to him.

¶19-030 Types of superannuation funds

There are various types of superannuation funds. They include:

- *corporate funds* — established by employers, or a group of employers

- *industry funds* — receive contributions from a number of different employers in a particular industry, and often involved with unions or groups of unions

- *public sector funds* — established under federal, state or territory legislation for government employees

- *public offer funds* — administered under a single trust deed, and which receive contributions from employers and members

- *self-managed superannuation funds* (SMSFs) — these funds must have fewer than five members and are regulated by the Australian Taxation Office. Each member must be a trustee or a director of the trustee company

- *eligible roll-over funds* — used to collect entitlements of members no longer eligible to remain in a fund (eg if they leave an employer-sponsored fund), and

- *retirement savings accounts* (RSAs) — a type of superannuation account introduced by the *Retirement Savings Accounts Act 1997* (Cth). These accounts are generally available from banks and life insurance companies, and are intended to be used by employees who have very small superannuation contributions or work only occasionally. RSAs generally provide low returns as the investment return is guaranteed.

¶19-040 Categories of superannuation funds

There are different categories of funds:

- *Accumulation funds* are the most common. They provide benefits to members based on contributions and earnings, less fees.

- *Defined benefit funds* provide benefits to their members according to a formula set out in the trust deed. This formula usually takes into account the member's length of service and final average salary.

- *Hybrid funds* are a combination of a defined benefit fund with an accumulation component.

¶19-050 When are benefits payable?

The *Superannuation Industry (Supervision) Act 1993* (Cth) provides that a member's interest consists of preserved, restricted non-preserved or unrestricted non-preserved components.

Benefits which are preserved and restricted non-preserved become unrestricted non-preserved where a member satisfies a "condition of release". The conditions of release include:

- permanent retirement after reaching "preservation age" (which is from age 55 to 60 depending on the member's date of birth)
- reaching preservation age and beginning a transition to retirement income stream
- reaching the age of 65 even if still employed
- suffering total and permanent disability
- death
- ceasing employment with an employer on or after reaching age 60 (although the member may continue to work in another employment arrangement)
- ceasing employment with an employer before age 60, but the member has since reached 60 and the trustee is reasonably satisfied that the member will not return to work, and
- if the preserved benefits in an employer-sponsored fund are under $200 and the employment ends.

Early release of benefits is possible on certain grounds including:

- severe financial hardship

- compassionate grounds
- temporary incapacity, and
- accessing benefits by way of a non-commutable transition to a retirement income stream on or after age 55 (even if still working).

When a member satisfies a condition of release, the benefits are payable to the member as a lump sum or an annuity or pension or both (a cashing restriction as specified in Sch 1 may apply, based on the condition of release that is met). Also, depending on the trust deed of the fund, the member may be able to elect how the benefits are paid.

¶19-060 Orders and agreements made before the start up time

Part VIIIB of the *Family Law Act 1975* (Cth) (FLA) does not apply to orders or financial agreements between married couples made before 28 December 2002. It applies to orders made between de facto couples who are caught by Pt VIIIAB after 1 March 2009 (in South Australia from 1 July 2010 and in Western Australia not at all).[2]

If the property settlement order was made by a Registrar, some judges have been prepared to allow an extension of time to review the decision, set aside the original property order, and make a fresh property settlement order including a superannuation splitting order.[3]

Keegan & Webber [2016] FCCA 2685 was a somewhat surprising decision and inconsistent with most of the earlier authorities. Orders made in 1999 were set aside insofar as they dealt with superannuation. Justice Young found that the orders were "impracticable" within s 79A(1)(b) FLA.

Footnotes

2 See *Family Law Legislation Amendment (Superannuation) Act 2001*, s 5.

3 See *RBH & JIH* [2005] FamCA 226; *S & S* [2007] FamCA 973 and *Greetham & Greetham* [2010] FamCA 246. For a contrary authority, see *Lehear & Lehear* [2009] FamCA 645.

¶19-070 Dealings with superannuation interests

The superannuation interests of parties to a marriage or a de facto relationship can be dealt with directly by a court dealing with the adjustment of their non-superannuation property interests after separation. Alternatively, while dividing their property, parties can also split or flag a superannuation interest. A split can occur through either:

- an order of the Family Court or Federal Circuit Court — see ¶19-150, or
- a superannuation agreement — see ¶19-170.

A payment flag can be imposed on a superannuation interest by a superannuation agreement or a court order. A payment flag prevents the trustee of the superannuation fund from making any future payments. The flag can be lifted by a superannuation agreement or a court order. The parties can agree to “lift” the payment flag to enable a split to occur (s 90XN(1) (formerly s 90MN(1)), *Family Law Act 1975* (Cth) or the court can order that the agreement imposing the flag be set aside (s 90XN(4) (formerly s 90MN(4)).

Superannuation agreements and orders bind third-party trustees of superannuation funds if they have been afforded procedural fairness (see ¶19-260).

¶19-080 Definition of “property”

Under Pt VIIIB of the *Family Law Act 1975* (Cth) (FLA), superannuation interests can be divided on the breakdown of a

marriage or de facto relationship. Superannuation is treated as "property" for the purposes of para (ca) of the definition of "matrimonial cause" in s 4 and para (c) of the definition of "de facto financial cause" in s 4 of the FLA (s 90XC (formerly s 90MC), FLA).

Superannuation is usually considered to be a financial resource (*Crapp & Crapp* (1979) FLC ¶90-615 at p 78,181). Although it is generally treated as property for the purpose of Pt VIIIB, the introduction of the superannuation splitting regime did not change its nature. It can be dealt with as property, rather than a financial resource which is only "treated" as property for the purposes of Pt VIIIB and in some circumstances where a party has satisfied as a condition of release.[4]

The first major reported case on superannuation splitting was *Hickey & Hickey*.[5] The Full Court held:

> "… the effect of s 90MC [now s 90XC] is that in proceedings in relation to property under s 79 the superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made".[6]

The five member Full Court in *Coghlan & Coghlan*, which was the first major Full Court case on super-splitting[7] said, as to the interpretation of s 90MC (now s 90XC):

> "… superannuation interests are another species of asset which is different from property as defined in s 4(1), and in relation to which orders also can be made in proceedings under s 79".[8]

The majority considered that s 90MC (now s 90XC) did no more than confer jurisdiction on the courts to make orders in relation to superannuation. Section 90MC (now s 90XC) did not mean that superannuation was "treated" exactly the same as "property" as defined in s 4(1). The court did not explain precisely the consequences of superannuation being "another species of asset". This phrase has not been widely adopted since.

The majority found support for its views in s 90MS(1) (now s 90XS(1)), the Explanatory Memorandum to the *Family Law Legislation*

Amendment (Superannuation) Act 2001 which introduced Pt VIIIB, and Coleman J's decision in a 2003 case, *Cahill & Cahill*.[9]

The majority said that the practical implication of its analysis was that superannuation could be included in a list of property under "the first step" in the four-step s 79 process, used prior to *Stanford and Stanford* (2012) FLC ¶93-518, whether or not a splitting order is sought. Under the post-*Stanford* process, the court must identify the legal and equitable interests of the parties in property. Superannuation interests are identified as part of this process but it is unclear whether it is a legal or equitable interest.

The Full Court majority in *Coghlan* said that the superannuation can be included in one pool with non-superannuation:

- by agreement
- if the court is satisfied that the interest is property within the definition in s 4(1) FLA
- if the interest is not within that definition, but of relatively small value in terms of the other assets, or
- there are features about the interest which lead the court to conclude that this is an appropriate approach.

However, the Full Court majority said in *Coghlan* that the preferred approach was to deal with superannuation separately from property as defined in s 4(1). This approach means that the direct and indirect contributions by either party to superannuation are more likely to be given proper recognition, and "the real nature" of the superannuation interests can be taken into account. It was relevant to "the real nature" of a superannuation interest, that an interest "may be no more than a present or future periodic sum, or perhaps a future lump sum, the value of which at date of receipt is unknown".[10]

The majority concluded there was insufficient evidence before it to enable it to re-exercise its discretion, and remitted the case for a rehearing in accordance with the principles it had enunciated.

Justice Warnick, in the minority, disagreed with the majority's interpretation of s 90MC (now s 90XC) and did not accept that in the circumstances the Full Court could depart from *Hickey*.

Justice O'Ryan agreed with Warnick J's views about the treatment of superannuation and s 90MC (now s 90XC). He also agreed that the Full Court was bound by *Hickey*.

Footnotes

4 *Wunderwald & Wunderwald* (1992) FLC ¶92-315; *Todd & Todd* [2014] FamCA 101.

5 *Hickey & Hickey* (2003) FLC ¶93-143.

6 Ibid, at pp 78,392–78,393.

7 *Coghlan & Coghlan* (2005) FLC ¶93-220.

8 Ibid, at p 79,642.

9 *Cahill & Cahill* (2006) FLC ¶93-253.

10 Ibid, at p 80,302.

¶19-085 How should superannuation be split?

Superannuation and non-superannuation do not need to be divided in the same percentages (eg *Englebrecht & Moss* [2015] FCWA 10).

Whether superannuation will be split and in what proportions will depend upon the circumstances of the case. Possible relevant factors were set out in *Levick & Levick*,[11] *BAR & JMR*[12] and *Coghlan*. These include:

- whether there are children
- if splitting the superannuation means the primary carer can keep the home
- the needs of the parties for cash and saleable assets
- the value of all the property and the proportion of the property pool which is superannuation
- the type of fund
- the ages of the parties
- the length of time before the parties reach a condition of release, and
- tax implications such as whether a party is close to the eligible termination payment (now employment termination payment) components. For example, some pre-1983 tax benefits may be lost if the fund is split.

The Full Court confirmed in *Doherty & Doherty*[13] that the mix of superannuation and non-superannuation was discretionary.

Examples

***B & B* [2005] FamCA 624**

Faulks DCJ considered whether the wife contributed to the husband's superannuation. It was still in the accumulation phase and potentially would be for another 12 years. The husband contributed to his superannuation for four years before the relationship commenced. The wife argued that she contributed indirectly to it for 17 years. She argued that funds were not available to the family during cohabitation because those funds were paid into the husband's superannuation. Faulks DCJ rejected the wife's argument because the husband had no choice about the funds being paid into his superannuation. The argument had more force if voluntary contributions were made.

He concluded that, on a contributions basis, it would be reasonable to say that the wife had contributed about 45% and the husband 55% of the superannuation. The difference took account of the earlier contributions by the husband.

Faulks DCJ considered that he was required to examine the superannuation under s 75(2)(f) after contributions had been assessed. He assessed the s 75(2) factors as

reducing the wife's entitlements to the husband's superannuation to 20%.

The wife had superannuation in the payment phase. As the wife's entitlements accrued prior to cohabitation, the husband had made no contributions to it. The husband's income stream was valued at about $333,400. The wife argued that if it was included in the assets, then he should treat the wife as having no income. Faulks DCJ considered there was some force in that submission.

Faulks DCJ assessed the contributions of the parties to the non-superannuation as 52% by the wife and 48% by the husband. Due to s 75(2) factors (including that the wife's superannuation was not otherwise taken into account), the parties' entitlements were adjusted so that the wife's entitlements were 57% and the husband's were 43%. As neither party sought a splitting order, the wife received a non-superannuation adjustment of $52,000 on account of the husband's superannuation.

Following *Coghlan*, Faulks DCJ held it was particularly appropriate, in the circumstances of the case, to deal with superannuation separately from other property.

***Mayne & Mayne (No 2)* (2012) FLC ¶93-510**

The wife proposed that from a total pool of about $1.2m, excluding an add-back and the agreed values of superannuation, she receive 78%, thus requiring the husband to split about $114,000 of his $376,000 superannuation entitlements. Alternatively, she included the add-back and superannuation in the pool and sought 81%, thus requiring a split of the husband's superannuation to her of about $116,500. Both options left the husband with only a small amount in shares, an aged vehicle and superannuation he could not access for at least seven years.

The husband argued for a two-pool approach and sought 35% of the non-superannuation assets including the add-back and 60% of the superannuation assets.

May and Strickland JJ, in separate judgments (and Faulks J agreed on this point), said that in circumstances where the superannuation interests constitute a significant portion of the parties' property, it may be appropriate to adopt a two-pool approach and that was appropriate in this case. There was an absence of evidence as to the nature of post-separation growth in the superannuation but that was a contribution argument. Valuing the superannuation at a date other than the current value would be a departure from the general principle that the court should consider the values of the assets "at trial".

After a 23-year marriage, the non-superannuation was divided 70/30 in favour of the wife and the superannuation 35/65 in favour of the husband. The wife was required to make a cash payment to the husband of about $227,000 and the husband had to make a superannuation split to the wife of about $105,000.

***Paul & Paul* (2012) FLC ¶93-505**

The husband was aged 54. The wife was aged 53. The parties had a relationship of 22 years. The total asset pool was $1,866,999, of which $595,200 represented superannuation interests. Moroni FM (as he then was) divided the parties' assets (including their superannuation entitlements) as to 53% to the wife and 47% to the husband. The wife received $68,088 of the husband's superannuation, leaving the husband with $458,931.

Each party sought to retain more non-superannuation than superannuation and the trial judge considered this in terms of the ability of each party to rehouse themselves. The

husband was able to rehouse himself adequately under the proposed orders. The husband received $418,559 in non-superannuation whereas the wife received $921,421.

Contributions were assessed as equal. The wife received a 3% loading on the total pool (ie both superannuation and non-superannuation) but the Federal Magistrate said that the adjustment would have been higher if the form of division had been different.

The husband's grounds of appeal relating to superannuation were that the trial judge:

- Failed to separate the superannuation assets from the other property when identifying the assets available for division.
- Failed to adequately consider the unfairness to the husband and the bulk of his property entitlements in superannuation entitlements.
- Failed or refused to assess the husband's post-separation contributions to his superannuation fund. While the trial judge was not mandated to follow the *Coghlan* approach, it was incumbent upon him to give reasons for not following the preferred approach.

The Full Court held that there was no appellable error. As to whether the trial judge ought to have dealt with the superannuation and non-superannuation in separate pools it said (at [47]–[48]):

> "The applicable legislation itself does not mandate a particular approach. The Full Court provides a suggested approach to be followed in cases involving superannuation interests. It is simply a suggested approach, although one which, in our view, has merit.
>
> Acknowledging that the approach has merit does not exclude other ways of dealing with the issue, especially when a case is presented and argued in such a way that another approach may be more appropriate".

Each party presented their evidence on contributions to particular assets in a holistic way. The trial judge acknowledged that the approach in *Coghlan* need not be followed. The trial judge did not separate the superannuation interests from the other assets nor specifically address post-separation contributions to superannuation in his judgment, yet it was held by the Full Court that he did not fall into appellable error. The trial judge made it clear he was aware that superannuation was different to non-superannuation property but as it was a long marriage, he dealt with them together.

***Prantage & Prantage* (2013) FLC ¶93-544**

The wife was aged 40 and the husband was aged 44. They separated after an 11-year marriage. There were two children. The wife worked part-time as a teacher and the husband was employed by a multi-national corporation.

The trial judge determined that the property available for division (excluding superannuation) totalled $3.1m and their superannuation interests were about $240,000. The husband's superannuation at the start of the marriage was much greater than that of the wife. However, the wife's contributions during the marriage far outweighed the husband's initial contribution.

The trial judge adopted a global approach and concluded that the parties' contributions were 65/35 in favour of the wife. However, contributions to superannuation favoured the

husband as to 55% (no arguments were made by the parties regarding post-superannuation contributions to superannuation). The trial judge made a 5% adjustment in the husband's favour on account of s 75(2) factors. The wife had her half of the family trust (with her sister), an investment capacity and a limited capacity for work. The husband had security of tenure of work and the care of the two children.

The trial judge did not consider that a superannuation splitting order met the current needs of both parties. The best way to achieve a just and equitable result was a cash adjustment of $60,000 in favour of the wife.

The wife's entitlement to 60% of the non-superannuation assets required the wife to pay $182,700 to the husband. The $60,000 cash adjustment, and the wife's contribution to various litigation costs which he fixed at $18,000, were offset against that amount. The wife was ultimately required to pay the husband $140,000.

The husband appealed. The wife cross-appealed. The wife conceded one of the grounds of appeal of the husband being the overstatement of a liability by $100,000. The wife's cross-appeal raised four grounds relating to superannuation:

- The trial judge erred in his discretion when attributing 55% to the husband by way of contribution to the superannuation assets.
- The weight placed by the trial judge on the $27,000 contributed by the husband over and above that of the wife to superannuation was disproportionate to and inconsistent with the weight placed by him on the wife's contribution of $2,023,000 over and above the husband to other assets.
- The trial judge placed undue weight on the initial superior contribution to superannuation made by the husband of $27,000 more than the wife.
- The trial judge failed to provide any or any proper reason for his calculation of the wife's reduced superannuation adjustment and/or payment in lieu.

In relation to the first three of these grounds, the Full Court said:

- The wife was attempting to establish that the trial judge's approach to the assessment of contributions to superannuation was inconsistent with his approach to the assessment of contributions to non-superannuation. These submissions did not have any credence as they looked at the effect of the trial judge's assessments rather than what he did.
- The parties had reached an agreement that the superannuation should be shared equally. The trial judge erred in departing from that agreement without giving any adequate reason for doing so.

The fourth ground related to the trial judge providing a cash adjustment to the wife of $60,000 in lieu of her entitlement to $82,217 of the superannuation. The Full Court noted that the trial judge explained why he was making the cash adjustment, but failed to explain how he arrived at the figure of $60,000. This ground was successful, as were a number of grounds not relating to superannuation. The matter was remitted for rehearing.

***Chapman & Chapman* (2014) FLC ¶93-592**

The asset pool after a 20-year marriage was $3.67m of which the superannuation was

about $2.1m. Of the superannuation, the husband's interest in a self-managed superannuation fund, of which he was the only beneficiary, was about $1.99m. He was entitled to a tax-free weekly pension which was, at the time of trial, about $3,000 per week. The wife had superannuation of about $100,000.

In addition to the $3.67m to be divided between the parties, each of the parties had earlier received a payment from the net proceeds of sale of the former matrimonial home of $1m each.

The trial judge declined to make an order spitting the husband's superannuation and divided the available cash as to 86% to the wife (about $1.4m) and 14% (about $230,000) to the husband.

Strickland & Murphy JJ said (and Bryant CJ agreed with them) that the husband's tax-free pension emanating from a superannuation fund, derived in the parties' 20-year marriage, was "an extremely important factor". This was particularly the case when the wife was in her 50s and had a limited capacity for remunerative employment and would need to predominantly meet her future needs from income derived from property she received in the property settlement. Strickland and Murphy JJ said that at least one of the three judges may have given this factor more weight than the trial judge. They considered the case to be "close to the point at which an appellate court would interfere with a trial judge's discretion but could not say that the trial judge's decision was ultimately wrong".

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

Cohabitation commenced in 1982. The parties married in 1983, separated under the one roof in September 2006 and physically separated in October 2007. They were aged in their mid 50s at the time of trial and had three adult children.

The wife received inheritances of almost $300,000 very late in the marriage. She lived in a property valued at $450,000, purchased entirely by funds advanced by an aunt, who she was required to repay after the proceedings were completed. The parties' property otherwise totalled about $1.134m.

The husband had superannuation of $34,507 and the wife had superannuation of $96,650. The superannuation entitlements accrued by the wife were largely as a result of a clearing sale of plant and equipment in 2007. The net proceeds of sale were $121,500, and of this, $96,500 went to the wife and $25,000 went to the husband. The wife placed approximately $66,000 into her superannuation fund for CGT reasons. That contribution was about 2/3 of the current value of the wife's superannuation.

The trial judge observed that it was "just and equitable" to deal with the superannuation interests separately. However, he only referred to the superannuation interests when determining that an adjustment should be made in favour of the husband on account of s 75(2), and not to otherwise take them into account. He allowed each party to retain their own superannuation interests.

The trial judge regarded the parties' respective contributions to the non-superannuation assets as equal. He made an adjustment of 5% in the husband's favour under s 75(2) on account of the wife's inheritance and her greater superannuation entitlement.

The husband's appeal was upheld in relation to the trial judge's treatment of the parties' superannuation. The husband argued that the trial judge erred in failing to give adequate reasons for any contribution findings or adjustments in relation to the superannuation and his discretion miscarried by failing to make any contribution findings

regarding the superannuation pool and to consider the superannuation pool as part of the s 79(2) exercise.

The Full Court held that the "separate pool" approach used by the trial judge was permissible under the Full Court decision in *Coghlan*. The Full Court said (at [47]–[48]):

> "*However, it was also held in Coghlan (at [65]) that where the 'separate pool' approach is adopted, and even if a superannuation splitting order is not sought, it will be extremely prudent (in the interests of achieving just and equitable orders) to consider the contributions which have been made under ss 79(4)(a), (b) and (c) by both parties to both their superannuation interests and then to consider whether an adjustment (or further adjustment) to the interests is required on account of the other factors in s 79(4) (notably the s 75(2) matters).*
>
> *In the present case his Honour did not, in his reasons, give any consideration to the parties' contributions to their respective superannuation interests*…".

The Full Court did not refer to the proviso placed by the Full Court in *Coghlan* on dealing with superannuation as a separate pool where it said (at [61]) that there was nothing to prevent a court from including a superannuation interest with the other property if, for example, the interest "is of relatively small value in the context of the value of the other assets in the case". This proviso seems relevant to *Bishop* where the non-superannuation pool was about $1.135m, plus a sum of about $200,000 which was the wife's inheritance and not included in the pool. It was received by her shortly prior to separation and not mingled with joint assets. The separate superannuation pool consisted only of the husband's superannuation of $34,507 and the wife's superannuation of $96,650.

The case was remitted for re-hearing.

***Bellinger & Bellinger* [2015] FamCA 64**

The Family Court took into account that the wife's superannuation scheme was more generous than that of the husband. An adjustment in favour of the husband of 5% of the overall outcome was made on that ground.

***Bulow & Bulow* (2019) FLC ¶93-885**

The Full Court of the Family Court found that the trial judge had not considered the nature, form and characteristics of the husband's superannuation interest, which was a defined benefit interest, when making a splitting order in favour of the wife whose superannuation was an accumulation fund.

The experts relied upon by the parties gave evidence as to the value of the husband's superannuation, but the Full Court said (at [28]):

> "Neither expert provided an opinion on the nature, form and characteristics of the husband's superannuation interest nor how any splitting order sought by the wife (or any other splitting order) might impact upon that interest.".

The husband had unsuccessfully sought to obtain that evidence.

The trial judge did not refer to these issues or make any findings in relation to them. The Full Court found that the fact that there was no evidence before the trial judge did not mean that the trial judge was able to proceed as he did, as (at [32] and [34]):

> "The fact that particular considerations apply to defined benefit interests is, or should be, notorious as is the fact that the effects of splitting orders on those

interests are fund-specific. While the PSS fund Rules were not otherwise referenced or expanded upon, nor the subject of expert evidence, a link to those Rules was contained in a Family Law Information document attached to an annexure in the husband's affidavit. As has already been said, the Rules are contained in the PSS Deed which is a statutory instrument and publicly available…".

The trial judge was required to arrive at a judicial determination that a proposed splitting order was just and equitable, and therefore, he was under an obligation to seek evidence in respect of matters plainly in issue and relevant, but where evidence was lacking.

Footnotes

11 *Levick & Levick* (2006) FLC ¶93-254.

12 *BAR & JMR* (2005) FLC ¶93-231.

13 *Doherty & Doherty* (2006) FLC ¶93-256.

¶19-090 Eligible superannuation plan

An "eligible superannuation plan" is defined in s 90XD (formerly s 90MD) of the *Family Law Act 1975* (Cth) (FLA) as any of the following:

- a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) (¶19-020)
- an approved deposit fund, within the meaning of the SIS Act
- a retirement savings account (RSA), and
- an account within the meaning of the *Small Superannuation Accounts Act 1995* (Cth).

Part VIIIB of the FLA covers both regulated and unregulated superannuation funds. The Family Law (Superannuation) Regulations 2001 (Cth) relate to all superannuation interests. The Superannuation

Industry (Superannuation) Regulations 1994 (Cth) deal only with regulated superannuation funds.

¶19-100 Splittable payments

Section 90XE(1) (formerly s 90ME(1)) of the *Family Law Act 1975* (Cth) defines "splittable payments". Only a splittable payment can be effected by a superannuation agreement or a flag lifting agreement. These are:

- a payment to the spouse (s 90XE(1)(a) — formerly s 90ME(1)(a))
- a payment to another person for the benefit of the spouse (s 90XE(1)(b) — formerly s 90ME(1)(b)). This will cover the situation where the member "rolls over" their superannuation interest into a new eligible superannuation plan
- a payment to the legal personal representative of the spouse, after the death of the spouse (s 90XE(1)(c) — formerly s 90ME(1)(c))
- a payment to a reversionary beneficiary, after the death of the spouse (s 90XE(1)(d) — formerly s 90ME(1)(d)), and
- a payment to the legal personal representative of a reversionary beneficiary covered in (d), after the death of the reversionary beneficiary (s 90XE(1)(e) — formerly s 90ME(1)(e)).

Some superannuation interests are not able to be flagged or split, pursuant to either an agreement or a court order (see ¶19-110).

Some courts have taken the view that if a superannuation split is not sought by the parties, a superannuation split cannot be ordered (see *Guthrie & Rushton* [2009] FamCA 1144). If parties are not prepared for a superannuation split, when final orders are being made, an adjournment may be required so that procedural fairness can be given to the fund.

¶19-110 Unflaggable, unsplittable and not splittable

The terms “unflaggable interest”, “unsplittable interest” and “not splittable payments” are defined in the Family Law (Superannuation) Regulations 2001 (Cth) (FLS Regulations).

Regulation 10A defines an “unflaggable interest” as a superannuation interest of a member that is in the “payment phase”. Regulation 11 defines an “unsplittable interest” as a superannuation interest of the member with a withdrawal benefit of less than $5,000.

Regulation 12 specifies that certain payments to the member are “not splittable payments”. These are generally payments that are made to the member as a result of that member satisfying the “compassionate grounds” under reg 6.19A(1) of the Superannuation Industry (Supervision) Regulations 1994 (Cth) (SIS Regulations). These grounds apply to a member who is in severe financial hardship as defined in reg 6.01(5) of the SIS Regulations or the payment is a result of the member’s ill-health. Note, however, that certain timing conditions are imposed in relation to benefit payments resulting from the member’s ill-health (reg 12(1)(c), FLS Regulations).

Regulation 13 of the FLS Regulations also states that certain payments made after the death of the member are “not splittable payments”. These include payments made to a reversionary beneficiary who is a child of the member who is yet to reach age 18, or a dependent child over 18 if the payment is required to enable the child to complete his/her education or to provide for special needs arising from a physical or intellectual disability.

The concept of a “reversionary beneficiary” is defined in the *Family Law Act 1975* (Cth) as a “person who becomes entitled to a benefit in respect of a superannuation interest of a spouse, after the spouse dies” (s 90XD — formerly s 90MD).

Regulation 14 of the FLS Regulations provides that a payment is not a “splittable payment” if it has been subject to a superannuation agreement, flag lifting agreement or splitting order, for the purposes of applying Pt VIIIB of the FLA and the requirements of Div 2.2 of the FLS Regulations have been satisfied in respect of that interest.

GETTING STARTED — REQUESTS FOR INFORMATION

¶19-120 Requests for information

To obtain information from the trustee, a declaration and Superannuation Information Form (in Sch 1 to the Family Law (Superannuation) Regulations 2001 (Cth)) must be sent to the trustee by an "eligible person". Section 90XZB (formerly s 90MZB) of the *Family Law Act 1975* (Cth) (FLA) defines an "eligible person", and this definition is used in the declaration, which must be completed and accompany the Superannuation Information Form.[14]

The declaration must state that the applicant requires the information for one or more of the following purposes:

- to assist the applicant to properly negotiate a superannuation agreement, and
- to assist the applicant with the operation of Pt VIIIB of the FLA.

Most working Australians hold (on average) more than one superannuation fund, and enquiries should be conducted to ensure that all potential superannuation interests are considered. A starting point might be to contact previous employers. A member may also be able to locate "lost" superannuation through the Australian Taxation Office website (www.ato.gov.au).

The trustee of the relevant fund is entitled to charge a "reasonable fee" for providing the information (see ¶19-240).

The trustee must not give an applicant who is a non-member the address of the member, or even inform a member that an application has been received (s 90XZB(5) — formerly s 90MZB(5)) and must not advise the member if a non-member has requested information (s 90XZB(6) — formerly s 90MZB(6)).

Footnotes

14 The “Superannuation Information Kit”, comprising the declaration and the Superannuation Information Form, is contained in Wolters Kluwer’s *Australian Family Law Court Handbook*.

¶19-130 What information is available from the trustee?

Under the Family Law (Superannuation) Regulations 2001 (Cth) (FLS Regulations), if a valid request is made for information in accordance with a declaration and Superannuation Information Form (in Sch 1 to the FLS Regulations), the trustee must provide certain information, which varies according to the type of fund involved (ie accumulation, defined benefit or partially vested accumulation funds).

The trustee must give a statement outlining:

- the value of the superannuation “account” or interest as at certain specified dates (except for self-managed superannuation fund benefits still in the growth phase)
- any withdrawals made between those dates
- details of any payment flags or previous splits over the relevant account
- any fees that it will charge for payment splits and flags
- the member’s eligible service period and date of commencing membership in the fund
- preservation and components of the interest
- vesting terms and scales, and
- details regarding reversionary beneficiary entitlements if the benefit is in the pension phase.

VALUATION

¶19-140 Valuing a superannuation interest

Section 90XT(2) (formerly s 90MT(2)) of the *Family Law Act 1975* (Cth) requires the court to value a superannuation interest which is being split. The valuation must be in accordance with the Family Law (Superannuation) Regulations 2001 (Cth) (FLS Regulations). An interest not being split can be valued another way (eg in relation to a defined benefit interest, by relying on a recent member's statement or an agreed figure). The valuation provisions do not apply to self-managed superannuation funds (FLS Regulations, reg 22(2)(b)). The contents of the fund must be valued (eg shares, real property). The majority of superannuation interests are in the growth phase and are accumulation interests. Valuations will, therefore, usually be straightforward. A recent member's statement and/or a completed Superannuation Information Form will be sufficient.

For other funds, the first step is to have the fund complete a Superannuation Information Form. Depending on the fund, this may give a valuation. If it does not, an expert in superannuation splitting will need to be engaged.

The methods of valuing superannuation interests are in the FLS Regulations and the schedules to the Regulations.

The Attorney-General is also able to approve special methods or factors for determining the gross value of particular superannuation interests (reg 38). Funds with approved special methods are:

- Commonwealth Governors-General Pension Scheme
- Commonwealth Judges' Pension Act Scheme
- Commonwealth Parliamentary Contributory Superannuation Scheme
- Commonwealth Public Sector Superannuation Scheme

- Commonwealth Superannuation Scheme
- Defence Force Productivity Benefit Scheme
- Defence Force Retirement and Death Benefits Scheme
- Ford Employees Superannuation Fund
- Ford Management Retirement Plan
- GlaxoSmithKline Superannuation Fund
- Hanson Australia Pty Limited as a participating employer in Sunsuper (previously shown as Pioneer International Limited Staff Superannuation Plan)
- Military Superannuation and Benefits Scheme
- New South Wales Energy Industries Superannuation Scheme
- New South Wales Local Government Superannuation Scheme
- New South Wales Parliamentary Contribution Scheme
- New South Wales Police Association Superannuation Scheme
- New South Wales Police Superannuation Scheme
- New South Wales State Authorities Non-contributory Superannuation Scheme
- New South Wales State Authorities Superannuation Scheme
- New South Wales State Superannuation Scheme
- *Queensland Governors (Salary and Pensions) Act 2003*
- *Queensland Judges (Pensions and Long Leave) Act 1957*

- Queensland Local Government Superannuation (known as LG Super)
- Queensland Parliamentary Contributory Superannuation Scheme
- Queensland Superannuation (State Public Sector) Scheme (known as QSuper)
- RACV Superannuation Fund
- South Australian Judges' Pensions Scheme
- South Australian Local Government Superannuation Scheme
- South Australian Metro Fire Service Super Fund
- South Australian Parliamentary Superannuation Scheme under the *Parliamentary Superannuation Act 1974* (SA)
- South Australian Police Superannuation Scheme
- South Australian Superannuation Scheme
- *Tasmanian Judges Contributory Pensions Act 1908*
- UniSuper (the Superannuation Scheme for Australian Universities)
- Victorian Judges (and other Officers) Pensions Scheme — Governor, Judges, Masters, Chief Magistrate, Solicitor-General, Director of Public Prosecutions and Chief Crown Prosecutor
- Victorian Parliamentary Contributory Superannuation Fund
- Victorian Racing Industry Superannuation Fund
- Victorian State Employees Retirement Benefits Scheme (new scheme and revised scheme)
- Victorian State Superannuation Fund

- Victorian Transport Superannuation Fund
- WA Government Employees Superannuation Fund
- WA Gold State Super Scheme
- Woodside Superannuation Fund
- Woolworths Group Superannuation Scheme

Example

***Robertson & Robertson* [2012] FamCAFC 60**

The wife failed to appear at the hearing and the trial judge made final property orders in her absence. The trial judge ordered that the wife receive the former matrimonial home and the husband retain superannuation in the payment phase which provided him with an annuity of approximately $23,600 annually. The valuation of the husband's superannuation interests was six years old. The trial judge's reasons for judgment were only eight paragraphs in length.

The wife's challenges to the orders were that the Federal Magistrate (as he then was):

- Did not have a proper valuation of the husband's superannuation available and he failed to make relevant findings of fact as to the asset pool and its value.
- Failed to make findings as to the parties' respective contributions.
- Could not find that the proposed orders were just and equitable under s 79(2).

In relation to ground 1, being the valuation of the husband's superannuation, the Full Court found that it was not in dispute that the valuation of the husband's superannuation interest was six years old. The Full Court agreed with the wife that the absence of evidence and findings as to the valuation of the husband's superannuation interest constituted an error.

Grounds 2 and 3 were also made out and the matter was remitted for rehearing.

ORDERS

¶19-150 Orders — powers of the court

Part VIIIB of the *Family Law Act 1975* (Cth) gives the court the power to deal with superannuation interests of spouses (s 90XS – formerly s 90MS). Superannuation agreements can also be used. Section 90XT

(formerly s 90MT) allows the court to make orders in relation to superannuation interests to the effect that, when the splittable interest becomes payable:

- for interests that are not percentage-only:
  - the non-member is paid an amount which has been calculated in accordance with the regulations, and
  - the non-member is paid a percentage of the splittable payment.
- for percentage-only interests:
  - the non-member is paid an amount calculated in accordance with the regulations by reference to the percentage specified in the order, and
  - the member's entitlement is reduced accordingly.

The court may order that up to 100% of the entitlement of a member be transferred to create the non-member's interest. The court can also make such orders as it thinks necessary for the enforcement of the splitting order. These orders bind third party trustees provided they have been given procedural fairness (see ¶19-260).

The court cannot make orders splitting superannuation funds, interests or entitlements. It can only make orders to split payments being made from a fund, interest or entitlement.[15]

The court is not obliged to make a splitting order in every case.[16] If the court does not make a splitting order when one has been sought, it must give reasons.[17]

A superannuation splitting order was made in favour of the deceased estate of the wife in *Medlow & Estate of the late Ms Medlow* [2015] FamCA 1182. This was consistent with the Full Court's finding in *Casey & Braione-Howard & DFRDB Authority* (2005) FLC ¶93-219. A superannuation splitting order can be made if the interest is or is to be treated as "the property of the parties to the marriage or either of them". In *Casey*, the Full Court found that it did not have the power to

make a superannuation splitting order in favour of the former wife of a surviving spouse's pension. The pension was the property of a third party, being the widow from the husband's remarriage, and not of the estate.

Footnotes

15 *Wrigley & Wrigley* (2004) FLC ¶93-182.

16 *Hickey & Hickey* (2003) FLC ¶93-143.

17 *Van Ballekom & Kelly* (2005) FLC ¶93-233 at p 79,874.

¶19-160 Drafting superannuation-splitting orders

There is some judicial guidance on the drafting of orders. In *Wilkinson & Wilkinson*,[18] the Full Court found that, as a general rule, orders made under s 79 of the *Family Law Act 1975* (Cth) should be drafted on an *in personam* basis, rather than an *in rem* basis, to ensure the order is effective and enforceable. However, in relation to a splitting order under s 90XT (formerly s 90MT) it is sufficient to include an express statement that the order binds the trustee of the fund.

The Full Court also said that an order should contain an "operative time", to provide the trustee with a reference point from which to commence the adjustments of the base amount for the purposes of reg 45D of the Family Law (Superannuation) Regulations 2001 (Cth). The court considered that, as a general rule, the operative time should be the date of valuation of the interest, because the interest may continue to grow between the date of valuation and the order.

In *Stevens & Stevens*,[19] three technical defects in the orders were corrected:

- a failure to identify the "type" of order made pursuant to s 90XT (formerly s 90MT), by reference to s 90XT(1) (formerly s 90MT(1))

under which the order was made

- the order provided that the interest of the husband in the superannuation scheme “shall be split”, whereas the power to make orders is confined to splitting payments, and

- the entire order was expressed to bind the trustee, including clauses which were of no concern to the trustee, and the trustee should only be bound by those clauses that relate to the trustee’s obligations.

Although the trustee of a superannuation fund is entitled to procedural fairness, this does not give the trustee the right to prescribe the wording of the super-splitting orders. Often, it is easier to draft the orders following the trustee’s preferred wording.

Footnotes

18 *Wilkinson & Wilkinson* (2005) FLC ¶93-222 at p 79,683.

19 *Stevens & Stevens* (2005) FLC ¶93-246.

AGREEMENTS

¶19-170 Superannuation agreements

Superannuation splits can be made and superannuation flags can be imposed or lifted by court order or by a superannuation agreement.

Part VIIIB of the *Family Law Act 1975* (Cth) (FLA) deals mainly with superannuation agreements. This might erroneously suggest that this is the most common way in which parties will deal with their superannuation interests. In practice:

- most splits are imposed by court order, and

- flagging orders and agreements are relatively rare.

A “superannuation agreement” is a financial agreement that deals with a superannuation interest. A superannuation interest can be flagged or split or a payment flag lifted. Part VIIIB uses the terms “superannuation agreement” and “flag lifting agreement”. For the purposes of this commentary, both are described as “superannuation agreements”. This is consistent with s 90XH (formerly s 90MH). A flag lifting agreement can also operate to split a superannuation payment (s 90XN(1)(b) — formerly s 90MN(1)(b)). If the agreement is binding, the court cannot make an order about the superannuation interest dealt with in the flag lifting agreement.

As with financial agreements dealing with non-superannuation assets, a superannuation agreement must meet certain formal requirements to be binding under the *Family Law Amendment Act 2000*. There are some additional requirements for superannuation agreements in relation to separation declarations. See ¶19-210.

A financial agreement is binding on the parties if all of the following requirements of s 90G of the FLA are met:

- the agreement is signed by all parties (s 90G(1)(a))

- before signing the agreement each spouse party was provided with independent advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages at the time the advice was provided to the party making the agreement (s 90G(1)(b))

- either before or after signing the agreement, each spouse party was provided with the statement of independent legal advice provided to that party (s 90G(1)(c))

- a copy of the statement that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse (s 90G(1)(ca)), and

- a signed statement by the legal practitioner stating the agreement

has not been terminated and has not been set aside by a court (s 90G(1)(d)).

A Pt VIIIAB financial agreement must meet similar requirements under s 90UJ.

The operative time for a payment split under a financial agreement which deals with superannuation is not until the fourth day after the day on which a copy of the agreement is served on the trustee accompanied by the documents required by s 90XI (formerly s 90MI).

The “operative time” (when trustees need to take action on an agreement) is dependent upon the service of additional documents on the trustee to establish that the parties have separated.

Financial agreements can be set aside in the circumstances set out in s 90K(1) or s 90UM(1). These are discussed at ¶19-185 and ¶20-280.

Two of the grounds are only applicable to superannuation provisions:

- a payment flag is operating under Pt VIIIB of the FLA on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part (s 90K(1)(f) or s 90UM(1)(i)), and

- the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Pt VIIIB (s 90K(1)(g) or s 90UM(1)(j)).

¶19-180 Payment splits under superannuation agreements

A superannuation agreement (including a flag lifting agreement) may provide for a payment split (s 90XJ (formerly s 90MJ), *Family Law Act 1975* (Cth) (FLA)).

Section 90XJ(1)(c) (formerly s 90MJ(1)(c)) of the FLA sets out the three usual ways in which superannuation interests, which are not percentage-only interests, are split. These are by specifying one of:

- a *base amount* of the superannuation which the non-member will receive
- a *method by which a base amount can be calculated*, or
- a *percentage* which the non-member will receive of all splittable payments.

The most common method of splitting is the “base amount” concept. Superannuation is usually split in the accumulation phase. Many funds have governing rules to enable the non-member to have their interest rolled over into their own fund rather than wait until the member meets a condition of release.

The parties to a superannuation agreement have an additional option not available to the court in relation to splitting a superannuation interest. The parties can specify a “method” by which a superannuation interest can be split (s 90XJ(1)(c)(ii) — formerly s 90MJ(1)(c)(ii)), provided they also give a worked example to the trustee demonstrating how that base amount is to be achieved (s 90XI(b) — formerly s 90MI(b)). The court, however, can only use one of two methods in orders. It can either set out a base amount or percentage basis to effect the split.

The percentage method may impact on any contributions received for or on behalf of the member after the agreement is made, but before the split is “effected”. For that reason, the percentage method is usually more appropriate for interests in the payment phase than those in the accumulation phase.

Under s 90XJ (formerly s 90MJ) of the FLA, after the “operative time” for the relevant agreement, if a splittable payment becomes “payable”, the non-member is entitled to be “paid” an amount based on the specified methods. The member’s interest is subject to a corresponding reduction. The terms “payable” and “paid” are not defined in the FLA. However, Pt 7A of the Superannuation Industry (Supervision) Regulations 1994 (Cth) allows an interest to be created for a non-member. Part 7A of the SIS Regulations is triggered when an interest becomes “subject to a payment split”.

The Family Law (Superannuation) Regulations 2001 (Cth) provide valuation methodology for ascertaining a base amount for both accumulation and defined benefit funds in both their growth phase and their payment phase. The time for determining the value to be split is determined according to the "relevant date".

¶19-185 Setting aside agreements

Superannuation agreements are a discrete subset of financial agreements under the *Family Law Act 1975* (Cth) (FLA). The grounds for setting aside financial agreements are set out in s 90XH (formerly s 90MH), 90XN (formerly s 90MN) and 90K of the FLA. In addition, superannuation agreements are subject to two further grounds for being set aside, namely s 90K(1)(f) and (g). Section 90K(1) sets out the grounds for setting aside superannuation agreements:

- the agreement was obtained by fraud (s 90K(1)(a)). To succeed under this ground, the applicant needs to prove that there was a false statement of fact (including non-disclosure of a material matter), culpable intent and reliance

- either party entered into the agreement either for the purpose or for purposes that included the purpose of defrauding or defeating the interests of a creditor or creditors of the party or with reckless disregard of the interests of a creditor or creditors (s 90K(1)(aa))

- either party entered the agreement (s 90K(1)(ab)):

    (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party, or

    (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the de facto relationship, or

    (iii) with reckless disregard of those interests of that other

person

- the agreement is void, voidable or unenforceable (s 90K(1)(b))
- it is impracticable for the agreement (or part of it) to be carried out having regard to circumstances that have arisen since the agreement was made (s 90K(1)(c))
- where a party to the agreement will suffer hardship and that party has responsibility for the care, welfare and development of a child (s 90K(1)(d))
- the agreement is unconscionable (s 90K(1)(e)), for example, where the conditions under which the superannuation agreement was made were grossly unfair or unjust to one of the parties and the other party took advantage of the other party
- there is no reasonable likelihood of a flag being terminated by a flag lifting agreement (s 90K(1)(f)), and
- one of the superannuation interests covered by the superannuation agreement is an unsplittable interest (s 90K(1)(g)).

Similar provisions apply under s 90UM for setting aside Pt VIIIAB financial agreements. A major difference is that a Pt VIIIAB financial agreement ceases to be binding if the parties marry each other (s 90UJ(3)).

The grounds for setting aside financial agreements are discussed at ¶20-280.

FLAGS

¶19-190 Payment flags

A payment flag is like an injunction on a superannuation entitlement. It:

(a) directs the trustee not to make any splittable payment without the leave of the court, and

(b) requires the trustee to notify the court, within a specified period, of the next occasion when a splittable payment becomes payable.

A flag may be appropriate, particularly with respect to a defined benefit fund, if:

(a) the member is close to meeting, or has met, a condition of release

(b) there is a chance that the non-member will not achieve a just and equitable settlement if the member elects to receive a pension rather than a lump sum, or

(c) an imminent event may impact on the value of the superannuation. The most common situations are proposed resignation, possible redundancy, possible invalidity or terminal illness. If one of those events occurs, however, the payment may be "not splittable" and therefore unaffected by the flag.

The court may take into account, in deciding whether to make a flagging order:

- such matters as it considers relevant, and

- in particular, the likelihood that a splittable payment will soon become payable in respect of the superannuation interest (s 90XU(2) — formerly s 90MU(2) *Family Law Act 1975* (Cth)). There is no definition of "soon". Its meaning may depend on the overall circumstances of the parties. The "mischief" which the Act is trying to prevent is that if a flagging order is made many years before the member may reasonably expect to be eligible for their superannuation, it may be difficult to locate the non-member to have the flag lifted.

A superannuation interest in the growth phase (Family Law (Superannuation) Regulations 2001, reg 6) can be subject to a

payment flag.

Further requirements are:

- the interest is identified in a superannuation agreement (s 90XL(1)(a) — formerly s 90ML(1)(a))
- the agreement provides that the interest is to be subject to a payment flag (s 90XL(1)(b) — formerly s 90ML(1)(b))
- the agreement is in force at the operative time (s 90XL(1)(c) — formerly s 90ML(1)(c)), and
- the interest, to which the agreement relates, is not an unflaggable interest (s 90XL(1)(d) — formerly s 90ML(1)(d)).

A flagging agreement prevents the trustee of the superannuation fund from dealing with the superannuation interest until the “flag” has been lifted. The flag can only be lifted either by further agreement (s 90XN — formerly s 90MN) or by a court order (s 90XM — formerly s 90MM).

Section 90XL(5) (formerly s 90ML(5)) imposes a reporting obligation on the trustee if a splittable payment becomes payable while the flag is in force. The trustee must, within 14 days of a splittable payment becoming payable, give written notice to both the member spouse and the non-member spouse. The trustee can be subject to a fine of 50 penalty units.

In deciding whether to make a flagging order, the court must take into account such matters as it considers relevant and, in particular, may take into account the likelihood that a splitting payment will soon become payable (s 90XU(2) — formerly s 90MU(2)). This is not a matter the parties need to consider when making a superannuation agreement. The comparable section, s 79(5) which deals with general adjournment of property applications, does not include a similar limitation. Section 79(5) was used before 28 December 2002 by parties seeking that s 79 proceedings be adjourned until the superannuation benefits could be quantified. The period of the adjournment could be quite long (eg *O’Shea & O’Shea* (1988) FLC ¶91-964).

It is an offence for the trustee of a fund to make any splittable payment in respect of the interest while a valid flag is in force (s 90XL(4) — formerly s 90ML(4)).

Examples

***BAR & JMR* (2005) FLC ¶93-231**

Justice Young held that imposing a payment flag and giving the wife a split of the husband's interest when it was in the payment phase, rather than the growth phase, was fairer because the wife would share in the growth of the fund. The likely period until the husband retired was four years but it could be as long as 14 years. Justice Young considered the likely period until retirement was between four and nine years. He did not expressly consider the effect of s 90MU(2) (now s 90XU(2)) and whether the period until retirement was "soon".

The single expert valued the husband's defined benefit interest using the method in the Family Law (Superannuation) Regulations 2001 (Cth). As at 5 February 2005, it was worth $403,810.42. He calculated the resignation benefit, not in accordance with the Regulations, as $534,084.74. The difference was $130,274.32.

The expert said that valuing under the Regulations did not give a fair and just valuation of the Emergency Services Superannuation Scheme fund (the ESSS fund). He did not give an alternative valuation.

Justice Young disregarded the difference in the two values for valuation purposes, but held the difference relevant under s 75(2)(f) and (o). It was very significant that the valuation under the Regulations increased by almost $45,000 within one year. The wife was entitled to share in the growth. A splitting order in the growth phase disadvantaged the wife. She would lose the very real financial benefit of the applicable multiple and the generous provisions of the particular fund. Her base amount when rolled over could not appreciate in value in any way comparable to the husband's interest left within the fund.

Section 90MT(2) (now s 90XT(2)) required the court to "make a determination" rather than value the superannuation interest. Without contrary evidence, Young J was not able to look behind the valuation. It is unclear how Young J would have dealt with any contrary evidence.

There were many uncertainties and contingencies about valuing the husband's interest, including:

- the husband's actual retirement date
- the husband's salary
- the applicable superannuation tax rates for each of the parties
- proposed changes to the ESSS fund
- the husband's applicable multiple (from time to time)
- a just and equitable valuation as put by the single expert, and

- the failure to have evidence from the trustee of the ESSS fund.

Orders in the payment phase overcame these problems, allowed the wife to share in the growth of the fund, and achieved a just and equitable alteration of property interests. The husband's income, multiplier, applicable tax rate and retirement date would be known with certainty. The guess work and likely injustices were largely eliminated.

***Gerard & Gerard* [2011] FamCA 263**

Justice Cronin considered that as a flagging order is an injunction it should only be made, as with a s 114 injunction, if it was proper to do so in the circumstances. There was evidence that the relevant deferred annuity was a superannuation interest which could be split and flagged.

The flagging order was made ex parte on the basis of urgency as the husband was about to turn 65 years of age. The husband and wife were separated but living under the one roof, the husband did not speak to the wife and the wife said that the husband had not opened any letters from the wife's solicitors.

¶19-200 Flag lifting agreements and orders

Section 90XN(1) (formerly s 90MN(1)) of the *Family Law Act 1975* (Cth) provides that at any time when a payment flag is operating on a superannuation interest, the spouses may enter into a flag lifting agreement that either:

- provides that the flag is to cease operating without any payment split (s 90XN(1)(a) — formerly s 90MN(1)(a)), or

- provides for a payment split pursuant to s 90XJ(1)(b) (formerly s 90MJ(1)(b)) (s 90XN(1)(b) — formerly s 90MN(1)(b)).

A flag lifting agreement has no effect unless it satisfies the following criteria:

- the agreement is signed by both parties (s 90XN(3)(a) — formerly s 90MN(3)(a))

- for each spouse, the agreement contains a statement that the spouse has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement (s 90XN(3)(b) — formerly s 90MN(3)(b))

- a certificate is attached to the agreement, signed by the person

who provided the legal advice and stating that the advice was provided (s 90XN(3)(c) — formerly s 90MN(3)(c)), and

- after the agreement is signed by the spouses, each spouse is given a copy of the agreement (s 90XN(3)(d) — formerly s 90MN(3)(d)).

Section 90XM also allows a payment flag under an agreement to be terminated by a court order.

SEPARATION DECLARATIONS

¶19-210 Separation declarations

There are two definitions of “separation declaration”. The sections of the *Family Law Act 1975* (Cth) (FLA) dealing with separation declarations are unnecessarily complicated partly because they are in two different Parts of the FLA.

The relevant sections are s 90XP (formerly s 90MP), 90XQ (formerly s 90MQ), 90XZG (formerly s 90MZG), 90UF and 90DA. Since 1 March 2009, s 90XP (formerly s 90MP) and 90XQ (formerly s 90MQ) apply to Pt VIIIAB financial agreements between de facto couples and prospective couples (subject to them meeting jurisdictional requirements). Section 90XZG (formerly s 90MZG) is in Pt VIIIB and deals with false declarations. Section 90DA is in Pt VIIIA which deals with financial agreements. Section 90UF is a similar section in Pt VIIIAB and applies to financial agreements under that Part. The other sections are in Pt VIIIB which deals with superannuation interests. If terms in a financial agreement under Pt VIIIA deal with superannuation, those terms are a “superannuation agreement” for the purposes of Pt VIIIB and must be dealt with in accordance with Pt VIIIB.

A separation declaration is defined as:

- a written declaration that complies with s 90XP (formerly s 90MP) (s 90XP(1) — formerly s 90MP(1)), and

- a written declaration that complies with s 90DA(3) and (4) (s 90DA(2)).

There are two types of s 90XP (formerly s 90MP) separation declarations — one where s 90XQ (formerly s 90MQ) does not apply and one where s 90XQ (formerly s 90MQ) applies (with additional requirements if s 90XQ (formerly s 90MQ) applies).

The three types of separation declarations are referred to in this commentary as s 90XP (formerly s 90MP), 90XQ (formerly 90MQ) and 90DA (or s 90UF) separation declarations. The purpose of the first two declarations is different from the third.

The first two relate specifically to superannuation and flag lifting agreements. For a superannuation agreement or a flag lifting agreement to be binding on a trustee, a decree absolute or a separation declaration must be served on the trustee. The declaration time must not be more than 28 days before service on the trustee. The operative time for the payment split is the fourth business day after the agreement, accompanied by the separation declaration or decree absolute, is served.

Section 90XZG (formerly s 90MZG) makes it an offence if a person makes a statement in a s 90XP (formerly s 90MP) or s 90XQ (formerly s 90MQ) declaration knowing that the statement is false or misleading and the declaration is served on the trustee of an eligible superannuation plan. The offence is punishable by a period of imprisonment of up to 12 months where the statement is false or misleading in a material particular.

Section 90XP (formerly s 90MP) separation declarations

A s 90XP (formerly s 90MP) separation declaration is used in relation to superannuation or flag lifting agreements where the interests do not exceed the low cap amount. The low cap amount is discussed under s 90XQ (formerly s 90MQ) declarations below.

A s 90XP (formerly s 90MP) separation declaration must be signed by at least one of the spouses. It must state that the spouses are married but are separated at the declaration time.

Section 90XQ (formerly s 90MQ) declarations

Section 90XQ (formerly s 90MQ) applies if, at the declaration time, the total withdrawal value for all the superannuation interests of the member spouse is more than the low rate cap amount. The low rate cap amount relates to post-June 1983 superannuation contributions (but not undeducted contributions) plus earnings on the contributions. Section 90XQ (formerly s 90MQ) does not apply in the circumstances (if any) prescribed by the Regulations. There are currently no circumstances prescribed. The low cap rate amount is defined in s 90XQ(3) (formerly s 90MQ(3)) as the meaning given by the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997). It is $205,000 in 2018/19 (see s 307–345 of ITAA 1997). Depending on the age of a person, a zero tax rate applies to taxed benefits received up to that limit, and a 15% tax rate applies to amounts received over the amount. The low rate cap amount is indexed annually in $5,000 increments.

A s 90XQ (formerly s 90MQ) separation declaration must state that:

- the spouses are married or lived in a de facto relationship
- the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time, and
- in the opinion of the spouse (or spouses) making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Sections 90DA and 90UF separation declarations

A s 90DA separation declaration applies to a Pt VIIIA financial agreement to the extent to which it deals with:

- how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of them at the time when the agreement is made or at a later time and before the termination of the marriage by divorce, is to be dealt with, or
- the maintenance of either of them after the termination of the

marriage by divorce.

The financial agreement will be of no force or effect until a separation declaration is made.

A s 90UF declaration is required for a Pt VIIIAB financial agreement to the extent to which it deals with how, in the event of the breakdown of the de facto relationship, all or any of the property or financial resources of either or both of the spouse parties:

(a) at the time when the agreement is made, or

(b) at a later time and during the de facto relationship.

Section 90UG specifically provides that to the extent that a Pt VIIIAB financial agreement deals with incidental or ancillary matters, the agreement is effective from the date of separation and that no separation declaration is required to make them effective.

The separation declaration must be signed by at least one of the parties to the financial agreement, and must state that:

- the parties have separated and are living separately and apart at the declaration time, and
- in the opinion of the parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Section 90DA(5) adopts the same definition of “separated” as in s 90XP(6) (formerly s 90MP(6)). Given that the s 90XQ (formerly s 90MQ) declaration requires a statement of 12 months’ separation, it seems that 12 months’ separation is not required for a s 90DA separation declaration.

TRUSTEES

¶19-230 Beneficiary nominations

It is important for trustees to advise members contemplating, or

subject to, a payment split that they may need to revise any nomination of beneficiary forms or binding death benefit nominations (as contemplated by s 59(1A) of the *Superannuation Industry (Supervision) Act 1993* (Cth)). Without such a review occurring, it is possible that certain nominations may be invalid if the nominee is no longer the “spouse” of the member.

¶19-240 Fees of trustee

Regulation 59 of the Family Law (Superannuation) Regulations 2001 (Cth) allows the trustee of an eligible superannuation plan to charge reasonable fees in respect of:

- a payment split
- a payment flag
- a flag lifting agreement that does not provide for a payment split
- an order under s 90XM (formerly s 90MM) of the *Family Law Act 1975* (Cth) terminating the operation of a payment flag
- an application under s 90XZB (formerly s 90MZB) for information about a superannuation interest, and
- any other thing done by the trustee in relation to a superannuation interest covered by a superannuation agreement, flag lifting agreement or splitting order.

Fees are generally split equally between the member spouse and the non-member spouse (reg 59(2)(a)). The exceptions are:

- a payment split under reg 59(2)(b), if the non-member spouse is entitled to be paid the whole of each splittable payment, is paid by the non-member spouse, and
- an application for information about a superannuation interest under reg 59(1)(e) is paid by the applicant.

Apart from the requirement of reasonableness, there is no guidance as to the level of the fees for the completion of a declaration and Superannuation Information Form. They are usually between nil and $250.

¶19-250 Creating new interests for a non-member

If there is a delay between the date of the agreement or order and when a split is to be effected, the trustee may create a “notional” non-member interest so that a base amount may be credited with appropriate earnings as required.[20]

The amount payable to the spouse is calculated in accordance with reg 45A, 45B and 45D(3) and (4) of the Family Law (Superannuation) Regulations 2001 (FLS Regulations). At the time of the payment, the amount to be paid to the spouse is the base amount stipulated in the order or agreement adjusted with interest from the operative time up to the payment date. The interest rate applied to the base amount is determined by the Australian Government Actuary and is published in the Commonwealth Gazette. The rate is 2.5% above the percentage change in the original estimate of full-time adult ordinary time earnings for all persons in Australia, as published by the Australian Bureau of Statistics during the year ending with the November quarter immediately before the beginning of the adjustment period. The rates for the current and last financial year are:

- 2018/19 — 4.9%, and
- 2017/18 — 4.7%.

A new interest created for a non-member spouse will be in the same proportion of preserved benefits, restricted non-preserved benefits and unrestricted non-preserved benefits (¶19-280) as those of the member spouse (reg 7A.11(6), Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations)).

Usually, the non-member spouse will not be able to obtain a benefit from the fund until he or she satisfies a relevant condition of release (as specified in Sch 1 to the SIS Regulations).

Tennant & Tennant [2018] FamCA 111

The respondent, who was the recipient of a superannuation split under a court order, claimed interest on the delayed payment of the superannuation split. The respondent was entitled to a superannuation split from the Tennant Superannuation Fund of a base amount of $347,400, calculated in accordance with Pt 6 of the FLS Regulations (FLS Regulations).

The applicant paid only $342,293.27. Interest on that sum at the rate of 7.5% was sought by the respondent.

The respondent also sought enforcement of the outstanding base amount of $5,106.73 and interest on that sum. Part 6 of the FLS Regulations provides for adjustments to be made to a base amount for applicable adjustment periods. The applicable adjustment period in this case was from the operative time pursuant to the order, ie four business days from the date of the 2017 order and the day before the payment, became payable. Adjustments may be negative or positive.

There was no evidence before Carew J of the calculation of the base amount pursuant to Pt 6 of the FLS Regulations. Accordingly, it was not possible to calculate what (if any) interest should be paid. Pursuant to the orders each party was obligated to contribute equally to the costs and fees involved in giving effect to the payment split. The applicant had deducted from the payment made to the respondent certain accountant's costs which she contended had been incurred in giving effect to the payment split, but provided no evidence to support those amounts.

It seemed to Carew J (at [37]) that the most efficacious way of resolving the dispute "… is for the parties to retain an accountant to undertake the calculation of the base amount in accordance with Part 6 of the FLS Regulations and obtain an invoice specifically for the costs and fees involved in giving effect to the payment split", which the parties should pay equally.

Footnotes

20 Superannuation Industry (Supervision) Regulations 1994

(Cth), reg 7A.11.

¶19-260 Procedural fairness

Parties to orders have a legitimate expectation to receive procedural fairness before the orders are made.[21] The right of a trustee to procedural fairness is reinforced by s 90XZD (formerly s 90MZD) of the *Family Law Act 1975* (Cth) (FLA). The court cannot make an order which binds a trustee who is not a secondary government trustee without according procedural fairness (s 90XZD(1) — formerly s 90MZD(1)). A "secondary government trustee" means a trustee that is the Commonwealth, a state or territory and is a trustee only because of the operation of s 90XDA (formerly s 90MDA).

The court may, if it thinks fit, accord a secondary government trustee procedural fairness (s 90XZD(2) — formerly s 90MZD(2)). In practice, the court will prefer that all trustees are accorded procedural fairness and is likely to refuse to make an order which binds any trustee if there has not been procedural fairness. If an order is sought by consent in the Family Court which is intended to bind the trustee of an eligible superannuation plan, not less than 28 days before lodging the draft consent order or filing the Application for Consent Orders, a party must notify the trustee in writing of:

- the terms of the order that will be sought to bind the trustee
- the next court event (if any)
- that the parties intend to apply for the order sought if no objection to the order is received from the trustee within 28 days, and
- that if the trustee objects to the order sought, the trustee must give the parties written notice of the objection within 28 days (r 10.16(2), Family Law Rules 2004 (Cth)).

If the matter is proceeding to trial, a party seeking an order to bind the

trustee of an eligible superannuation plan must, not less than 28 days before the date fixed for the trial, notify the trustee of the fund in writing of the terms of the order that will be sought at the trial and bind the trustee, and the date of the trial (r 14.06(1)).

The FLA and the Family Law Rules 2004 are silent about according procedural fairness to trustees in superannuation agreements. However, if the parties do not give the trustee reasonable notice of the terms of the agreement which it is proposed will affect them, before executing the agreement, the trustee may say it is unable to put the provisions dealing with superannuation into effect.

Procedural fairness in the Federal Circuit Court is dealt with in r 24.07 Federal Circuit Court Rules 2001.

Footnotes

21 *FAI Insurances Ltd* v *Winneke* (1982) 151 CLR 342; *Kioa* v *West* (1985) 159 CLR 550.

TAX

¶19-270 Tax issues

Taxation treatment of superannuation splitting

Since 1 July 2007, the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) has provided the taxation treatment of payments as a result of superannuation splitting after a court order is made or a superannuation agreement is entered into are as follows:

- A superannuation lump sum paid to or a superannuation interest created for a non-member spouse after a payment or interest split is treated as a separate superannuation benefit for the non-member spouse.

- A non-member spouse's entitlement that is paid as a

superannuation income stream is treated as a separate superannuation income stream for the non-member spouse.

Various capital gains tax concessions also apply to payment splits, including roll-over relief when assets are transferred to another superannuation fund to satisfy the non-member spouse's entitlement.

Apportionment of components of a superannuation benefit

When a payment split or an interest split occurs, both the member spouse and the non-member spouse are entitled to a share of the components of the member's superannuation benefit at that time.

Since 1 July 2007, the two components of a superannuation benefit under the ITAA 1997 are the tax-free component and the taxable component.

The tax-free component is the part of a benefit that is tax free and does not count towards the recipient's (taxpayer's) assessable (or taxable) income. It has two components: the "contributions segment" and the "crystallised segment".

A taxable component is the part of the benefit that is taxable. It may include two parts: one where tax has been paid (the taxed element in the fund) and one where tax has not yet been paid (the untaxed element in the fund).

Most superannuation benefits from a private sector superannuation fund will have only a taxed element in the fund. Certain public sector funds or schemes, such as government funds for public servants, will have an element untaxed in the fund as these funds or schemes are generally not subject to tax.

The components for the member and non-member spouse are worked out by calculating the components of the superannuation benefit immediately before the payment or interest split and apportioning them in the same proportion as the payment or interest split. As part of the components contained in the member's superannuation benefit or interest are allocated to the non-member spouse, the components in the member's benefit or interest are reduced accordingly.

Self-managed superannuation funds are discussed at ¶19-290.

¶19-280 Preservation

Under Pt 7A of the Superannuation Industry (Superannuation) Regulations 1994 (Cth) (SIS Regulations), where a split of a member's interest in the growth phase is made, any new interest created for the non-member must have the same proportion of the interest to the preservation components of the member's interest.

Example

Assume the member held an interest in the fund of $100,000, made up of $80,000 preserved benefits and $20,000 restricted non-preserved benefits. If that interest is subject to a 50/50 split, the new interest for the non-member will be worth $50,000, and will comprise $40,000 preserved benefits and $10,000 restricted non-preserved benefits.

A further issue to note is that where a non-member spouse becomes a member of the fund after a "split", they will need to satisfy a "relevant condition of release" in order to get access to their benefits. The conditions of release are set out in Sch 1 to the SIS Regulations.

The exception to this rule is where the interest of the member was in payment phase prior to the operative time. In this case, Treasury has confirmed that as the non-member was previously indirectly receiving the benefit of these pension payments, so the status quo should continue.

SELF - MANAGED SUPERANNUATION FUNDS

¶19-290 Self-managed superannuation funds

The statutory requirements for self-managed superannuation funds (SMSFs) are heavy, and many clients and their partners seem ill-equipped to meet them.

Importantly, members of self-managed superannuation funds (SMSFs) must also be trustees of the fund or directors of any corporate trustee. If both parties to the marriage are members of a

SMSF, an added layer of complexity arises as both parties must continue to be involved in the trusteeship of that fund until the parties are no longer members of the same fund. This may affect decision making during the period between separation and settlement. Each trustee or director is jointly and severally liable for breaches of the obligations imposed on trustees.

Common problems with SMSFs include:

- Taxation returns not done
- Use of fund bank account for personal purposes
- Not investing properly — simply having the funds in a bank account. This is not, in itself, necessarily a breach, although the fund is required to have an investment strategy and this may be an indication that there is no investment strategy or it is not being followed. In these cases, especially in a low interest rate environment, parties may be financially better off using an accumulation fund
- Use of fund assets for personal use, eg holiday house and even a matrimonial home
- Incorrectly categorising the taxation status of funds
- Investing in investments which are not approved for superannuation funds.

Furthermore, the underlying assets may be illiquid or “lumpy”, making it difficult to split the interest of one party to another fund. The capital gains tax (CGT) concessions that may apply in transferring assets in specie between superannuation funds are discussed at ¶17-350.

Valuations may be more costly with SMSFs than accumulation or defined benefit funds as forensic accountants and real estate valuers may be required. Expert actuarial advice may be required to consider issues associated with reserves, forgone benefits or unallocated contributions. Legal advice may be required to assist with the interpretation or construction of the trust deed, and to finalise the

relevant resolutions of the trustee.

Care must be taken when dealing with SMSFs as many are non-compliant. If the SMSF is compliant, it is important to ensure that the fund will maintain its complying status at all times.

Non-complying funds have potential tax liabilities and professional advice should be sought as to how to deal with these.

If a SMSF's financial statements show current values of the assets in the fund, they can be used to value the fund. However, it cannot be assumed that the valuations in the financial statements are current. In addition, interest or dividends may have been earned and taxation or other expenses incurred since the financial statements were prepared.

It is usual for the assets of the fund to be valued and for the updated values to be taken into the financial statements of the fund. There may be liabilities to take into account. In particular, tax advice may be required as to:

(a) Unrealised capital gains on the basis of *Rosati & Rosati* (1998) FLC ¶92-804 as the CGT will definitely be incurred or is likely to be incurred in the near future. If it is not incurred immediately or in the near future, it should not be taken into account in valuing the SMSF. CGT may not ultimately be payable or the amount may vary due to changes in the members' circumstances, tax law etc. Unrealised capital gains may not be taxable when the member becomes entitled to the benefit. Other CGT relief is available in certain circumstances and specialist advice should be sought.

(b) CGT roll-over relief between SMSFs or from one SMSF to another complying superannuation fund.

The conditions which must be satisfied to attract CGT roll-over relief between funds in circumstances where each party is keeping their own entitlement are as follows:

1. The parties are members of a SMSF.

2. An interest in the SMSF is subject to a payment split under the *Family Law Act 1975*.

3. The trustee of the SMSF transfers a CGT asset to the trustee of another complying fund for the benefit of the leaving party.

4. The transfer is in accordance with an award, order or agreement under s 126–140(2B) of the *Income Tax Assessment Act 1997* or under s 90XZA (formerly s 90MZA) of the *Family Law Act 1975* (Cth) (FLA).

5. As a result of the transfer, the leaving party will have no entitlement in the SMSF.

6. The transfer is in accordance with the terms of a superannuation agreement or the transfer is because of marriage or relationship breakdown.

7. It may be necessary to have cross-splits to ensure that the party who remains a member of the SMSF does not incur a CGT liability as a result of the restructure.

CGT roll-over relief may also be available to payment splits where the parties are not retaining their own interests if the requirements of the FLA, especially s 90XZA (formerly s 90MZA), or the Superannuation Industry (Supervision) Regulations 1994, are met.

Examples

***Gabbard & Gabbard* [2010] FMCAfam 1486**

The husband dissipated nearly all of the assets of the SMSF without the wife's knowledge or consent. In August 2007, there was $164,936.45 in the SMSF. By 12 January 2009, the balance was only $1,767.23. Henderson FM found that it was a priority that the fund be repaid the sum necessary to make it compliant. There had been two adjournments to enable the husband to do certain things including to reimburse the SMSF, but he did not do so.

The wife provided the report of an expert setting out the actions required to make the SMSF compliant. These actions were:

- the moneys must be fully refunded
- tax returns had to be prepared for the six non-complying years
- the ATO had to be advised of the husband's conduct and actions, and

- the parties would then await the ATO's decision.

Henderson FM (as she then was) referred to the SMSF's trust deed and found that the wife could be appointed as the delegate of the trustee of the SMSF to do all acts necessary to make the fund compliant. She also appointed the wife as trustee to sell the real estate so that the wife could pay the amount necessary to the fund to make it compliant.

The management of investments in a self-managed superannuation fund may also be an issue.

***Kane & Kane* (2013) FLC ¶93-569**

The Full Court considered whether the husband's contributions to a self-managed superannuation fund were a "special" contribution. The Full Court found that they were not. Although not the decisive factor, all three judges, in two separate judgments, said that it was relevant that the husband would not have agreed that he bear all the losses if his investments had made losses.

***Idoni & Idoni* [2013] FamCA 874**

Benjamin J refused to take into account the husband's extra contributions to a self-managed superannuation fund or his losses on the investment in the fund in his assessment of the parties' contributions. The husband had transferred his superannuation of about $166,000 into the fund and the wife had only transferred $40,000. The fund fell from an asset base of between $200,000 and $300,000 to about $22,000. The husband had effective control of the funds and oversaw what Benjamin J described as its "decimation". Justice Benjamin said (at [35]):

> "The husband could have at any time taken steps to sell the options and reduce the losses. He did not, as he did with the other investments, draw a line in the sand. He stood mute while the fund was reduced to where it is now".

Justice Benjamin ordered that the balance of the fund be transferred to the wife. He said (at [147]):

> "I have considered the superannuation fund both in the context of contribution and s 75(2)(o) factors. As to contribution the husband put aside a relatively large sum and the wife a lesser sum. That arose from the different, but agreed, paths the parties took during their relationship. As indicated earlier I have treated those, as part of a holistic approach, as equal. As to the disastrous post-separation superannuation investments, it was open for the husband to discuss this fund (in which the wife had a significant interest) with her. He did not do so. It was also open for the wife to become involved in the management of the fund, she did not do so. I have not made an adjustment in favour or against either party in the context of contributions. I have included a modest percentage (3 per cent) in the overall adjustment in favour of the wife under the s 75(2) factors".

In the total pool of $575,207, the husband received $171,886 or 32%. Their contributions were assessed as equal but the wife received a s 75(2) loading of 15% (including 3% for the husband's wastage of the fund) plus an adjustment of $12,500 for half of the legal costs drawn down by the husband.

***Thurston & Loomis* [2016] FamCA 138**

The court ordered that actions be taken to repay money withdrawn by the members of an SMSF and used for the parties' personal purposes. The accountant was ordered to

report the matters to the ATO. The net pool to be divided between the parties was not able to be ascertained until after the ATO was paid in full.

COMMUTATIONS

¶19-300 Commutations

The majority of superannuation agreements and court orders deal with interests in the growth phase, but the superannuation splitting regime provided in Pt VIIIB of the *Family Law Act 1975* (Cth) also deals with interests in the payment phase, and allows the parties or the court to split these interests by either a percentage or base amount method.

The calculation of the entitlements of the non-member in these situations is complicated, and will also depend on whether the relevant interest is an allocated pension or other pension product.

A non-member may have the right to commute an interest which is in the pension phase. This right is subject to various criteria (such as the governing rules of the fund).

Forms 1, 2, 3 and 4[22] permit the non-member to receive a lump sum payment in lieu of future entitlements. Both parties need independent financial planning advice to determine if a commutation is in their interests.

The legal effect of a waiver notice is to remove the legal entitlements of the non-member to assert that there is an order or agreement in place which is in their favour.

Footnotes

22 See Sch 1 to the Family Law (Superannuation) Regulations 2001 (Cth) and Wolters Kluwer's *Australian Family Law Court Handbook*.

ASSESSING CONTRIBUTIONS

¶19-310 Assessing contributions to superannuation as part of s 79 or s 90SM process

Prior to December 2002, courts and legal practitioners sometimes used formulas to calculate the amount of extra non-superannuation which the non-member would receive to adjust for the member retaining their superannuation.

The non-member received extra non-superannuation calculated on the following formula:

$$50\% \times \frac{\text{period of cohabitation}}{\text{period of membership}} \times \text{estimated net value of current superannuation}$$

Formula approaches were described as artificial by the Full Court in such cases as *Tomasetti & Tomasetti*[23] and *Bartlett & Bartlett*.[24] When used post-December 2002, *West & Green*[25] is used to calculate the percentage split of superannuation to which the non-member is entitled. An example of how it works is set out below:

- the husband has $300,000 of superannuation at the end of a 10-year relationship and 15 years of employment
- 10 years as a proportion of 15 years is ⅔
- ⅔ of $300,000 is $200,000
- $200,000 is divided equally between the two parties. Before December 2002, this could only be done notionally. The non-member received their share from non-superannuation assets, and
- the non-member receives $100,000 and the member retains $200,000.

However, if the actual superannuation at the start of a 10-year relationship can be ascertained, this is better evidence than saying, as under the *West & Green* formula, that after 15 years of employment, one-third of the superannuation was accrued prior to the relationship. Clearly, one-third of the superannuation did not accrue prior to separation. In most cases, contributions in money terms could have been less in the first five years than the final five years. There would have been growth in the fund during the marriage.

In long relationships, pre-cohabitation contributions made to non-superannuation are often of little, if any, significance. *West & Green* may seem unfair because it gives more weight to pre-cohabitation contributions to superannuation than are often allowed for pre-cohabitation contributions to other property.

In *Coghlan & Coghlan*[26] it was held by the Full Court that:

> "In the context of a consideration of the matters [in s 79(4), FLA] … the following matters may well be relevant: the relationship between years of fund membership and cohabitation; actual contributions made by the fund member at the commencement of the cohabitation (if applicable), at separation and at the date of hearing; preserved and non-preserved resignation entitlements at those times; and any factors peculiar to the fund or to the spouse's present and/or future entitlements under the fund".

While over time the "value" of pre-cohabitation contributions to other property falls,[27] the *West & Green* formula increases the "value" of pre-cohabitation contributions.

In *Palmer & Palmer* (2012) FLC ¶93-514, the husband argued that the value of his superannuation to be included in the pool should be determined at the time of separation so that 62% of the total value of his superannuation of $864,386 was attributable to the relationship, or $535,920.

The Full Court said that the husband's argument was "superficially attractive". However, the trial judge did not purport to explain the result on that basis and incorrectly assumed that the husband made post-separation contributions to the superannuation. The value of $864,386

was at separation not as at the date of trial two years later, which was the date at which it ought to have been valued. The Full Court said (at [55]) that the proper approach was:

> "More importantly, His Honour was obliged to consider the totality of the parties' contributions to the superannuation and non-superannuation assets, to take account of any relevant factors under s 75(2), and then to consider whether the overall result he arrived at was just and equitable".

The Full Court also noted that the trial judge had a valuation of the husband's interests in 1993, which was the date of the marriage and about a year after cohabitation commenced. This valuation had been properly prepared and was the only evidence the trial judge had as to pre-cohabitation values.

Disputes about the date of valuation of superannuation usually relate to the weight to be given to post-separation contributions. Assets are usually valued as at the date of trial. Post-separation contributions may affect the percentage split rather than the value of assets. Usually, if there are children of the marriage, contributions to the family after separation offset any contributions by the primary income earner to property, including superannuation after separation.[28]

Examples

***McKinnon & McKinnon* (2005) FLC ¶93-242**

On appeal from the Federal Magistrates Court, Coleman J sitting as a Full Court assessed the wife's contributions to the husband's Australia Post superannuation as one-sixth because they cohabited for four out of the 13 years of his employment. She made no contributions to his Defence Forces Retirement and Death Benefit Scheme (DFRDB) superannuation which related to other employment which ended nine years before cohabitation. Justice Coleman dealt with it as a separate pool, using the asset-by-asset approach. Justice Coleman stated (at [16]) "that recent discussions of the Full Court suggest such an approach to be less heretical than in earlier times".

Justice Coleman held (at [24]) that: "Whilst the determination of contribution entitlements involves the exercise of a wide discretion, and does not readily permit mathematical precision, the figures indicated above are useful for present purposes".

He made an adjustment under s 75(2) in favour of the wife regarding the other assets. Her contribution to the asset pool (excluding $248,774 referable to the DFRDB pension) of $596,000 was 15.5%. A 10% adjustment was made for s 75(2) factors. The 10% figure equated to four years of the husband's superannuation pension payments.

***Trott & Trott* (2006) FLC ¶93-263**

Justice Watts assessed the wife's contributions to the Category 1 pension as 15%. The husband was a member of the fund for 10 years before the marriage. Relevant matters to the treatment of contributions before and after cohabitation included:

- the importance of the imbalance in initial contributions lessens as the period of cohabitation increases, even if there is equality of contributions during cohabitation[29]
- it was not practical or desirable to approach cases in a pseudo-mathematical way, but this was a "rough initial point of reference", and[30]
- it was "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".[31]

***Coghlan & Coghlan* (2005) FLC ¶93-220**

The Full Court considered the following matters to be relevant:

1. the relationship between years of fund membership and cohabitation
2. the actual contributions made by the fund member at the commencement of cohabitation (if applicable), at separation and at the date of hearing, and
3. preserved and non-preserved resignation entitlements at those times.

The Full Court's first point seemed to suggest that there may be life in a *West & Green* approach as a starting point to consider the initial contributions or post-separation contributions. However, the weight and effect of "time served" contributions had to be assessed in the context of the contributions made by each party. The second and third points might be important depending on the nature of the fund. Justice Watts did not, however, think that the *West & Green* approach fitted comfortably with how the court assessed contributions to other property.

On the *West & Green* formula, Watts J found that the wife's entitlements were 21.7% of the husband's superannuation. Justice Watts went on to assess the wife's contributions to the interest in the growth phase as 40%.

***M & M* (2006) FLC ¶93-281**

The parties separated after a 12-year marriage and had three children. About 2½ years after separation, the husband was medically discharged from the police force. His fortnightly pension, of approximately $1,900, was valued at $1,081,726. The net non-superannuation assets were $488,752.

The parties' superannuation was $1,098,071.

The trial judge ordered that the non-superannuation assets be divided 52.5%/47.5% in favour of the wife. The superannuation was not split.

The judgment was delivered before the Full Court delivered its judgment in *Coghlan & Coghlan* (2005) FLC ¶93-220.

Using the *West & Green* formula to assess the wife's contributions to the husband's superannuation, the trial judge found that the wife made an equal contribution to 13/20ths of it. She was therefore entitled to over $330,000. However, the trial judge only

awarded the wife $80,000 from the non-superannuation. His main reasons were:

- the husband was only entitled to a periodic pension
- the husband was not entitled to a large lump sum for at least 16 years, and
- a splitting order might be required if the adjustment was larger.

The Full Court used the *West & Green* formula as a rough rule of thumb, and concluded that insufficient weight was given to the wife's contributions.

The Full Court in *M & M* tried to close the door on formula approaches. It considered that the cases in which formulas can be usefully applied to an adjustment of non-superannuation assets, taking into account contributions to superannuation, were rare.

The strength of the Full Court's view was diminished by its finding that it could not order a super split as neither party sought one. It also found other advantages of not splitting superannuation. It adjusted for the husband's pension entitlement by giving the wife a greater share of the non-superannuation. The most the wife could secure for her $330,000 "contribution" to the husband's superannuation was about $158,000, being the husband's equity in the home, about double the amount ordered by the trial judge and less than 50% of the *West & Green* rough rule of thumb.

***Clives & Clives* (2008) FLC ¶93-385**

The Full Court considered pre-cohabitation and post-separation contributions by the husband to superannuation.

At the commencement of cohabitation, the husband had a superannuation entitlement then worth approximately $33,000. There was no dispute that the present day value of that initial financial contribution was $71,768.55. Expert evidence was given on the issue. The trial judge noted that the husband's initial contributions to his superannuation fund, at their present day value, represented 23% of its agreed value of $310,731.

The trial judge gave weight to the husband's contributions, but rejected a purely mathematical approach and divided the husband's superannuation 60% in favour of the husband and 40% in favour of the wife.

The Full Court considered the trial judge gave appropriate weight to the husband's greater pre- and post-cohabitation contributions to his fund, including his post-separation contributions of $122,000, but gave insufficient weight to the disparity in the parties' ages and, as a consequence, the number of years until the likely retirement of each party.

The Full Court held that the trial judge, when dealing with relevant matters under s 75(2), failed to consider the quantum of the splitting order he proposed to make in the wife's favour. The wife's superannuation entitlements would increase from $76,944 to $170,456 and the husband's entitlements reduce from $310,731 to $217,219. This omission constituted appealable error.

The Full Court assessed the husband's contributions to his superannuation fund to be approximately 62% or $191,249 and the wife's indirect contributions to be approximately 38%. Post-separation, there was a significant but unexplained increase in the husband's superannuation entitlement. The Full Court was hindered by the paucity of evidence from the husband in assessing his post-separation contributions. However, also relevant was that post-separation, the wife continued her role as primary carer of the children,

and that, as a result of the agreement between the parties to invest the net proceeds of sale of the matrimonial home in the wife's name, her income increased. As a result the husband's child support obligations were reduced, prima facie giving him greater capacity to contribute to his superannuation.

Under s 75(2), it was relevant that the husband, by reason of his age, had a shorter working life expectancy than the wife (the husband being age 49 years at the date of trial and the wife, 38 years). That factor balanced against the husband's present higher earning capacity to that of the wife.

The wife would have immediately available to her a capital entitlement retaining approximately $50,000 more from the net proceeds of sale of the matrimonial home than the husband and that she would receive additional superannuation by way of a splitting order of approximately $81,000. In all of these circumstances, no adjustment was made under s 75(2) to the husband's superannuation entitlements in favour of the wife. The splitting order was approximately $12,000 less than ordered by the trial judge.

***Steele & Stanley* [2008] FamCA 83**

A defined benefit fund was valued by a single expert on two different dates:

- date of separation — October 2004 at $670,729, and
- date of hearing — October 2007 at $815,222.

Justice Benjamin acceded to the wife's request to use the lower figure for assessing contributions, but used the higher figure for determining the pool. He took the difference into account as a factor under s 75(2)(o), *Family Law Act 1975* (Cth).

***Xu-Mao & Xu-Mao* [2009] FamCA 375**

The court was adjusting property interests three years after separation where the husband had the care of the two children post-separation while the wife lived overseas. Justice Cronin found that the contributions to non-superannuation assets were 70/30 in favour of the husband.

In relation to superannuation, Cronin J found the contributions were equal until the date of separation. As at the date of separation the husband's superannuation was $794,000 but 3½ years later it was $531,000. Justice Cronin considered all possible reasons for the disparity and concluded (at [42]–[43]):

> "The first of course is that the husband has continued to work and this is a defined-benefit fund. In addition he has had salary increases which have put him in the category that he now enjoys. In addition to that, the accumulation component has continued to amass some interest, presumably at government rates. However, offset against those increases has been the fact that there was seed capital, not only in terms of the value as at separation, but also that the husband has the position of employment that he does by virtue of the wife's contribution during the period of time that the parties were together.
>
> To that extent it is a little more difficult to try and quantify the contributions and, having regard to the totally different nature of non-superannuation and superannuation assets, I cannot find the same contributions. In this case I find the contributions favour the husband as to 60% and to the wife 40%".

Footnotes

Footnotes

23 *Tomasetti & Tomasetti* (2000) FLC ¶93-023.

24 *Bartlett & Bartlett* (1996) FLC ¶92-721.

25 *West & Green* (1993) FLC ¶92-395.

26 *Coghlan & Coghlan* (2005) FLC ¶93-220 at p 79,646.

27 For example, *Bremner & Bremner* (1995) FLC ¶92-560; *Pierce v Pierce* (1999) FLC ¶92-844.

28 For example, *Spiteri & Spiteri* (2005) FLC ¶93-214; *Williams & Williams* (1984) FLC ¶91-541.

29 *Bremner & Bremner* (1995) FLC ¶92-560.

30 *Clauson & Clauson* (1995) FLC ¶92-595.

31 *Pierce v Pierce* (1999) FLC ¶92-844.

PENSIONS IN THE PAYMENT PHASE

¶19-320 Dealing with pension payments

Pensions in the payment phase pose particular challenges to the court. The parties and the court have to wrestle with the challenge of a lump sum value being given to an entitlement which may never be commuted into a lump sum, and with the challenge of achieving an outcome that is just and equitable.

Some pensions are referable to a capital sum which can easily be identified. Other pensions are not. The valuation process gives a

capital value to a pension even if the member can never receive a lump sum.

The correctness of many of the cases discussed below which involve the valuation of a pension in the payment phase has been thrown into doubt by the Federal Court in the decision of *Campbell* v *Superannuation Complaints Tribunal* (2016) FLC ¶93-724. Justice Logan heard an appeal from the Superannuation Complaints Tribunal. He held that Mr Campbell's vested entitlement to an invalidity pension was, for the purposes of the Family Law (Superannuation) Regulations 2001 (FLS Regulations), an "accumulation interest". Mr Campbell was receiving invalidity benefits under the Military Superannuation Benefits Scheme (MSBS). He applied for information about his superannuation interest under the MSBS under s 90MZB (now s 90XZB) *Family Law Act 1975* (FLA) using a superannuation information form. The Commonwealth Superannuation Corporation (CSC) provided two responses: one with respect to his preserved benefit which was in the growth phase and one with respect to the invalidity pension which was in the payment phase.

Mr Campbell objected to receiving information with respect to his invalidity pension and argued that it was not superannuation. The Federal Court accepted that it was superannuation. It was not disputed that MSBS was a superannuation fund within the meaning of the SIS Act and thus, within the definition of s 90MD (now s 90XD) of an "eligible superannuation plan". That definition is "an interest that a person has as a member of an eligible superannuation plan".

However, Logan J found that the invalidity pension was not a defined benefit interest as reg 5(2) removed it from the scope of reg 5(1) because the pension was "only payable on invalidity".

Regulation 5(2) states:

> "A superannuation interest, or a component of a superannuation interest, is not a ***defined benefit interest*** for these Regulations if the only benefits payable in respect of the interest, or the component, that are defined by reference to the amounts or factors mentioned in subregulation (1A) are benefits payable on death or invalidity".

The effect of the determination of Mr Campbell's invalidity pension as an accumulation interest rather than a defined benefit interest on its value was not set out in the judgment. Justice Logan remitted the matter to the Superannuation Complaints Tribunal.

Prior to December 2002, the problem of dealing with a pension in the payment phase arose in cases such as *Perrett & Perrett*.[32] In *Perrett*, the Full Court refused to look at the husband's fortnightly Defence Forces Retirement and Death Benefits Scheme pension (DFRDB) as anything more than an entitlement to receive a series of fortnightly pension payments for the rest of his life. However, superannuation must now be "treated as property". The Regulations require it to be given a capitalised value if it is to be split.

In the 2003 case of *Cahill & Cahill*,[33] the husband had a DFRDB pension entitlement of just under $1,000 per fortnight. The husband's entitlement was valued at about $430,000. Justice Coleman said this was artificial. He said:

> "It is one thing to 'treat' superannuation as 'property' to enliven the jurisdiction of the Court to make an order in respect of superannuation, but another altogether to suggest that superannuation must be treated the same way as existing or tangible assets …".[34]

His Honour said he could not make a contribution finding in relation to the DFRDB figure. The substantial guaranteed income stream was, however, a powerful *Family Law Act 1975* (Cth) s 75(2) factor. This does not appear to be consistent with the four-step approach required under s 79.

The valuation provisions of the FLS Regulations (Cth) distinguish between allocated pension products and other pension products (such as fixed term or complying pensions). A similar distinction is made in Pt 7A of the Superannuation Industry (Supervision) Regulations 1994 (Cth).

The rationale for this distinction is based on the fact that allocated pensions are based on a set capital amount which is readily identifiable (and thus may be split with relative administrative ease).

A difficulty that arises in respect of an interest that is currently in the payment phase is that the FLS Regulations (Cth) contemplate that, *where a base* amount is stipulated, the first payment will be used to satisfy the interest of the non-member and, if this is deficient, a ratio of all future pension payments will be provided to the non-member.

It may be possible, depending on the fund, for the non-member to request a commutation of an interest in the payment phase (see ¶19-300). This may create certain difficulties in relation to the continuation of payments for the member, especially where the underlying sum is insufficient to provide ongoing payments.

There is no ability for trustees to recalculate minimum or maximum payments, in respect of allocated pension products that are subject to a split, at the time of the split.

Examples

***Trott & Trott* (2006) FLC ¶93-263**

The husband, a police officer, was entitled to a pension before the usual retirement age because of an injury he received after separation.

The single expert valued the husband's superannuation at about $1,809,000, but under the Regulations it was valued at about $1,865,000. The parties and the court accepted the lower value, seemingly contrary to s 90MT(2)(a) (now s 90XT(2)(a)).

The husband had two superannuation interests in defined benefit funds. One was a pension in the payment phase and the other was in the accumulation phase. Justice Watts said that it was important to analyse the "real nature" of the husband's superannuation, and the different contributions made to each interest.

The Category 1 interest was a CPI indexed pension which was currently $91,414.51 gross per annum. It was valued at about $1,390,000. The husband proposed that the wife receive 10% or about $180,000 of his superannuation by way of adjustment against other property. The wife sought variously 25%–50% of the superannuation and a 75:25 split in her favour of non-superannuation.

Justice Watts did not accept that giving a lump sum value to a pension had "an air of artificiality" (Coleman J in *Cahill & Cahill* (2006) FLC ¶93-253). It was reasonable to conclude that a similar purchase price was required to obtain an annuity with the income streams to which the husband was entitled. Prior to Pt VIIIB being introduced, superannuation was often undervalued.

The value of the superannuation under the FLS Regulations 2001 (Cth) differed from the single expert's valuation adopted by the parties and the court because, for example:

- the Regulations used a discount factor to age 65. Due to the injury, the husband was entitled to a pension until the age of 60

- the Regulations did not have a method to value the pension which might later be commuted
- the Category 2 superannuation had a different formula than it would have used had the husband worked to the usual retirement age, and
- the Category 1 superannuation was not based merely on the length of time in the fund. The circumstances of the injury and the amount of salary at the time of the injury were also relevant.

The wife sought a splitting order, but the husband did not. Justice Watts held (at [197]) that:

> "Much of the debate as to whether or not valuation methodology leads to 'a quite artificial and largely arbitrary exercise' is eliminated, if the facts of an individual case allow the utility of section 90MT(1)(b) [now s 90XT(1)(b)] to be used. I find that in this case it can be".

Based on contributions, he proposed a splitting order of 15% in the wife's favour of the Category 1 superannuation interest and a splitting order of 40% in the wife's favour of the Category 2 superannuation interest.

The trustee said that invalidity pensions were only splittable payments if they had been in the payment phase for more than two years. Provided the husband satisfied the definition of permanent incapacity, the single expert considered the pension payment was splittable. Justice Watts was satisfied that the husband was suffering from a permanent incapacity and was medically discharged from the police force on that basis. However, he also made an order against the husband personally.

***Glover & Glover (No 2)* [2009] FamCA 411**

In *Glover & Glover (No 2)* [2009] FamCA 411, the husband was receiving a DFRDB pension of $1,241 gross per fortnight with CPI increases. It was valued at $609,139. Justice Moore said (at [14]):

> "There is otherwise the husband's DFRDB entitlement which is a defined benefit interest in the payment phase. The single expert accountant … valued it as at 23 October 2007 at $609,139 … But whatever its capitalised value, the difficulty here is that there is no sufficient other property to give to the wife a proper apportionment of the capitalised value in recognition of her contributions. They have both resolved this difficulty by proposing the wife receive the whole of his net after tax entitlement for a period of 13 years, which is not without implications for obligations and entitlements related to child support, Centrelink benefits and income tax assessment. Those implications cannot be solved by orders here, but to the extent orders can address possible issues related to child support assessment they will be made. Of course the DFRDB payment she receives will be towards her property entitlement and the funds will already have been taxed in the husband's hands".

Justice Moore concluded that there was little realisable property to distribute and the parties recognised that part of the wife's entitlement had to be met by passing over to her the net amount received from the DFRDB entitlement.

The wife received:

- 60% of the cash = $37,200

- 60% total superannuation entitlements = $59,547 (therefore allocation of a base amount of $42,547), and
- $313,326 paid from the DFRDB entitlement over 13 years or shorter period.

Each party kept the chattels in their possession and their own debts.

Justice Moore said (at [27]):

> "Since the entitlement is to be passed through to the wife over those years and not paid in a lump sum, it is a flawed exercise to calculate the proportion this total sum bears to the its value according to Ms B but nonetheless it can be noted that $313,326 is a little over 51% of $609,139 or, to put it another way, it is close to 53% of the value attributed to the period of marriage of $593,750".

***Laporte & Penfold* [2008] FMCAfam 1093**

In *Laporte & Penfold* [2008] FMCAfam 1093, Brown FM ordered that the wife receive 25% of each of the husband's Comsuper pension payments.

The parties cohabitated for 28 years. There were two children. The husband was invalided out of his employment due to Crohn's disease. He received an annual indexed pension for life of about $325 per week. The pension entitlements had a capitalised value of $285,582.38.

The contributions during the marriage were assessed as equal but post-separation contributions towards the parties' non-superannuation assets favoured the husband.

Brown FM divided the parties' net non-superannuation assets 52%/48% in the husband's favour.

The husband argued that the parties' contributions towards the acquisition of his CSS pension should be assessed independently of their contributions to the other more conventional items of their property. As the pension resulted from his personal disability, he considered that his contributions towards that pension were intrinsically different from those made by the wife and should essentially be regarded as total.

Brown FM considered such an approach potentially inequitable to the wife, given the value of the husband's interest in the superannuation scheme, when compared with the value of the parties' other assets. In addition, there was no doubt that the husband's interest in the CSS pension was acquired by him entirely during the parties' marriage.

Brown FM said that the fact that the pension was triggered by the occurrence of a disability was no different from the situation where the payment was triggered by another factor, such as retirement or the attainment of a particular age, so far as the question of contributions towards that asset were concerned.

Whatever the ultimate outcome of the proceedings, the husband would retain a financial "*safety net*", which was a very significant resource. In his old age, he had some semblance of financial security. The parties had differing prospective needs. The wife had a far greater need to maintain and accrue capital, but the husband needed income. The situation would change when the wife retired from the workforce.

The difficulty was that the husband's CSS pension could only be split once. However, their prospective needs over the next 20 years or so were likely to change dramatically. The court needed to estimate the level of those needs in order to do individual justice to the parties when the split was being made shortly after the hearing.

A factor which militated in favour of an adjustment towards the husband, so far as the CSS pension was concerned, was that he had a greater need for a reliable stream of income than the wife over the next decade or so. That was potentially unfair to the wife as she was left with the prospect of living in penury, compared to the husband, in her retirement and old age. Her major source of income would be social security, whereas the husband would have a greater superannuation pension as well as access to either the aged pension or disability support pension.

Brown FM was not satisfied that any adjustment was merited in favour of either party under s 75(2) in respect of their non-superannuation assets. The issue was more complicated with respect to the CSS pension. It was fundamentally inequitable to the husband if his recurrent income was dramatically reduced by half as he was so significantly incapacitated. However, the wife was a low income earner on a salary of around $30,000 per annum. She had limited scope to make provision for her retirement but, in comparison to the husband, her income situation, although modest, was vastly superior.

It was impossible to ascertain precisely how long the wife had to prepare for her retirement and so for how long the inequality in the parties' respective income positions would remain. Brown FM apportioned a 25% split to the wife from the CSS pension. The husband was left with pension income of around $12,700 indexed. The wife could divert her recurrent income of around $4,200 per annum into superannuation.

Brown FM considered that as a result of the orders there was some prospect of the parties having an approximately equal income in retirement.

***Winn & Winn* [2011] FamCA 501**

The trial judge refused to accept a valuation of the husband's superannuation interests under the Regulations. The valuation assumed that the husband, aged 58 years, would live to approximately 80 years and the pension would continue until that time. The medical evidence was that, at best, he would live until his seventies or perhaps a further five years. The valuation under the Regulations was $774,265. Justice Johnston took the mid-point of the single expert's calculations based on age 65 and age 70 which gave a figure of $383,534. His Honour declined to make a splitting order as:

1. There was ample non-superannuation property to do justice and equity without a splitting order.

2. The husband's pension was his only source of income and was reduced by a split.

3. The wife had significant superannuation and well-paid expenses.

In addition, although this reason was not given by the trial judge, by not splitting superannuation, the valuation under the Regulations did not need to be used.

***Craig & Rowlands* (2013) FLC ¶93-535**

The Full Court considered an appeal by the husband in proceedings involving a DFRDB. The facts and law were very similar to *Semperton v Semperton* [2012] FamCAFC 132.

The Federal Magistrate treated the husband's DFRDB entitlement as if it were a capital sum capable of actual distribution and adopted a two pool approach when identifying the property for distribution.

The Full Court concluded that the Federal Magistrate failed to demonstrate an appreciation of the different character or real nature of the DFRDB in the final stage, together with the necessary assessment of whether the orders were just and equitable.

The Federal Magistrate "double counted" the DFRDB by determining the parties' entitlement to it in one separate pool, then having regard to it again as a s 75(2) factor in the division of the other pool.

In both instances, the Full Court concluded that appealable error was demonstrated. See also *Semperton & Semperton* [2012] FamCAFC 132.

***Linch & Linch* [2014] FamCAFC 69**

The Full Court of the Family Court upheld an appeal against a finding that the wife's contributions to the husband's invalidity pension entitlements were 15% and an order that for other reasons the splitting order in favour of the wife should be a figure slightly less than 15%. The trial judge had failed to give adequate reasons for the 15% contribution based entitlement and failed to consider the effect of the split on the husband of the reduction of his income.

***Surridge & Surridge* [2015] FamCA 493; (2017) FLC ¶93-757**

The trial judge adopted a two-pool approach with the wife's pension being a discrete second pool and the parties' other superannuation and non-superannuation assets being in the primary pool. The wife was in receipt of a hurt on duty pension under the *Police Regulation Superannuation Act 1906* (NSW). She was receiving a pension of about $1,000 per week net at the time of trial.

The wife was aged 46 and her eligible service period commenced in June 1987. The parties commenced a relationship in 1991 and married in 1996. They separated in August 2012. Contributions to the primary pool were assessed as equal. A s 75(2) adjustment of 12½% was made in favour of the wife who had the continuing care of the children aged 12 and 16 with little prospect of financial support from the husband. The s 75(2) adjustment also took into account unexplained funds received and disbursed by the husband of $800,000.

The value of the wife's future pension was determined according to fund specific factors at $1,022,821. No lump sum was payable in the future to her but the effect of a splitting order was to allow an immediate lump sum to be paid to the husband or for a roll-over of that lump sum to another superannuation fund or a combination of the two. The effect of any spitting order was to commensurately reduce the wife's pension.

The trial judge found that the wife's contribution-based entitlement to the income stream was overwhelming and it was difficult to find any contribution-based entitlement of the husband. The pension was in effect unearned income, indexed and payable during the wife's lifetime. The consequence of any splitting order of the pension entitlement was to commensurately reduce the wife's pension and procure an immediate cash payment to the husband leaving the wife with the reduced periodic income.

A modest adjustment of 5% in relation to the wife's pension was made in favour of the husband which equated to an approximate lump sum of about $20,000. The outcome of the orders was that the wife had a cash equivalent of about $1,621,250 from the primary pool less an adjustment of $20,000 in favour of the husband from the pension pool leaving a net figure of $1,601,250. She otherwise retained her pension intact. The husband had an entitlement of $993,050 including the $20,000 adjustment of the wife's pension.

On appeal, the Full Court found that the trial judge's approach to the wife's hurt on duty pension was erroneous, even though both parties urged him to adopt that approach. Even though no ground of the wife's appeal referred to the error, their Honours considered it to be "a matter of significance and is productive of injustice. We consider ourselves bound to correct it" (at [13]). The Full Court found that it was not just and equitable to make a splitting order in respect of the wife's pension and stated (at [27]) that there was "… a compelling case for not doing so".

The reasons for this conclusion were:

1. Importantly, the property and superannuation interests of the parties permitted justice and equity to be achieved without such an order. The wife had only a possible residual capacity for some form of future part-time employment, her pension income of $50,000 per annum was modest and she had the continuing full-time care of two children, including one aged 12. She had little prospect of receiving child support or other financial assistance from the husband, although he had a significant earning capacity.

2. Once the trial judge determined not to make a splitting order, there was no requirement to value the interest (s 90MT — now s 90XT).

3. The wife could never receive the calculated lump sum amount in specie. Nor could she commute any part of the pension to a lump sum. Her only entitlement was to an income stream for so long as she remained entitled to receive the pension. If no splitting order was to be made but an assessed percentage entitlement was attributed to the lump sum on account of the husband's contributions (even if those contributions were assessed to be modest as the trial judge considered them to be), the husband was receiving a lump sum entitlement from a lump sum that the wife could never receive.

4. The pension was taxed, but the scheme-specific methodology by which the capital sum was calculated referred to the gross amount of the pension.

5. If the wife's pension was to be included in the parties' assets and liabilities, even if part of a separate pool, her very significant contributions to it needed to be considered and the trial judge did not do so.

6. The proper way to deal with the wife's pension was under s 79(4)(e) as income in the hands of the wife.

There was no actuarial assessment of the "value" of the projected income stream of the husband of $340,000 per annum based on his earning capacity (as he had chosen not to work, his projected income was irrelevant), to compare to the lump sum calculation of the wife's pension income stream.

The Full Court increased the wife's entitlements overall to 75% by way of a s 90(4)(e) adjustment of 25%, mainly because of large transactions made by the husband which were unexplained and significantly depleted the pool. They could not be precisely quantified because of the husband's attempt to mislead the wife and the court.

***Janos & Janos* [2013] FamCA 846**

The property pool was modest and the husband's superannuation was the most significant part of it. The husband was aged 58 and in receipt of an invalidity pension of

$900 per week. It had been valued at $631,767 for family law purposes. At aged 60, he could commute the whole of his pension entitlement to a lump sum of $225,000 or commute part of it only.

The Family Court accepted that there should be a notional add-back of certain assets to the property pool, as the husband had either wasted assets or given no explanation as to how they had been dissipated. The adjusted property pool, including the add-backs and using the commutation value for the superannuation rather than the family law value, was only $305,640. The Family Court said (at [39]):

> "Otherwise the valuation obtained is a capitalisation of a future income stream which, if included in the asset pool, would result a distortion in relation to the available assets of the parties for division".

For the wife to receive 60% of the property pool, she was entitled to a superannuation split of 80% of the commuted lump sum. Although that would reduce the husband's income in circumstances where the wife, aged 49, had an income of $60,000 per annum, the husband was in receipt of workers' compensation payments of about $28,600 per annum. There was no evidence to support his assertion that he had no capacity for employment following his recovery from heart surgery. He would receive the balance of his superannuation pension indexed for life.

The Family Court, in relying on the commutation value of the pension rather than the family law value, said (at [164]):

> "The capitalised value of the pension is significantly in excess of its realisable value on commutation".

***Russo & Wylie* (2016) FLC ¶93-747**

The Full Court said that the difficulties faced by the trial judge in dealing with the husband's Military Superannuation Benefit Scheme defined benefit interest ("MSBS benefit") were compounded by the fact that both parties asked him not to make a splitting order in relation to the benefit and they each took different approaches to dealing with it. The husband sought that it be excluded from the pool but the wife sought that it be included.

The pension was $33,531 per annum indexed and had been valued at $416,804 for family law purposes. The Full Court referred favourably to the distinction made between the exercise of the property power under s 79(4) and 75(2) (in this case, as it was a de facto relationship, s 90SM(4) and 90SF(3)). The Full Court upheld the trial judge's approach which was to consider the husband's pension as not being property available for distribution (while the wife's was), that the parties made equal contributions to the pool of $1,554,236 and giving the wife 7% or $103,000 for s 90SF(3) factors which meant that she was left with approximately $200,000 more in available assets than the husband.

The Full Court said (at [54]):

> "Whilst, of course, orders under s 90MT [now s 90XT] must be made judicially, there is nothing in either s 90MS [now s 90XS] or s 90MT [now s 90XT] that evinces an overarching obligation to make orders that are just and equitable regardless of the wishes of the parties. It is to be recalled that it is implicit in the parties' requests that the court make orders other than superannuation splitting orders that the parties accepted such orders would be just and equitable".

***Welch & Abney* (2016) FLC ¶93-756**

The Full Court allowed the appeal of the wife against the manner in which the trial judge dealt with her non-commutable Total & Permanent Disability Pension (TPD). The grounds upon which the wife's appeal succeeded were that the trial judge fell into error in the following respects:

(a) by adopting, as the present value of the TPD pension, the capitalised amount determined pursuant to s 90MT(2) (now as 90XT(2)) FLA. This value (or, more accurately, "amount") is mandated solely for the purpose of a splitting order of a superannuation interest being made. No splitting order was made by the trial judge and therefore the trial judge was not required to use that value or amount

(b) by disregarding the evidence of the single expert as to the TPD pension entitlement being considered in a similar manner to earnings from employment, and that expert's evidence as to the different nature of the TPD pension entitlement from normal superannuation interests

(c) as a consequence of (a) and (b), ignoring the imposition of taxation upon the TPD pension and making orders which left that substantial burden entirely with the wife, and

(d) as a consequence of (a) and (b), ignoring contingencies operative upon the TPD pension and making orders that left those contingencies entirely with the wife and, conversely, relieved the husband of any impact of them.

The TPD pension was paid to the wife in monthly gross sums liable to taxation. The wife could not commute any part of the pension into a capital lump sum. It was not a guaranteed fixed-term or life-time pension. Its continued receipt was subject to conditions. She was 49 years of age at the time of trial and she might continue to receive the pension until she attained the age of 65 years. However, her continued receipt of the pension was contingent upon her continued survival, and upon medical assessments from time to time confirming her continued incapacity for gainful employment and the wife not in fact undertaking gainful employment. The single expert confirmed that if the wife ceased to be eligible to receive the disability pension "tomorrow", then his calculation of the disability pension amount would be a "nil" value.

The Full Court followed *Semperton & Semperton* [2012] FamCAFC 132 and *Hayton* v *Bendall* [2010] FamCA 592 where the Courts emphasised that it was important to consider the "nature, form and characteristics" of the superannuation interest.

The effect of the trial judge's orders where the capital value of the TPD pension was ascribed a value of almost $980,000 (or 34.8% of the total of the parties' combined property interests), was that the wife received net non-superannuation property of $368,608 while the husband received $1,119,111. The majority of the wife's 60% entitlement was constituted by the capital value ascribed to the TPD pension.

The Full Court also found that the trial judge fell into error by not considering the wife's contributions to the TPD pension. If her pension was to be taken as part of a global assessment of contributions and its value equated to 34.8% of the trial judge's determination of the overall pool, it was an error for the trial judge to find that the wife's contributions were only "modestly greater" than those of the husband. The matter was remitted for re-trial.

***Jarvis & Seymour* [2016] FCCA 1676**

The husband, supported by the evidence of a single expert as to the value of his superannuation, argued that there should be three pools: the non-superannuation pool, the invalidity superannuation benefit of the husband and the retirement superannuation benefit of the husband. The wife contended that there should be only two pools: the superannuation pool and the non-superannuation pool.

Although Altobelli J acknowledged that in other cases involving a hurt on duty pension, such as *Schmidt & Schmidt* [2009] FamCA 1386, a distinction was drawn between the invalidity benefit and the retirement benefit, he declined to do so in *Jarvis*. Justice Altobelli had difficulty adopting the distinction for a number of reasons:

- The expert's report made assumptions about the husband's retirement age and whether he would take any benefits as a pension-only or commute to a lump sum and if so, at what age. There was no evidence led by or for the husband about these matters.

- The valuation of the husband's superannuation as two components — retirement and invalidity — did not total the valuation of the interest as a whole.

To value the invalidity component of the husband's superannuation in that manner suggested by the single expert was to take a legalistic and technical approach to the assessment of the wife's contributions to his hurt on duty pension and had the potential to distract the court from its fundamental task under s 79(2) which was to make an order that was, in all the circumstances, just and equitable. Section 79(4) requires the court to consider "the very broad ranges of contribution set out in s 79(4)" (at [88]).

***Goudarzi & Bagheri* [2016] FamCA 205**

The husband was receiving a pension of $3,068 per week. It was valued at $2.03m, which was equivalent to about 14% of the property pool. The court did not deal with it as an asset, but as a financial resource. This was because it was payable over the lifetime of the husband, whatever that period was, and was not presently available as a lump sum. A s 75(2) adjustment of 20% was made in the wife's favour, the majority of which was on account of the husband's pension. Her total property entitlements were determined at almost $8m and the husband retained $6.5m of property plus his pension.

***Goudarzi & Bagheri (No 2)* [2017] FamCAFC 190**

The extent to which the recent cases that deal with a pension in the payment phase as an income stream and a financial resource rather than an asset available for distribution is unclear. The Full Court in *Goudarzi* confirmed this uncertainty (at [4]) and discussed the different approaches, and referred favourably to the majority in *Semperton & Semperton* [2012] FamCAFC 132, acknowledging the wide discretion invested in a judge in the position of the primary judge (*Norbis v Norbis* (1986) FLC ¶91-712; [1986] HCA 17; (1986) 161 CLR 513).

***Regan & Regan* [2017] FamCA 406**

At trial, the husband's hurt on duty pension had an agreed value of approximately $1,424,000. Following the handing down of *Campbell & Superannuation Complaints Tribunal* (2016) FLC ¶93-724, the valuation became an issue in dispute. The case was re-opened and further evidence admitted. The trial judge determined that if the superannuation interest had been in the growth phase, it would have been characterised as an accumulation interest, whereas previously it would have been

considered to be a defined benefit interest.

As the interest was a pension in the payment phase, the valuation method set out in the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* applied if the pension was a "pension payable for the life of the member spouse". If the benefit did not fall within that description, there was no specified method in the regulations.

The parties agreed that the pension would continue for the husband's life, unless an interrupting event occurred. The interrupting events included the husband's incapacity ceasing and the option at either 55 or 60 years of age to commute part or all of his pension into a lump sum. He was aged 49 at the time of trial.

There was no evidence that the husband would ever be fit to return to work as a public servant. The wife contended that the husband had capacity for work other than as a public servant, but if he was able to work, the nature of the pension was that it would continue and would be supplementary to his wage.

As the pension arose from the husband being hurt on duty, it was not readily amenable to assessment in terms of contribution. The wife's contributions to it were assessed as 5%, which was close to 50% of the wife's superannuation entitlements of $129,000, which the trial judge found the parties had contributed to equally. The wife received a 20% loading for s 75(2) factors on top of her contribution-based entitlements with respect to the non-superannuation pool.

The outcome was that:

- the wife received 72.5% or $777,635 of the non-superannuation property pool and the husband received $294,965
- the wife received 8% or $129,000 of the superannuation, whereas the husband received a pension with a capitalised value of $1,418,302, and
- the wife received 35% or $978,080 of the total pool, whereas the husband received 65% or $1,845,821.

Footnotes

32 *Perrett & Perrett* (1990) FLC ¶92-101.

33 *Cahill & Cahill* (2006) FLC ¶93-253.

34 Ibid, at p 80,303.

Footnotes

1 Based in part on commentary written by Scott Charaneka for *Australian Family Law and Practice*.

Part D — Financial agreements

FINANCIAL AGREEMENTS

FRAUD

VOID, VOIDABLE OR UNENFORCEABLE

Editorial information

Written by Jacqueline Campbell

¶20-000 Introduction

Parties who agree on issues of property and maintenance can finalise these arrangements either in consent orders or in an agreement.

A financial agreement is usually the only option for a couple that has not separated. They can be made by couples who are:

- intending to marry
- intending to live in a de facto relationship
- are married and not separated
- are living in a de facto relationship and not separated
- are married and separated but not divorced
- were living in a de facto relationship and have separated, and
- are divorced.

A financial agreement may also give more certainty for parties wanting to finalise maintenance by ousting the jurisdiction of the court to make maintenance orders.

If a financial agreement is binding, it ousts the jurisdiction of the Family Law Courts to make orders about property, maintenance or both.

The court does not have jurisdiction under Pt VIII (Property, maintenance and maintenance agreements) of the *Family Law Act 1975* (Cth) in relation to financial matters and financial resources to which a financial agreement under Pt VIIIA applies (s 71A).

The court does not have jurisdiction under Div 2 of Pt VIIIAB (Financial matters relating to de facto relationships) in relation to maintenance, property and financial resources to which a Pt VIIIAB financial agreement applies (s 90SA(1)).

¶20-010 Legislation

Married couples

The *Family Law Amendment Act 2000*, which commenced on 27 December 2000, inserted a new Pt VIIIA (Financial Agreements) into the *Family Law Act 1975* (Cth) (FLA). Part VIIIA provides for four types of financial agreements categorised according to the time they are made:

- before marriage (s 90B)
- during marriage but before separation (s 90C)
- during marriage but after separation (s 90C), and
- after divorce (s 90D).

De facto couples

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* inserted a new Pt VIIIAB into the FLA from 1 March 2009. There are three types of financial agreements categorised according to the time they are made:

- before a de facto relationship commences (s 90UB)
- during a de facto relationship (s 90UC), and
- after a de facto relationship ends (s 90UD).

Superannuation agreements are made under s 90XH (formerly s 90MH).

Termination agreements

Termination agreements can also be made (s 90J or s 90UL). They are one way to end a financial agreement. They are discussed further at ¶20-250.

Other methods of ending a financial agreement are discussed at ¶20-220.

Matters covered by an agreement

A financial agreement under Pt VIIIA or Pt VIIIAB may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property (s 90XH(1) — formerly s 90MH(1)).

Financial agreements can deal with four types of matters:

1. How property and financial resources are "dealt with" (s 90B(2)(a), 90C(2)(a), 90D(2)(a), 90UB(2)(a), 90UC(2)(a) and 90UC(2)(d)).

2. Maintenance (s 90B(2)(b), 90C(2)(b), 90D(2)(b), 90UB(2)(b), 90UC(2)(b) and 90UD(2)(b)).

3. Matters "incidental or ancillary to" the above matters (s 90B(3)(a), 90C(3)(a), 90D(3)(a), 90UB(3), 90UC(3) and 90UD(3)).

4. Other matters — Pt VIIIA only and if made after 1 November 2008 (s 90B(3)(b), 90C(3)(b) and 90D(3)(b)).

In de facto relationships, a financial agreement cannot deal with property acquired post-separation. In married relationships, a financial agreement cannot deal with property acquired after divorce.

It is arguable that s 90D(3) and 90UD(3), which allow a financial agreement to deal with "matters incidental or ancillary" to those mentioned in s 90D(2) and 90UD(2), can deal with post-divorce or post-separation property. There is, however, a strong argument that

they cannot do so because post-divorce and post-separation property appear to have been deliberately excluded from the legislation. The reason for the exclusion is unclear save that in relation to de facto relationships, it was a limitation on the referral of powers by the states.

See also ¶20-110 and ¶20-120.

If there is a Pt VIIIA financial agreement, Pt VIII does not operate in relation to "financial matters" (s 71A(a)) or "financial resources" (s 71A(b)) covered by the agreement. If there is a Pt VIIIAB financial agreement, Pt VIIIAB does not operate in relation to maintenance, property or financial resources covered by the agreement (s 90SA(1)).

In *Stanford* v *Stanford* (2012) FLC ¶93-518, the High Court confirmed that both property and maintenance orders can be sought by parties in an intact marriage (although not in an intact de facto relationship). A financial agreement is binding on parties who are not separated with respect to how property and financial resources are dealt with as provisions in a financial agreement relating to those matters are only effective when a separation declaration is made under s 90DA(1).

¶20-015 Practical tips

The following is a checklist for drafting a financial agreement:

1. Check the names of the parties are correct.

2. Check the section of the *Family Law Act 1975* (Cth) (FLA) under which the agreement is made is correct, eg s 90B or s 90C. The parties' circumstances may have changed since the first draft.

3. Read that section of the FLA and check that the matters covered by the agreement can be included.

4. Is it necessary to update disclosure or lists of assets and liabilities since the first draft?

5. Have detailed and contemporaneous file notes of conferences, including the time the conferences started and ended and who was present.

6. Give the client a letter of advice about the final version of the agreement a few days before the agreement is signed. A formal letter is better than the informality of an e-mail.

7. Update the advice if amendments are made to the agreement, making sure that the advice is given in relation to the final version of the agreement, not just the amendments.

8. Do not include general statements in the agreement which are not true — eg mutual disclosure has occurred, party able to support themselves without Centrelink.

9. Follow s 90G(1) (s 90UJ(1)). Look at the wording of this section before your client comes into the office to sign the agreement, when you write to the other lawyer and before you close the file. Create a checklist and keep it on the file.

10. Avoid, if possible, provisions relating to superannuation in agreements entered into before separation, as the s 90XJ(1) (formerly s 90MJ(1)) requirements may not be met.

11. Post-separation, finalising a property settlement in court orders is almost always preferable. A financial agreement ousting the jurisdiction of the court to deal with spousal maintenance may be a useful adjunct. The proviso to this is that the impact of *Thorne v Kennedy*, if any, on s 79A is unknown. Will it be easier to set aside orders for undue influence or unconscionable conduct than it has been for duress? Are they “any other circumstance” in s 79(1)(a)?

12. Property acquired after the end of a de facto relationship or after a divorce cannot be dealt with in a financial agreement.

13. If there are spousal maintenance provisions, ensure you have complied with s 90E or 90UH and s 90F or 90UI.

14. If it is a Pt VIIIAB financial agreement, make sure there is a de facto relationship in existence or that one will exist. If it is a s 90B

agreement, there needs to be a marriage before the agreement can be effective.

15. Check for uncertainties and inconsistencies in drafting. Use terms which are in the FLA.

16. Have another senior lawyer read the agreement.

17. Have you covered all the assets and potential assets?

18. Have you read the most recent cases on financial agreements, particularly of the Full Court and the High Court?

19. Are there potential claims in overseas jurisdictions now or later?

20. If the parties may have children, then provide for this.

Following the High Court judgment in *Thorne v Kennedy* (2017) FLC 93-807, while there are many uncertainties, some further matters can be added to the above checklist:

21. The High Court listed six factors (which were not intended to be exclusive) which will have prominence in assessing where there has been undue influence in the particular context of pre-nuptial and post-nuptial agreements. They need to be considered when taking instructions, negotiating, drafting and advising on financial agreements. They are repeated here because of their importance:

    21.1. whether the agreement was offered on a basis that it was not subject to negotiation

    21.2. the emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or to end an engagement

    21.3. whether there was any time for careful reflection

    21.4. the nature of the parties' relationship

    21.5. the relative financial positions of the parties, and

21.6. the independent advice that was received and whether there was time to reflect on that advice.

22. The stronger party should be prepared to negotiate the terms. A “take it or the relationship ends” approach means that the agreement is more likely to be set aside.

23. Ensure there is mutual disclosure

24. There should be time for careful reflection about the terms of the agreement, but the High Court did not say how long this should be. It is likely to vary according to the weaker party’s level of education and literacy, the terms of the agreement and other matters.

25. The terms of an agreement which is “a bad bargain” for one of the parties may be relied on to help establish or as an indicator of undue influence or unconscionable conduct. Why else would they have entered into it?

26. An agreement that gives an outcome which is within the broad range of the broad discretion given under s 79 or s 90SM FLA to make a property settlement order is more likely to withstand scrutiny than one which is “unfair and unreasonable”.

27. Accept that the advice requirement in s 90G(1) is important and if there is a “bad bargain”, the absence of advice may mean that it cannot be “saved” under s 90G(1A).

28. If an agreement entered into before the commencement of a relationship or a marriage was affected by undue influence or unconscionable conduct, an agreement entered into after the relationship or the marriage commences is likely to be affected by the same vitiating factor.

29. Be wary of false declarations in recitals, such as:

29.1. a party is able to support themselves without an income-tested pension or benefit when they clearly cannot

29.2. there has been mutual disclosure when there has not, and

29.3. a mutual waiver of the right to disclosure, particularly when the parties have unequal bargaining power.

¶20-020 Requirements for financial agreements

A financial agreement must meet the specific requirements of Pt VIIIA or Pt VIIIAB of the *Family Law Act 1975* (Cth) (FLA), although the requirements in s 90G(1)(b), (c) and (ca) and 90J(1)(b), (c) and (ca) are subject to s 90G(1A) and 90UJ(1A) respectively and the agreement may be found by a court to be binding despite the requirements not being met. If an agreement does not meet these requirements, it will not be a financial agreement for the purposes of Pt VIIIA or Pt VIIIAB and will not be binding on either the parties or the court.

In order to satisfy the requirements of an agreement under Pt VIIIA or Pt VIIIAB of the FLA, the agreement:

1. Must be in writing (s 90B(1)(a), 90C(1)(a), 90D(1)(a), 90UB(1)(a), 90UC(1)(a) or s 90UD(1)(a)).

2. Must specify whether it is made under s 90B, 90C, 90D, 90UB, 90UC or s 90UD.

3. Must be signed by all parties (s 90G(1)(a) or s 90UJ(1)(a)).

4. Must be between parties:

   – “who are contemplating entering into a marriage with each other” and one or more other people (s 90B(1)(a))

   – “to a marriage” and one or more other people (s 90C(1)(a))

   – “to the former marriage” and one or more other people (s 90D(1)(a))

   – “who are contemplating entering into a de facto relationship

with each other" (s 90UB(1)(a))

– who are "in a de facto relationship" (s 90UC(1)(a))

– to a de facto relationship which has broken down (s 90UD(1)(a)).

It appears that an agreement can be entered into by parties who are intending to enter a de facto relationship (s 90UB) or in a de facto relationship (s 90UC) and also cover the couple once they are married (s 90C). See *Cording & Oster* [2010] FamCA 511; *Piper & Mueller* (2015) FLC ¶93-686. It is, however, common for parties to enter into two separate agreements if they want an agreement as de facto parties (under s 90UB of Pt VIIIAB) and as a couple contemplating marriage (under s 90B of Pt VIIIA). This appears to be the best practice, as it ensures:

- that the requisite advice is given in relation to each type of agreement, and

- that if one agreement is found not to be binding or set aside, the other agreement may still stand and is not necessarily tainted by the other agreement.

However, the Full Court in *Piper & Mueller* (2015) FLC ¶93-686, in two separate judgments determined that an agreement could be under both Pt VIIIA and Pt VIIIAB of the FLA. The parties were in a de facto relationship and also engaged to marry. As they had not married, whether the agreement would still be valid if they were married did not need to be determined.

If the parties declare in the financial agreement that they are in a de facto relationship, but are not in one, the agreement will not be binding. In *Teh & Muir* [2017] FamCA 138, the parties entered into a financial agreement under s 90UC. The court found that they were not in a de facto relationship at the time and had never been in one, so the agreement was not binding.

5. Must deal with property, financial resources and/or spousal

maintenance of the parties or “matters incidental or ancillary” to those matters (s 90B(2), (3), 90C(2), (3), 90D(2), (3), 90UB(2), (3), 90UC(2), (3) and 90UD(2), (3)). Agreements under s 90B, 90C or s 90D can deal with “other matters” if made on or after 21 November 2008. However, “other matters” cannot be dealt with in Pt VIIIAB financial agreements.

6. Cannot cover matters dealt with in a previous agreement between the parties which is still in effect (s 90B(1)(aa), 90C(1)(aa), 90D(1)(aa), 90UB(1)(b), 90UC(1)(b) and 90UD(1)(b)).

7. Must be between parties who have been given independent legal advice provided by a legal practitioner before the agreement was signed to that party about:

   – the effect of the agreement on the rights of that party

   – the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement (s 90G(1)(b) or s 90UJ(1)(b)).

8. Must be between parties who have been provided with a signed statement by the legal practitioner stating that the advice was provided (s 90G(1)(c) or s 90UJ(1)(c)).

9. A copy of the statement must have been provided to the party or to a legal practitioner for the other party (s 90G(1)(ca) or s 90UJ(1)(ca).

10. Cannot have been terminated or set aside by a court (s 90G(1)(d) or s 90UJ(1)(d)).

11. Must have a separation declaration in certain circumstances:

   – the financial agreement deals with property or financial resources and the parties are not divorced (s 90DA(1)(a) or s 90UF(1)), or

   – if the parties are splitting superannuation above a certain

balance in the financial agreement (s 90XP and 90XQ — formerly s 90MP and s 90MQ), and

12. Under s 90UB, 90UC or s 90UD, the agreement must be between parties who are ordinarily resident in a participating jurisdiction when they make the agreement (ie one or both parties must not be ordinarily resident overseas or in Western Australia).

Sections 90G(1)(b) and 90UJ(1)(b) are unclear as to whether the advice must be given to both parties before either party signs the agreement, but the court and legal practitioners appear to assume that the advice can be given to a party signing the agreement after the first party has already received their advice and signed. In *Sawyer & Sawyer* [2011] FMCAfam 610, the court accepted that the wife received advice on the agreement after she signed it, rather than before, so the requirements of s 90G(1) were not met.

Since the commencement of the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* on 4 January 2010, failure to comply with s 90G(1)(b), (c) or (ca) or s 90UJ(1)(b), (c) or (ca) may not be fatal to the binding nature of the agreement (s 90G(1A) or s 90UJ(1A)). The court can declare that the agreement is binding on the parties if it is satisfied that it would be unjust and inequitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made), (s 90G(1A) and 90UJ(1A)). This means that, despite non-compliance with the advice and certificate requirements, the court can declare an agreement to be binding. Sections 90G(1C) and 90UJ(1C) allow the court to consider the equitable principles under s 90KA (or s 90UN) in any enforcement proceedings about the validity of such an agreement. The meaning of the transitional provisions was discussed in *Senior & Anderson* (2011) FLC ¶93-470, *Parker & Parker* (2012) FLC ¶93-499, *Wallace & Stelzer* (2013) FLC ¶93-566 and *Weldon & Asher* (2014) FLC ¶93-579.

Separation declarations are discussed in more detail at ¶19-210.

A termination agreement has similar requirements (see ¶20-260).

Example

***Adame & Adame* [2014] FCCA 42**

The agreement was executed after the January 2010 amendments. The original executed agreement was not in evidence. The husband possessed it last but was unable to produce it. The wife's legal practitioner said he never received a copy of the agreement signed by the husband nor the Statement of Independent Legal Advice. The wife's uncontradicted evidence was that the first time she saw a fully executed copy of the agreement was when the husband's lawyers sent it to her lawyers three years after she signed it. The agreement was not set aside on grounds relating to these matters (although it was set aside) but the actions of the legal practitioners did not demonstrate best practice.

¶20-025 Compliance with State and Territory legislation

The relevance of state contract legislation and federal contract legislation to financial agreements under the *Family Law Act 1975* has not been fully argued or decided.

Agreements entered into in New South Wales are arguably subject to the *Contracts Review Act 1980* (NSW). In *Noll & Noll and Anor* [2011] FamCA 872, the wife argued that the *Fair Trading Act 1999* (Vic) was relevant. The argument was put, but not resolved.

In *Zagar & Hellner* [2016] FamCA 224, the applicant argued that the agreement should be set aside pursuant to s 7 of the *Contracts Review Act 1980* (NSW). Justice McClelland did not need to decide this as he had already determined that the agreement should be set aside for unconscionability, but he said (at [130]–[131]):

> "I am, however, of the view that s 90UM of the FLA sets out an exclusive legislative framework for the Court to follow in contemplating whether to set aside a financial agreement entered into by parties to a de facto relationship which is given force and effect under the FLA by virtue of the transitional Act.
>
> In arriving at that conclusion, I have had particular regard to the opening words of section 90UM which empowers the Court to set aside a financial agreement 'if and only if' the Court is satisfied in respect to the matters thereafter set out in that section".

Justice McClelland was dealing with a Domestic Relationship

Agreement made under Pt IV *Property (Relationships) Act 1984* (NSW), which he had found to be a financial agreement for the purposes of s 90UJ *Family Law Act 1975* (Cth). He looked at s 88(2) of the transitional provisions (*Family Law Amendment (De Facto Financial Matters & Other Measures) Act 2008*) and said [at 133]:

> "That provision confirms that, in the period subsequent to the commencement of the transitional Act, the Agreement is taken to be a Part VIIIAB financial agreement, and is no longer an agreement under the NSW Act. As such, the Contracts Review Act no longer has application to the Agreement".

In *Reed & Reed* [2016] FCCA 1338, Riethmuller J considered that the Federal Circuit Court had jurisdiction to deal with the husband's claims against his former solicitors. He found that it could do so because it had:

1. Original jurisdiction pursuant to the *Trade Practices Act 1974* (now *Competition and Consumer Act 2010* (Cth)) and the accrued jurisdiction with respect to that claim, and

2. Accrued jurisdiction as a result of its jurisdiction to deal with the financial agreement under the Family Law Act.

As a result of the wife's claims that the agreement was not binding or should be set aside, the husband sought to join the partners of the law firm who prepared the financial agreement on his behalf and the solicitor who provide the advice to the wife to the proceedings.

The husband's claims against his former solicitors were in contract, tort, pursuant to the *Trade Practices Act 1974* and pursuant to the *Fair Trading Act (Vic) 1999*. The proceedings against the solicitor who gave advice to the wife were pleaded pursuant to s 9 Fair Trading Act, as being conduct that was misleading or deceptive on the basis of the certificate that he signed, certifying that he had given independent legal advice to the wife. The husband alleged that it was negligent of the solicitor to provide the advice if he had not done so. The husband said that he entered into the agreement in reliance upon the solicitor's representations which were misleading and deceptive within the meaning of the Fair Trading Act. Riethmuller J allowed the joinder of

the wife's solicitors.

¶20-030 Drafting financial agreements — checklist

When drafting a financial agreement the following matters should be included:

1. A detailed factual history in the recitals.

2. The incomes, expenses, assets, liabilities and financial resources of both parties in either summary form in the recitals or as annexures to the agreement.

3. Values of assets.

4. Clauses to meet the formal requirements of s 90G(1)(b) and 90UJ(1)(b) and the other requirements set out at ¶20-020.

5. The section of the *Family Law Act 1975* (Cth) under which the agreement is made (ie s 90B, 90C or s 90D (s 90B(1)(b), 90C(1)(b), 90D(1)(b), 90UB(1)(c), 90UC(1)(c) or s 90UD(1)(c))).

6. Any "reasonably foreseeable" circumstances, which have been considered by the parties in entering the agreement so as to lessen the risk of the agreement being set aside. These will be more helpful where it is clear that the agreement takes these into account. Merely stating that they have been considered may be insufficient where, for example, the agreement results in an outcome which will cause hardship to the carer of a child. The agreement might refer to the fact that the parties have considered unemployment or business failure, a party moving overseas, the birth of a child, serious injury or illness of a party, death of a party, separation, reconciliation, a child being or becoming ill, retirement of a party, remarriage or "re-partnering" of the parties and inheritances.

7. If appropriate, a sunset clause should be considered that makes the agreement or part of it, no longer effective if a certain event

occurs (eg the birth of a child, reconciliation for more than three months) or after a certain date or time (eg married for more than three years). The effectiveness of these have not been considered by the courts. Agreements can be terminated under s 90J or s 90UL. These provisions do not indicate that agreements can be terminated within the original agreement.

8. If the agreement deals with maintenance, the value or amount of property attributable to maintenance must be specified in compliance with s 90E or s 90UH. For the maintenance clause to be effective, the agreement must also include, if the statement is accurate, a clause confirming that the party or parties receiving maintenance are not reliant upon an income tested pension, allowance or benefit to support themselves (s 90F(1A) or s 90UI(2)). If the party is reliant upon an income tested pension, allowance or benefit to support themselves they cannot make this statement and therefore cannot contract out of their spousal maintenance rights.

9. If it is intended that the agreement or part of it (such as a provision for periodic maintenance) is to cease upon the death of one or both of the parties to the marriage, the agreement must specifically state this (s 90H). This is not required for de facto relationships, as s 90SJ(1) operates to terminate a maintenance clause upon the death of either party unless the court finds that special circumstances exist.

10. If a party to the agreement does not speak English well or at all, an annexure from a qualified translator confirming that the agreement and the legal advice was translated to that party should be included. It may also be prudent to have a written translation annexed in the language of the party entering the agreement.

11. Clauses which comply with the requirements of Pt VIIIB insofar as the agreement relates to a superannuation interest.

12. In a financial agreement made after separation dealing with the

division of property or financial resources, a separation declaration under s 90DA must be signed by one or both of the parties. It can be either annexed to the agreement or exist as a separate document. A separation declaration complying with s 90XP or s 90XQ (formerly s 90MP or s 90MQ) will be needed if there is a superannuation split.

13. A Statement of Independent Legal Advice must be signed by each party's legal representative in accordance with s 90G(1), s 90J(2), s 90UJ(2) or s 90UL(2), and the agreement should refer to the fact that both parties have received and understood that advice. Under the current version of s 90G(1) the statements need not be annexed, but it is more practical in post-separation agreements that they are annexed, so they are not mislaid.

¶20-040 Pre-nuptial or pre-cohabitation agreements

The appropriateness of a pre-nuptial or pre-cohabitation agreement depends upon the individual circumstances of each particular couple.

The advantages and disadvantages (not specific to the parties and not intended as a guide to the advice which must be given under s 90G(1)(c)) are discussed at ¶20-045.

There are some important distinctions between the way in which certain matters can be dealt within financial agreements under s 90B, 90C (during marriage but before separation), 90UB and 90UC as opposed to agreements entered into after separation under s 90C (after separation but before divorce), s 90D and 90UD *Family Law Act* (Cth) (FLA). Difficulties may be encountered in agreements entered into before separation with respect to such matters as:

- superannuation
- quarantining initial contributions
- spousal maintenance, and
- interests in corporate and trust entities.

Superannuation can be split in a superannuation agreement. A superannuation agreement can be separate from or can be included as part of a financial agreement dealing with non-superannuation or maintenance about a marriage (s 90XH(1) — formerly s 90MH(1)) or about a de facto relationship (s 90XHA(1) — formerly s 90MHA).

However, a provision in an agreement which provides for the parties to split any future superannuation may not be possible to implement without an order of the court made pursuant to s 90XT (formerly s 90MT) FLA.

Sections 90XH(1) (formerly s 90MH(1)) and 90XHA(1) (formerly s 90MHA(1)) say a superannuation interest does not have to exist when the agreement is made but s 90XJ(1)(a) (formerly s 90MJ(1)(a)) requires the interest to be identified in the agreement. How can an unknown future interest be identified?

Under s 90XI(1)(b) (formerly s 90MI(1)(b)) a split can occur if the agreement specifies a method for calculating the base amount. A formula can possibly be inserted in the agreement even if the future interests of the parties are unknown, but it will not be possible to give procedural fairness to the trustees. The Family Law Rules 2004 require this for orders but the Act is silent in relation to financial agreements. Although an unsplittable payment is a ground for an agreement to be set aside under s 90K(1)(g) or s 90UM(1)(j), trustee refusal to implement is not within the definition of an unsplittable interest in reg 11 Family Law (Superannuation) Regulations 2001. As a superannuation split cannot be as clearly set out in a pre-nuptial or pre-cohabitation agreement or an agreement entered into during cohabitation or marriage, as in a post-separation agreement or court order, a trustee may be quite justified in refusing to implement it. This may be grounds for impracticability within s 90K(1)(c) or s 90UM(1)(f). The difficulty in identifying future property interests was discussed in *Garvey & Jess* [2016] FamCA 445, but in that case the uncertainty did not make the agreement void or voidable as superannuation was not a joint asset to be divided (as defined in the agreement). Lawyers need to advise clients of the difficulties which may be encountered with a superannuation split.

Pre-separation agreements may attempt to quarantine initial contributions in the event of a separation. The agreement may result in an outcome which is “unfair”. Fairness is not the test, but a “fair” outcome is likely to reduce the risk of one of the parties seeking to set it aside or argue that it is not binding. There are many uncertainties which can impact on how fair the agreement will appear at the end of the relationship, such as whether the parties will have children, the length of the relationship, and the incomes, health and earning capacities of the parties in the future.

Whether or not seeking to protect the whole value of an initial contribution or part of it, definitions are important. The agreement needs to be clear as to what initial contribution is being protected. If the initial contribution amounts to the bulk of the property pool, in the event of a separation, there may be grounds to set the agreement aside, particularly if there are children (s 90K(1)(d) and 90UM(1)(g)).

An important restriction on spousal maintenance provisions in financial agreements arises in s 90F (and 90UH), which states:

> “(1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
>
> (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit”.

These provisions appear to make it easier to oust spousal maintenance in a pre-nuptial agreement than in a post-separation agreement. An attempt to oust the jurisdiction of the court to make a spousal maintenance order is ineffective if the potential maintenance recipient cannot support themselves without Centrelink benefits. There is more opportunity for the jurisdiction to be ousted in pre-nuptial agreements as both parties are more likely to be working, not have the

care of children and not be in receipt of Centrelink benefits, than in agreements made after separation.

Therefore, it appears easier to oust the spousal maintenance jurisdiction in a pre-nuptial agreement than in a post-separation agreement. However, the case law does not show whether a pre-nuptial agreement or a pre-cohabitation agreement is easier to set aside than a post-nuptial or post-cohabitation agreement if an application is made under s 90K(1)(d) or s 90UM(1)(g) in relation to hardship to a carer or a child.

Pre-nuptial or pre-cohabitation agreements may be appropriate:

- in second marriages or de facto relationships:
  - to protect prior assets, and/or
  - to ensure that children of previous relationships inherit
- for older, never-married people who have accumulated assets
- to preserve intact for future generations family farms or other businesses, which have been in a family for generations
- to protect the assets of one party where there is a significant difference in the wealth of the parties
- to protect assets which may be inherited during the relationship
- to give greater weight to contributions made during the marriage or de facto relationships by a high income-earning spouse than might be recognised under the *Family Law Act 1975* (Cth) (FLA)
- if the financial affairs of one party involve third parties such as a parent, trust or company who want to protect rights as against the other spouse
- to recognise gifts or settlements made by one party to the other before or during the marriage or relationship and ensure that they are taken into account in the event of a separation

- where one party finances the other's education directly or indirectly. For example, doctors may be financially supported by their partner during their studies, but then become high-income earners. This is sometimes described as "the medical student wife's syndrome"

- where one party has substantial debts at the commencement of the marriage or relationship

- to protect the rights of a party who feels his or her rights will be better protected in a formal agreement than with the discretion available to the court under s 79 or s 90SM of the FLA, and

- where the parties are members of a religion or culture in which a party can refuse to co-operate in a divorce in that religion or culture.

¶20-045 Why have a pre-nuptial or pre-cohabitation agreement?

These general observations of the advantages and disadvantages of financial agreements are not intended to replace advice specific for the particular circumstances under s 90G(1) or s 90UJ(1).

Advantages

The arguments usually advanced in favour of entering a pre-nuptial or pre-cohabitation agreement are that it:

- clarifies initial and ongoing financial contributions of the parties

- where parties have children from former relationships, they can protect assets for those children

- forces parties to sort out priorities such as children versus employment

- can be used to protect future inheritances

- promotes better communication in the long-term
- demonstrates that the parties have no secrets from each other
- prevents disputes as to the values of assets at the commencement of the relationship or, at least, at the time of entering the agreement
- removes a source or sources of stress
- gives greater certainty and control to the parties over their financial affairs than s 79 or s 90SM (which give considerable judicial discretion) can provide
- accords with the background and expectations of those who have migrated from or were born into cultures where marriage contracts are an accepted tradition, eg those with Jewish or South African heritage, and
- enables speedier resolution of financial matters at the end of a relationship.

Disadvantages

The arguments usually advanced against entering a pre-nuptial or pre-cohabitation agreement are that it:

- is a bad or negative start to a marriage or de facto relationship
- suggests a lack of trust in the other partner
- suggests a lack of confidence in the marriage or de facto relationship
- distracts from a religious commitment to permanent marriage
- removes the romance
- treats one party unfairly. One party usually has more modest financial circumstances and a weaker bargaining position.

Weakness of bargaining position may arise because of such factors as that party being more committed to the marriage or de facto relationship than concerned over financial issues. The person in the weaker bargaining position is less able to make credible threats and therefore has difficulty negotiating effectively. Frequently, the party in the weaker bargaining position will be female. Men are more likely than women to marry or enter a de facto relationship with a person with less education and/or lower paying employment and/or of a younger age. It will, therefore, usually be the female who gives away rights in an agreement. This is exacerbated by the fact that it is normally the female who, at the end of a marriage or relationship, will have reduced earning capacity due to spending periods out of the paid workforce to care for the children.

- changes the nature of the dispute at the end of a relationship from an adjustment of property interests under the FLA to a contractual dispute

- may be more costly to resolve a contractual dispute at the end of the marriage and have a less predictable outcome than if the matter had been dealt with solely under Pt VIII or Div 2 Pt VIIIAB *Family Law Act* (Cth) (FLA)

- encourages instability of marriages or relationships, and

- introduces the “morals of the market place” into an intimate relationship. Marriage and relationships are about love and commitment, not simply a merging of assets and negotiating what will occur if and when it ends.

Pre-nuptial and pre-cohabitation agreements may not be appropriate for young couples intending to have children. It is difficult for the parties to plan for future contingencies, while trying to protect modest initial contributions. The agreement may be at risk of being set aside under s 90K(1)(d) or s 90UM(1)(g) FLA which relates to the care of children. Grounds for setting aside agreements are discussed in more detail at ¶20-280 and following.

¶20-050 Financial agreements during a marriage or a relationship but before separation (s 90C and 90UC)

Financial agreements can be entered into during a marriage or relationship before the parties have separated under s 90C or s 90UC of the *Family Law Act 1975* (Cth). The advantages and disadvantages of this type of financial agreement are similar to those that apply to pre-nuptial or pre-cohabitation agreements under s 90B or s 90UB (see ¶20-040). The primary advantage is that parties who have not separated will not generally have the option of entering consent orders.

This type of financial agreement might be considered in the following circumstances:

- where a party has received, or is likely to receive, a gift or an inheritance that they wish to protect

- in conjunction with a termination agreement under s 90J or s 90UL, to "replace" an existing pre-nuptial or pre-cohabitation agreement. This might be appropriate if the parties' circumstances have changed since an earlier pre-nuptial agreement was made or the parties are concerned that the requirements of s 90G(1) or s 90UJ(1) were not met in the earlier agreement

- for parties who may have been uncomfortable entering into a pre-nuptial agreement prior to marriage

- for parties who have not separated but are considering separation. Parties may wish to clarify their financial entitlements in the event that they separate in the future. In these circumstances, there is a danger that a party who is more committed to salvaging the relationship will enter into an unfair agreement.

¶20-060 Financial agreements after separation (s 90C, 90D, 90UC and 90UD)

Parties who are separated have the option of either a financial agreement or a consent order.

Parties who were legally married, and are separated but not yet divorced can enter financial agreements under s 90C of the *Family Law Act 1975* (Cth). Parties who were in a de facto relationship but have separated can enter financial agreements under s 90UD. Parties who are divorced can enter financial agreements under s 90D.

When agreements are entered into after separation, the risks for a legal practitioner of a professional negligence claim may not be as great as when agreements are made before or during a marriage or relationship. Risks still exist, but if the parties are already separated, there will often not be a later event or an incentive which makes the parties look at the agreement and seek legal advice as to whether or not it can be set aside. If the agreement is made after separation and the provisions of the agreement have been implemented, parties often move on with their lives and are reluctant to engage lawyers and issue court proceedings years later.

Advantages of a financial agreement for separated couples include:

- no court appearance is required
- no approval is required by a court. This will be advantageous if the terms of the financial agreement would not be likely to be approved by the court if submitted as a consent order
- a superannuation agreement can be incorporated (s 90XH — formerly s 90MH)
- it can be used in conjunction with a consent order. Parties may wish to enter a financial agreement with respect to certain aspects of their case only, such as maintenance or superannuation
- it can be used to set out short-term maintenance obligations for a fixed period. This is less risky than doing so under a court order, where the obligations may be extended or increased by a further court order beyond the original term

- ousts the jurisdiction of the court to make maintenance orders
- it takes effect from the date of signing. In the case of consent orders, parties will need to obtain court approval before the orders can take effect which could involve delays
- it can be used for an interim property settlement if parties do not wish to finally determine their financial relationships until some time in the future
- the time limits for the making of court orders after divorce and separation in s 44(3) and 44(5) appear not to apply, and
- it provides greater privacy than a consent order.

Disadvantages include:

- the inability of a financial agreement under Pt VIIIAB to deal with property acquired post-separation
- the inability of a financial agreement under Pt VIIIB to deal with property acquired post-divorce
- the extra expense, particularly if the financial agreement is only for maintenance obligations and court orders are used to settle property matters.

¶20-070 Alternatives to financial agreements

A financial agreement may not be the best option for the parties to finalise their agreement regarding property and/or maintenance. Careful thought must therefore be given to other options.

Some factors may advantage one party and disadvantage the other.

Alternatives to a financial agreement include:

- consent orders for property and/or maintenance (s 79, 90SM, 72, 90SF(3)) *Family Law Act 1975* (Cth)

- ante-nuptial and post-nuptial settlements to which s 85A applies (s 4(1), 85A(3)) (discussed at ¶20-090), and

- other agreements, which do not meet the requirements of Pt VIIIA or Pt VIIIAB (discussed at ¶20-090).

¶20-080 Section 79 or s 90SM order

The major alternative to a financial agreement for parties who are separated and want to finalise property matters is an order by consent under s 79 or s 90SM *Family Law Act 1975* (Cth). The advantages and disadvantages of a s 79 or s 90SM order are discussed below.

Advantages

The advantages of a s 79 or s 90SM order include:

- Legal advice requirements are less detailed and comprehensive than for financial agreements. It is not a requirement that parties have received independent legal advice although it is preferable.

- Parties and legal practitioners have the added security of knowing that their "agreement" has been approved by the court. This may be of particular benefit where a party is at risk of claims by a creditor or potential trustee in bankruptcy. The creditors will, of course, need to be given notice of the proposed orders if the orders may result in a creditor not being paid.

- Clear enforcement procedures are available in the event that an order is breached.

- Avoids the uncertainty of the law with respect to financial agreements and the prospect of future legislative change de-stabilising an agreement which appeared to comply with the legislative requirements and the case law at the time it was executed.

- For legal practitioners, there is less risk as the settlement has been approved by a court.

Disadvantages

The disadvantages include:

- substantial documentation is required to comply with *Harris v Caladine*[1]
- less ability to restrict future maintenance claims than with financial agreements
- less privacy than with financial agreements
- finalisation is not in the control of the parties and their lawyers, but is dependant upon whether there is a pending court date, and if not, how fast the court can deal with it
- less flexibility to have settlements which are not just and equitable than with financial agreements, and
- less flexibility to value and/or split superannuation other than as set out in the *Family Law Act 1975* (Cth) and the Family Law (Superannuation) Regulations.

Footnotes

1 *Harris* v *Caladine* (1991) FLC ¶92-217.

¶20-090 Agreements that do not meet the requirements of Pt VIIIA or Pt VIIIAB

An agreement that does not comply with s 90G or s 90UJ and one of s 90B, 90C, 90D, 90UB, 90UC or s 90UD of the *Family Law Act 1975* (Cth) (FLA) can be held to be binding (or validated) under s 90G(1A) or s 90UJ(1A) (see ¶20-180 and ¶20-185). If it is not binding, there are three possibilities for the effect of such an agreement. These are:

- the agreement is still followed in its entirety

- the agreement is totally ignored, and
- the agreement is considered by the court along with other evidence.

Factors the court may consider in determining the relevance of a non-binding agreement could include whether the parties have had independent legal advice, provided full disclosure and abided by the agreement, and whether the agreement is within the range of discretionary outcomes. This type of agreement was discussed in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411.

Strickland and Murphy JJ considered these types of agreements in *Senior & Anderson* (2011) FLC ¶93-420. Strickland J (with whom Murphy J agreed) said (at [94] and [95]):

> "The Act in effect draws a distinction between agreements which are financial agreements (s 4, s 90B, s 90C, s 90D) and those financial agreements which are binding (s 90G). Financial agreements can, like any other agreement, govern the actions of the parties to them and bind the parties to obligations, but do not oust the jurisdiction of the court. Parties to an agreement that satisfies the definition of 'financial agreement' are bound by its terms (or not bound as the case may be), just as they would be bound (or not bound) by any other agreement (s 90KA) (see generally *Australian Securities and Investment Corporation and Rich & Anor* (2003) FLC ¶93-171; [2003] FamCA 1114)… .
>
> If an agreement, including an agreement that satisfies the definition of 'financial agreement' under the Act, fails to effectively bar Part VIII claims (because of its failure to comply with the requirements of s 90G and, as a result, is not 'binding' within the meaning of that section) the financial agreement can nevertheless have an affect. However, an agreement's failure to be 'binding' in the s 90GD sense renders its use in Part VIII proceedings to be very limited; specifically it does not operate as a bar to orders made under that Part (see e.g. *Woodland and Todd* (2005) FLC ¶93-217; [2005] FamCA 161 at paragraphs 37–39)".

If the agreement deals with property but is not a financial agreement, it

may be a s 85A ante-nuptial or post-nuptial settlement. Section 85A settlements do not preclude a court from making s 79 or s 90SM orders. There is limited case law on the use of s 85A. In *Rice & Rice and Ors* [2015] FamCA 85, Cronin J determined that a transfer 16 years previously of a farm from the husband and the wife to their two adult daughters on condition that the husband and wife could stay living on the farm was a nuptial settlement under s 85A. He made s 79 orders between the husband, the wife and the two daughters. He found the only asset he could deal with was the farm, as the non-farm realty had been gifted to the daughters and was not part of the s 85A settlement.

Prior to the introduction of Pt VIIIA, the Full Court indicated in dicta that an informal agreement, which had been acted upon although s 79 orders had not been made, might be relevant in a later s 79 application. In *Woodcock v Woodcock*,[2] the Full Court held that estoppel did not operate "so as to oust the jurisdiction of the court to make orders under s 74, 79 or 85A". It refused to say that estoppel had no relevance except where specifically referred to in the Act. Instead, it said that the doctrine does not "prevent the Court from exercising its jurisdiction … under s 74, 79 and 85A".

Although cl (c), (caa), (ca) and (cb) of the matrimonial causes set out in s 4 of the FLA appear to cover the field regarding the property and maintenance rights of the parties to a marriage in the event of a separation, it may be possible to enforce rights pursuant to informal agreements between parties to a de facto relationship in state or territory courts. Opportunities for using state or territory courts for proceedings between separated de facto couples are greater because the "de facto financial causes" are much more limited than the "matrimonial causes" and de facto couples have greater jurisdictional hurdles before they can utilise the FLA. See *Patel & Patel* [2015] NSWDC 2; *Bate & Priestley* (1989) 97 FLR 310 and *Sewell & Wilson* [2010] WASCA 152.

Example

***G v G* (2000) FLC ¶93-043**

The parties entered into an agreement two days before the marriage. At that time,

financial agreements had not yet been introduced to the FLA. The wife gave evidence that she was opposed to having a pre-marital agreement. It became apparent to her that without it there would be no marriage. She signed it because she wanted to formalise their 13-year relationship. The parties were not in a de facto relationship.

The trial judge considered it relevant that the parties had not allowed for the wife's entitlements to increase over time. The parties did not take into account that her needs might change. In the nine years of their marriage they paid no regard to the agreement and substantially treated the agreement as one which governed their rights in the event of their respective deaths. Given the wife's contributions over the period of the parties' close relationship of 13 years pre-marriage and during their marriage, the trial judge found it would not be just and equitable if the wife only retained approximately 20% of the parties' net assets and so gave her 25%. This was upheld by the Full Court.

The Full Court, following *Woodcock* v *Woodcock* (1997) FLC ¶92-739 at p 87,676, upheld the trial judge's approach:

> "Her Honour clearly paid regard to the agreement. She made a finding of fact that it may have been a just and equitable provision at the time of execution. She properly took into account the events that had occurred afterwards and having done that, she took the view that the parties ought not to be bound by the agreement".

An agreement which does not meet the requirements of the FLA may not be totally ignored by the court. Its relevance will depend on various factors including:

- the degree of disclosure of either "relevant" or "material" matters by both parties. Sections 79A(1)(a) and 90SN(1)(a) allow s 79 and 90SM orders to be set aside if there is a failure to disclose all "relevant information". Under s 90K(1)(a) and 90UM(1)(a), a financial agreement can be set aside for failure to disclose a "material matter", which is a less stringent test than s 79(1)(a) and s 90SN(1)(a)

- whether the agreement sets out details of initial contributions, including values. Many years later, this may be the best evidence of initial contributions

- whether each party received independent legal advice

- the degree to which the parties have abided by the terms of the agreement

- whether the terms of the agreement are within the range of

discretion of the court in dealing with s 74 and/or s 79 or s 90SF and/or s 90SM matters, and

- whether the agreement took into account the needs of the parties, that these may change over time, and that the parties' entitlements should probably change over time.

An alternative result is that the mere existence of the agreement has an emotional impact. It may encourage the parties to voluntarily effect a property division in accordance with the terms of the agreement.

Parties may decide to enter into agreements, which are not within Pt VIIIA or Pt VIIIAB of the FLA, to avoid incurring substantial legal costs and avoid providing detailed disclosure. They may decide to abide by them after separation, although deliberately entering into unenforceable agreements is a risky strategy.

Agreements under Pt VIIIAB must also meet the jurisdictional requirements for de facto relationships in Pt VIIIAB (see ¶20-020 to ¶20-060). If the agreement does not meet these requirements, it will not be binding.

Example

***Darrow & Malden* [2017] FamCA 497**

The parties were in a de facto relationship between 1986 and 1993. After their separation, they continued a business relationship. In December 2011, they entered into an agreement which purported to be a financial agreement under s 90UD. As they separated in NSW before 1 March 2009, they were required by item 86A of the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* to opt into the FLA regime. They did not do so.

The court was asked to determine whether the opting in provisions were mandatory and whether by the agreement itself the parties made an effective choice to opt in. If no effective choice had been made, did the court have jurisdiction to determine proceedings under Pt VIIIAB?

Rees J found that the opting in provisions were mandatory and that the "choice" cannot be understood to have been made implicitly or assumed by the mere fact that the parties entered into the agreement.

As the parties had not opted into the regime, the agreement was not a Pt VIIIAB financial agreement and the matter was not a "de facto financial cause". The court had no jurisdiction to determine the Amended Initiating Application or any response filed.

Footnotes

Footnotes

2 *Woodcock* v *Woodcock* (1997) FLC ¶92-739 at p 83,969.

¶20-100 Maintenance in financial agreements

Specific reference is made in s 90B(2)(b), 90C(2)(b), 90D(2)(b), 90UB(2)(b), 90UC(2)(b) and 90UD(2)(b) of the *Family Law Act 1975* (Cth) to the ability of financial agreements to deal with maintenance. Under s 90UB and 90UC this is restricted to maintenance after the "breakdown" of the de facto relationship. There is no similar restriction in s 90B and 90C.

A maintenance provision will be void unless it complies with s 90E or s 90UH. Section 90E states:

> "A provision of a financial agreement that relates to the maintenance of a party to the agreement … is void unless the provision specifies:
>
> (a) the party … for whose maintenance provision is made; and
>
> (b) the amount provided for, or the value of the portion of the relevant property attributable to, the maintenance of the party …"

The meaning and effect of a figure specified as spousal maintenance under s 90E is unclear. Options when using s 90E include:

- Specify a large lump sum spousal maintenance which equates to, say 2–3 years of periodic spousal maintenance.
- Specify "nil" or a small sum such as $1 on the assumption that the amount makes no difference.

In *Ruane & Bachman-Ruane* [2009] FamCA 1101, Cronin J considered that the question of whether an agreement that provides for "nil" spousal maintenance was an "amount" and complies with s

90E was not relevant to the proceedings before him and was a question “for another day”. In 2016, there were proposals before parliament to amend the legislation so as to make it clear that “nil” was an amount, but the Bill lapsed when parliament was prorogued and an election was called. As at 1 May 2019, the Bill had not been re-tabled.

Note

Sections 90E and 90UH appear to apply to both periodic and lump sum maintenance. Sections 66R, 77A, 90SH and 87A, which are similar provisions (in relation to child maintenance orders, s 79, 90SM orders and 87 agreements, respectively), refer only to lump sum maintenance. The reason why s 90E and 90UH cover periodic maintenance provisions is unclear as regardless of s 90E and 90UH, the payer and payee and the amount payable need to be specified on the provision will be unenforceable.

A further restriction on maintenance provisions in financial agreements arises in s 90F and 90UI. Section 90UI states:

> “(1) No provision of a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party to a marriage if subsection (1A) applies.
>
> (1A) This subsection applies if the court is satisfied that, when the agreement came into effect, the circumstances of the party were such that, taking into account the terms and effect of the agreement, the party was unable to support himself or herself without an income tested pension, allowance or benefit”.

The assessment of the ability of a party to support themselves without an income tested pension allowance or benefit takes place not when the agreement is made, but when it takes effect.

As the provisions of a financial agreement are not deemed to be orders, there is no maintenance order to vary. It appears that, if the court still has jurisdiction because of the operation of s 90F(1) or s 90UI(1), a fresh order must be sought.

Periodic maintenance in a financial agreement should be specified to end on a certain date or on the occurrence of a certain event. The latest date should be on the death of the payee. A financial agreement continues to operate after the death of both parties and is binding on

their legal personal representatives (s 90H or s 90UK). It is possible, subject to the enforceability of s 90H or s 90UK, particularly when a provision conflicts with a will, a testator's family maintenance order or law with respect to the distribution of an estate (discussed further at ¶20-130), for an estate to pay maintenance to another estate forever or until there are no further funds.

The bill referred to above which proposed amendments to the *Family Law Act 1975* included amendments to terminate maintenance provisions in a financial agreement upon death.

Examples

***Adamidis & Adamidis* [2009] FMCAfam 1104**

Lapthorn FM severed two recitals from the agreement as the requirements of s 90E were not met. The rest of the agreement was still binding upon the parties. The same result was reached in *Otero and Otero* [2010] FMCAfam 1022.

***Millington & Millington* [2007] FamCA 687**

The application of s 90F was discussed. The trial judge found that the s 90G(1) requirements were not met so there was no binding agreement between the parties anyway. The husband's counsel argued that if the financial agreement was otherwise binding, the wife should not be permitted to make an application for spousal maintenance despite the fact that she was in receipt of an income-tested pension. He argued that "… the mere fact that someone was in receipt of a pension did not necessarily lead to a finding that that person was unable to support himself or herself".

The wife lived in an expensive house, although it was encumbered and she had significant mortgage payments. The husband argued that the wife could rearrange her financial affairs. Her Honour noted (at [52]) that "… it may seem ironic that a person can live in a million-dollar home and still receive the New Start Allowance. However, this was permitted under the conditions upon which this allowance is granted".

The trial judge pointed out that the wife may not have been successful in obtaining maintenance because s 75(2)(b) required her property and financial resources to be taken into account.

¶20-110 Child support and child maintenance

Child maintenance and child support are not specifically referred to as matters which can be covered by a financial agreement. Section 90B, 90C, 90D, 90UB, 90UC and 90UD of the *Family Law Act 1975* (Cth) refer to property, financial resources, maintenance and "matters

incidental or ancillary" to those matters and, since 21 November 2008 for agreements under Pt VIIIA, "other matters".

Despite the absence of a specific reference to child maintenance, it appears that child maintenance can be included in a financial agreement. This may be useful where there are children over 18 who are still studying or who have a disability or for children who are not otherwise caught by the *Child Support (Assessment) Act 1989*. Section 90E and 90UH set out the requirements if a provision for "maintenance of … a child or children" is made which indicates that child support and child maintenance are included in "matters incidental or ancillary".

If child support is to be included in a financial agreement, it is a requirement that the agreement must also be a binding child support agreement and meet the requirements of Div 2 of Pt 6 of the *Child Support (Assessment) Act 1989* (Cth). These requirements are different to those required for a financial agreement to be binding, and are discussed in more detail in Wolters Kluwer's *Child Support Handbook*. Binding child support agreements have been able to be made since 1 July 2008. Child support has been able to be included in financial agreements since 21 November 2008. In practice, it seems preferable to keep child support arrangements separate from property and spousal maintenance provisions by having both a binding child support agreement and a financial agreement.

¶20-120 Third parties and financial agreements

From 21 November 2008, the *Family Law Act 1975* (Cth) was amended to specifically enable financial agreements to include third parties.

Financial agreements, particularly under s 90B (before marriage) under s 90UB (before a de facto relationship) and under s 90C or s 90UC (if made prior to separation), are probably used more frequently where a party or the parties have significant assets. The party with significant assets may want to include third parties such as companies or parents as parties to the agreement.

The ability of third parties to be parties to a financial agreement gives considerable opportunity for contributions made by third parties to be protected. Even in 2019, lawyers and their clients have probably not taken sufficient advantage of the 2008 amendments.

A financial agreement can include, for example, one of:

- The parents of one of the spouse parties.
- A company or trustee of a trust.
- An unsecured creditor.

The ability of third parties to apply to set aside financial agreements is discussed at ¶20-290.

¶20-130 Effect of death of a party

When considering whether or not a financial agreement is an appropriate way to formalise an agreement, particularly with respect to maintenance, the effect of the death of one of the parties should be considered. Under s 90H and 90UK of the *Family Law Act 1975* (Cth) (FLA), a Pt VIIIA or Pt VIIIAB financial agreement operates despite the death of a party to the agreement and is binding on the legal representative of the deceased in relation to all obligations. If the agreement or part of it is to cease upon the death of one or both of the parties this must be specifically stated.

The precise effect of s 90H and 90UK is unclear. The intention may be that all provisions in a financial agreement are binding even if one party dies after separation, but before the agreement is implemented. Some lawyers believe that a financial agreement can be used as an estate planning device and over-ride the terms of a will. However, is there a conflict between s 90H, 90UK and 87(10) and state-based legislation with respect to the making of wills, distribution of deceased estates, probate and testator's family maintenance?

Section 90H states:

> "A financial agreement that is binding on the parties to the

> agreement continues to operate despite the death of a party to the agreement and operates in favour of and is binding on, the legal personal representative of that party".

Section 90UK is worded similarly for Pt VIIIAB financial agreements but also has a note:

> "If the parties are still in the de facto relationship when one of them dies, the de facto relationship is not taken to have broken down for the purposes of enforcing the matters mentioned in the financial agreement (see the definition of *breakdown* in s 4(1))".

At first glance, the inclusion of the note to s 90UK appears to support the view that s 90H can be relied to enable Pt VIIIA financial agreements to be used as an estate planning tool as s 90H does not have the same note. However, the word "breakdown" is used in s 90B(2), 90C(2), 90UB(2) and 90UC(2) to specifically exclude a breakdown of the marriage or the de facto relationship by reason of death.

There is doubt about the extent to which s 90H and 90UK are effective. The effect of s 87(10) in relation to s 87 maintenance agreements was never clear.

Despite the broad wording of s 90H and 90UK, it is unlikely that a state court would refuse to consider a testator's family maintenance application on the grounds that the parties entered into a financial agreement under the FLA, which was binding on the parties' heirs. The terms of the agreement and its effects are considered to be relevant. The agreement could not, however, oust the jurisdiction of the state court.

Example

***Davison (as personal Plaintiff representative of the estate of Staines, deceased) v Wilkinson* [2006] QSC 212**

The respondent alleged inter alia that the deceased breached an agreement to make mutual wills. The respondent was the deceased's second husband for three years.

After the death of the deceased, the respondent lodged caveats against the properties of the deceased and remained in possession of one of the properties. The executor of the deceased's will commenced proceedings to have the grant of probate resealed and to recover damages as a consequence of the defendant's refusal to deliver up

possession of the property.

The respondent challenged the will on the grounds of lack of knowledge and lack of capacity, and on the ground of a breach of the agreement to make mutual wills.

The defence and counterclaim of the respondent was struck out and he was ordered to pay damages and costs.

One of the determinative factors was the fact that on 20 June 2003 the deceased and the respondent signed a financial agreement. The agreement provided that the deceased's assets remained her sole and absolute property, that she was free to deal with them as she saw fit and that the respondent would not make any claim to any share of the deceased's assets. Furthermore, the agreement specifically stated that there was no agreement or understanding between the deceased and the defendant that either party would confer any interest or contingent interest on the other.

Property obligations which have not been complied with, whether under a financial agreement or in s 79 or s 90SM orders, are enforceable against a deceased estate or by a deceased estate.

The position with maintenance obligations upon the death of a party is quite different depending on whether the obligations are in a financial agreement or a court order. Sections 90H and 90UK make obligations binding on the estate of the legal personal representative of a deceased party and rights enforceable in favour of the legal personal representative of the deceased. There is nothing to prevent the estate from enforcing an order for maintenance. Presumably the payer would seek an order discharging the obligation, if the terms of the agreement or s 90F(1) or s 90UI(1) permit him or her to do so, or apply to set that part of the agreement aside under s 90K(1)(b) or s 90UM(1)(e) (eg common mistake, implied term) or even s 90K(1)(d) or s 90UM(1)(f) (material change in circumstances relating to child).

This contrasts with the position with respect to maintenance orders. Section 82(2) states that if a person liable to pay maintenance dies, the order ceases to be effective unless the order was made before 25 November 1983 and the order specifically bound the estate of a deceased payer. If the recipient dies, a maintenance order ceases under s 82(1). If either party to a Pt VIIIAB maintenance order dies, the maintenance order ceases under s 90J(1).

A bill proposing amendments to the FLA which terminated maintenance provisions upon death was being considered by the

Senate when the 2016 federal election was called. It has not been re-tabled.

It is possible for parties in New South Wales to contract out of the right to make a family provision claim under the *Succession Act 2006* (NSW). The *Family Law Act 1975* permits such clauses to be included in financial agreements. They fall within “matters incidental or ancillary to” and “other matters” in Pt VIIIA financial agreements (s 90B(3), 90C(3) and 90D(3)) and arguably fall within “matters incidental or ancillary to” in Pt VIIIAB financial agreements (s 90UB(3), 90UC(3) and 90UD(3)).

An example of an application for approval of a s 95 release contained in a financial agreement was *Dark & Dark* [2016] NSWSC 1223.

Financial agreements are useful if the parties intend a maintenance provision to be binding despite the death of the payer. If the parties intend a maintenance provision to cease upon the death of a payer or payee, specific provision must be made in the agreement.

Also, relevant in the event of the death of one or both of the parties after the breakdown of the marriage or relationship is that the requirement for a separation declaration under s 90DA(1) or s 90UF(1) is dispensed with and the financial agreement is at force and effect from the time of the death and deaths (s 90DA(1A) or s 90UF(2)).

¶20-140 Stamp duty and tax

Stamp duty and tax are important considerations in advising a party whether to enter into a financial agreement and whether a transaction should be covered by a financial agreement.

A stamp duty exemption may arise either from the *Family Law Act 1975* (Cth) (FLA) or the relevant legislation for the particular state in which the transaction takes place.

Section 90L and 90WA specifically provide that state or territory duties or charges do not apply to:

- Pt VIIIA and Div 4 of Pt VIIIAB financial agreements

- Pt VIIIA and Div 4 of Pt VIIIAB termination agreements, and
- deeds or other instruments executed by a person for the purposes of, or in accordance with, an order or financial agreement under Pt VIIIA or Div 4 of Pt VIIIAB.

However, the state and territory stamp duty exemptions, rather than s 90L and 90WA, are normally relied on for transactions pursuant to s 79 and 90SM orders. There is doubt as to the constitutional validity of s 90 (a similarly worded provision which applies under Pt VIII). A party to a financial agreement may be eligible for exemption from stamp duty regardless of the terms of and constitutionality of s 90L and 90WA if state and territory legislation provides for an exemption.

There is most likely to be an exemption under state law where the parties are in a de facto relationship, married, separated or divorced. Parties entering into an agreement under s 90B, and not in a de facto relationship, are less likely to be eligible for an exemption.

The stamp duty exemptions of the various states and territories are discussed at ¶17-460–¶17-540.

The *Income Tax Assessment Act 1997* (Cth) provides roll-over relief for capital gains tax with respect to certain transfers made pursuant to (inter alia) orders made under the FLA.

Since 12 December 2006, capital gains tax roll-over relief extends to transfers of assets between spouses made pursuant to a financial agreement.

Capital gains tax roll-over relief is discussed in more detail at ¶17-220 and following.

ROLE OF LEGAL PRACTITIONERS

¶20-160 Financial agreements generally

Sections 90G(1) and 90UJ(1), and s 90J(2) and 90UL(2) of the *Family Law Act 1975* (Cth) require that each party receive independent legal advice. These sections require that:

"(b) the agreement contains, in relation to each party to the agreement, a statement to the effect that the party to whom the statement relates has been provided, before the agreement was signed by him or her, as certified in an annexure to the agreement, with independent legal advice from a legal practitioner as to the following matters:

(i) the effect of the agreement on the rights of that party;

(ii) the advantages and disadvantages, at the time that the advice was provided, to the party of making the agreement; and

(c) the annexure to the agreement contains a certificate signed by the person providing the independent legal advice stating that the advice was provided …".

Since January 2010, financial and termination agreements can be held by the court to be binding despite failure to comply with the legal advice requirements (see ¶20-180 and ¶20-185). An agreement can be found by a court to be binding under s 90G(1A) or s 90UJ(1A) because it would be unjust and inequitable for the parties not to be bound. This does not mean though that parties and their legal practitioners should not try to meet the legal advice requirements. If the requirements are not met it is costly and risky to establish that the agreement is still binding.

The drafting of pre-nuptial agreements is fairly risky work for a legal practitioner. As with wills, negligence claims may be made years later. Also, like wills, there is pressure from clients to do them quickly and cheaply without comprehensive instructions. Clients request "a simple will" or "a simple agreement" when, in reality, these do not, or only rarely, exist.

Cases in which claims have been made against legal practitioners include:

- *Schacht* v *Bruce Lockhart Simpson & Dennis Michael Staunton (t/as Staunton & Thompson Lawyers) (No 3)* [2013] NSWSC 316. Professional negligence claim against the husband's legal

practitioner was successful as s 90G *Family Law Act 1975* was not complied with

- *Noll & Noll* (2013) FLC ¶93-529 where the Full Court dismissed an appeal against a decision that the court did not have jurisdiction to entertain proceedings by the husband against the wife's solicitors in proceedings relating to a financial agreement

- *F Firm & Ruane* (2014) FLC ¶93-611 where the Family Court's jurisdiction to deal with the negligence claim was upheld, as the financial agreement had already been found not to be binding in *Ruane & Bachmann-Ruane* [2009] FamCA 1101 (unlike in *Noll*).

- *Zagar & Hellner* [2016] FamCA 224. See discussion at ¶20-025.

- *Reed & Reed* [2016] FCCA 1338. Riethmuller J discussed the competing authorities of *Noll & Noll* and *F Firm & Ruane*. Joinder was dealt with as a separate issue and the husband's former law firm and the wife's former solicitors were joined.

- *Gibbs & Gibbs & Ors* [2017] FamCA 7. Whether the husband's solicitors were bound by a finding made in earlier proceedings between the parties to the agreement but not the husband's solicitors. Carew J was concerned that if the husband's solicitors were permitted to rely on a defence that the financial agreement was not void for uncertainty, there could be two conflicting findings made on the same issue. However, it was difficult to contemplate that the husband's solicitors should be bound by a finding in a case into which they had no input.

Checklist for legal practitioners

Ideally, legal practitioners should observe higher standards than the minimum requirements. The amount of litigation to date regarding the interpretation of Pt VIIIA has confirmed that to achieve a binding financial agreement, the requirements of s 90G(1) or s 90UJ(1) should be followed. Although the agreement may be "saved" under s 90G(1A) or s 90UJ(1A), this should not be relied upon. The only effective way of avoiding a professional negligence claim is, though, to avoid advising on financial agreements altogether. A claim may be made, thus attracting stress and time dealing with the claim, legal costs and insurance deductible/excess, even though the client was

advised not to sign the agreement. The claim may ultimately be unsuccessful, but that might not be much consolation.

Some suggested best practice requirements are:

1. The agreement is signed by all parties and the Statements are signed by their lawyers in the same location and at about the same time in the same office, but perhaps in different meeting rooms or even in the same room. Murphy J suggested in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411 that the requirements of s 90G(1) before it was amended by the Efficiency Measures Act (at [191]) "can all be accomplished readily (and "strictly") if all contemplated events were to occur on the one occasion: advice having previously been given".

2. If the client does not speak, read and understand English well, the agreement may need to be verbally translated to the client by an accredited interpreter in the legal practitioner's presence and any letter of advice should have a written translation.

3. The client should be advised verbally or in writing that they are foregoing their rights under the *Family Law Act 1975* (FLA) to a property adjustment and/or maintenance.

4. Each page of the agreement is signed by each party.

5. The Statements are annexed to the agreement so that they are easier to locate later.

6. A detailed letter of advice is given by the legal practitioner to their client about the final version of the agreement at least a week or so before the agreement is signed by the client.

7. The advice should cover the requirements of s 90G(1)(b) or s 90UJ(1)(b), namely:

    7.1. the effect of the agreement on the rights of that party

    7.2. the advantages and disadvantages at the time that the advice was provided, to that party of making the agreement.

8. The client signs a copy of the letter of advice prior to signing the agreement, acknowledging that the letter and agreement have been read and understood.

9. If the agreement is altered after the advice is given, updated verbal and written advice is given. It is best to avoid handwritten amendments to the agreement as they may cause evidentiary difficulties later. The whole agreement should be amended and reprinted and fresh advice given. The fresh advice needs to be documented, preferably by letter.

10. Although there is no current requirement that each party be given a copy of the agreement (only copies of the two Statements), each party should promptly receive a copy of the agreement to reduce the risk of allegations of duress and unconscionable conduct. It is also good practice, in any event, for lawyers to provide clients with copies of agreements they have signed.

11. It is best to have one original rather than multiple originals which may be different. There is less risk of uncertainty as to the terms.

12. Signing the Statements of Independent Legal Advice and exchanging copies of the Statements before the Agreement is executed, may assist in proving later that the advice was provided to each party before they signed the agreement rather than after (under s 90G(1)(b) or s 90UJ(1)(b)).

13. Detailed file notes should be kept verbal of advice and also the exchange of documents, if the latter is not done by letter.

14. Make sure the legal practitioners are truly independent.

15. Can the client understand the legal practitioner? Do they speak the same language or dialect? Is the client literate?

16. Consider the factors referred to in ¶20-020 and discuss these matters with the client where relevant.

17. Discuss alternatives to a financial agreement with the client where relevant (see ¶20-090).

18. As the legal practitioner may be a witness if there is litigation about the agreement:

– keep accurate and detailed contemporaneous file notes of instructions and verbal advice

– have standard questions to ask each client in addition to asking questions which are of particular relevance to an individual client

– confirm advice in writing to meet the requirements of s 90G(1) or s 90UJ(1).

19. Obtain a full statement of the client's financial position. Instructions must be comprehensive and complete including:

– detailed factual history

– detailed instructions about the assets, income and financial resources of each party. This may entail questions as to the value of any assets which are to be excluded by the financial agreement from the asset pool, but to which the other party may make a direct or indirect contribution (eg a business).

20. Consider and discuss with the client the circumstances which are reasonably foreseeable in the particular relationship (eg moving overseas where one party is at executive management level of an international corporation) or reasonably foreseeable in most relationships, for example:

– unemployment or business failure

– birth of a child

– serious injury or illness of a party

– death of a party

– separation

– reconciliation

– repartnering

– an ill or disabled child requiring extra care

– retirement of a party

– inheritance.

21. Set out in the financial agreement any “reasonably foreseeable” circumstances which have been considered.

22. Ask the client to list their goals in order of priority. Advice should be given as to whether these goals can be achieved. These goals must be weighed up against the merits or otherwise of the agreement and the risks of it being set aside. For example, if the primary goal is certainty in the event of a party’s death this may be unachievable. It is impossible to use a financial agreement to protect a party from a testator’s family maintenance claim except in New South Wales. If the primary goal is to protect all of a substantial pool of assets brought in by one party, but the parties have children or may have children, this goal may be difficult to achieve.

23. Advise the client that failure to disclose income or assets may be a ground for setting the agreement aside. The effectiveness of clauses in financial agreements in which the parties waive their rights to seek full disclosure is untested.

24. Advise the client that the terms of the agreement must be followed. If the parties do not abide by the agreement, the court may refuse to enforce it. In circumstances where it becomes difficult or impracticable to follow the agreement, or the parties change their minds, the agreement should be reviewed.

25. Use precedent agreements only as a guide. Every client and fact situation is unique, and each client will have different goals and different personal and financial positions. The client’s position must be accurately assessed so that the agreement is tailored to the parties’ circumstances and goals, not the other way around. Common errors made when amending an agreement previously used for other parties are to refer to the incorrect names of the parties and the incorrect sections of the Act.

26. Advise the client to encourage the other party to obtain independent legal advice at an early stage. This recommendation should also be made in writing by the legal practitioner to the other party. If the other party refuses to obtain independent legal advice, a binding financial agreement is not an option.

27. Ensure that advice is both verbal and in writing.

28. Ensure that the advice balances up the differing aims of:

– being comprehensive

– meeting the requirements of the FLA

– not being so complex that it is difficult for a client to understand

– not being too simple as to be misleading.

29. Draft a carefully worded precedent letter of advice in advance (despite point 28 above) which gives at least the structure of the requirements for an agreement to be binding and also the grounds for setting aside the agreement. Providing this advice in writing as well as verbally will assist in protecting the legal practitioner from a professional negligence claim. Specific clauses in the agreement which are of interest or concern should be highlighted and explained. The letter should explain the terms of the agreement.

30. Ask the client to acknowledge the advice they have received in writing, particularly if the client is signing the agreement contrary to the advice they have received. Be aware that professional negligence claims have been made by parties who signed financial agreements against their legal practitioners' advice. If advising a client not to sign a financial agreement, it may be best to refuse to sign the Statement of Independent Legal Advice and let another legal practitioner bear the risk.

31. Set out in the financial agreement the financial details of both parties either in summary form or as an annexure, possibly as completed financial statements.

32. Keep a copy of the agreement to ensure that a copy is available if the client cannot find a copy when it is needed. This is particularly important due to the fact that there is no system for court registration. It may be prudent to keep a certified copy of the original agreement. The agreement, letters and file notes of instructions and letters of advice should not be destroyed even if the file is destroyed.

33. Send the letter of advice and the agreement to the client at least several days before they sign the agreement.

34. Keep full records (and store them in a deed safe rather than in a file which may be thrown away after several years) of important documents, letters seeking information and any responses received. It may be important from the perspective of the client or his or her legal practitioner to have evidence of efforts to obtain full disclosure of the other party's financial position, the details provided and any advice by the legal practitioner.

35. The estimate of costs for the work done should take into account the complexity of the task and the risk of a later professional negligence claim.

¶20-170 Agreements made before the marriage or relationship, or during an ongoing marriage or relationship

The role of a legal practitioner instructed to draft an agreement before a marriage or commencement of cohabitation, or during an ongoing marriage or relationship, is quite different from that of a legal practitioner instructed to act for a party in the event of a separation.

The first and most obvious difference is the attitude of the client. Usually, the parties are far more conciliatory towards each other than after separation. They want the marriage or relationship to occur (or continue). They may want to protect their interests in the event of a separation but will often be prepared to make concessions to ensure that agreement is reached. The legal practitioner needs to be able to respond to these dual aims and give advice, which at least in tone recognises both aims.

A legal practitioner will often find it difficult to convince a client that a term of a proposed agreement entered into before separation (and particularly before marriage) is unfair or unreasonable. One party about to marry will often be prepared to sign an agreement against their interests in the belief that the marriage will not fail. That party may see the agreement as relatively unimportant but views the marriage as more important. The other party may be prepared to put their own financial interests above the relationship itself and may not be prepared to marry without a pre-nuptial agreement. The former party is at a distinct disadvantage in negotiations.

The potential for professional negligence claims is enormous. This potential is exacerbated by the fact that instructions will frequently be received shortly before the marriage or commencement of the de facto relationship. This leaves little time for negotiations, lengthy discussions with the client, consideration by the client, and careful drafting of an agreement and letter of advice.

Negotiating the terms and drafting a pre-nuptial agreement is a process which should start many months before the marriage or commencement of the de facto relationship. Ideally, the agreement should be completed and signed by the parties before any wedding plans are finalised and before the invitations are sent out. This will rarely occur.

The first issue which the legal practitioner must consider is whether or

not there is sufficient time for both parties to be properly advised and appropriate action to be taken. If not, it may be wise to refuse to act. Mistakes are more likely to be made by clients and their legal practitioners if there is only a short time for the agreement to be prepared. Issues may be missed, provisions may be uncertain, disclosure not properly completed and letters of advice incomplete or incorrect. If the parties separate, and the agreement did not properly protect the client's interests, the client may have a claim against the legal practitioner. There is also the potential for a claim by the other party for whom the legal practitioner did not act.[3] See ¶20-200.

It is unclear from the case law as to how close to the wedding day pre-nuptial agreements can "safely" be signed. See the Examples in ¶20-355. There are significant risks of professional negligence claims if legal practitioners make incorrect assessments, so it is best to be cautious.

Factors which may be relevant in determining whether there is "ink on the wedding dress" or "ink on the tuxedo" may include:

(a) The length of time spent negotiating the agreement

(b) How long prior to the wedding date did negotiations start and was the first draft of the agreement prepared?

(c) What pressures did the party who is less advantaged by the agreement feel to continue with the wedding? For example, financial costs of cancelling the wedding, family pressures, pregnancy, cultural considerations, immigration status and travel of guests from overseas

(d) General conduct of the parties

(e) Whether there was a prior de facto relationship and of what length

(f) Amount of contact between the party and their solicitor

(g) How much of the negotiations were conducted through lawyers

rather than directly between the parties

(h) The mental and physical health of the parties and any other factors which might put one party at a disadvantage such as drug or alcohol use, and financial pressures.[4]

If a decision is made to act for a particular client, the following guidelines should be followed:

1. Consider whether a s 90UB *Family Law Act 1975* (Cth) (FLA) or s 90UC agreement is more appropriate than a s 90B agreement, or whether a s 90UB or s 90UC agreement is required as well as s 90B agreement. A s 90UB or s 90UC agreement will no longer operate if the parties marry (s 90UJ(3)). However, if the parties separate without marrying, a s 90B agreement will not effectively dispose of the rights of the parties as well as a s 90UB agreement. A s 90UB or s 90UC agreement will no longer operate if the parties marry (s 90UJ(3)). However, if the parties separate without marrying, a s 90B agreement will be useless. Although Cronin J in *Cording & Oster* [2010] FamCA 511 (see also *Piper & Mueller* (2015) FLC ¶93-686) found that an agreement could be both a s 90B and a 90UC agreement, separate documents may be preferable. The advice required is different for agreements under Pt VIIIA and VIIIAB, although 2 agreements will be more expensive for the parties.

2. A legal practitioner acting for a female of childbearing age should seriously consider advising the client (and negotiating accordingly) to insert in the agreement that different provisions in the agreement apply upon the birth or adoption of a child by the parties. Consideration should be given to including a provision in the agreement allowing s 74 and 79, or s 90SE and 90SM to fully operate if the parties have a child. The agreement would then only be relied on to set out the parties' assets and resources at the commencement of the relationship.

3. The agreement should be negotiated and signed well prior to the wedding. Ideally it should be done a few months prior, but the

period of time which is reasonable will vary, depending on the circumstances.

4. Particular care should be taken where one of the parties (either the client or the other party):

   – does not speak English well or at all

   – has a disability, serious illness, serious injury or the possibility of an incapacity for work

   – may be a victim of (physical or emotional) domestic violence

   – is a female of child-bearing age, or the couple is a same-sex couple who may have children

   – is giving away rights to a substantial inheritance, likely inheritance or family business, eg a farm, to which he or she will directly or indirectly contribute.

5. Advise both parties to obtain advice about preparing new wills.

6. If the parties are living in a de facto relationship and intend to marry, the status of the agreement should be made clear in the agreement.

Footnotes

3 *Noll & Noll* (2013) FLC ¶93-529; *F Firm & Ruane and Ors* (2014) FLC ¶93-611.

4 *Ross* v *Caunters* [1979] 3 All ER 580.

¶20-175 Agreements made after separation or after divorce

If a financial agreement is being used to finalise property and/or maintenance claims after a separation, the risk of a professional negligence claim is not as great as when the agreement is made before separation. However, the risks are almost certainly greater than with consent orders. There is no judicial scrutiny, so the onus on the lawyers to ensure it is drafted correctly and the parties are properly advised is greater than with respect to consent orders.

If a decision is made to act for a particular client:

- the factors in ¶20-030 should be considered and discussed with the client where relevant
- alternatives to a financial agreement should be discussed with the client where relevant (see ¶20-070)
- legal practitioners should be particularly careful where one of the parties (the client or the other party):
  - does not speak English well or at all
  - has a disability, serious illness, serious injury or the possibility of an incapacity for work
  - may be a victim of family violence, and
- the client should be advised to prepare a will or a new will and notify any superannuation fund and life insurer of a change of beneficiary.

¶20-180 Independent legal advice

Independent legal advice is a requirement of financial and termination agreements. The advice must comply with s 90G(1) *Family Law Act 1975* (Cth) (FLA) or s 90UJ(1), be independent and, arguably, be accurate. The relevant provisions include:

- s 90G(1)(b) and (c) — requirements of a Pt VIIIA financial agreement

- s 90UJ(1)(b) and (c) — requirements of a Pt VIIIAB financial agreement
- s 90J(2)(b) and (c) — requirements of a Pt VIIIA termination agreement
- s 90UL(1)(b) and (c) — requirements of a Pt VIIIAB termination agreement
- s 90K(1) and 90UM(1) — grounds for setting aside a Pt VIIIA or Pt VIIIAB financial agreement or termination agreement, and
- s 90G(1A), 90J(2A), 90UJ(1A) and 90UL(2A) — ability of court to find agreement to be binding despite failure to meet legal advice requirements.

Many of the grounds in s 90K(1) and 90UM(1) of the FLA are more difficult to establish if the parties each have independent legal advice. Independent legal advice is particularly important in considering whether there has been undue influence or duress, making the agreement "void, voidable or unenforceable" under s 90K(1)(b) or s 90UM(1)(e), or unconscionable under s 90K(1)(e) or s 90UM(1)(h). For example, an allegation of undue influence may be rebutted by establishing that the party entered into the transaction as "the result of the free exercise of independent will" with "knowledge of all relevant circumstances".

There is a view that duress cannot be established if the party alleging that they were under duress had independent legal advice. This argument appears to have been rejected by the High Court in *Thorne* v *Kennedy* [2017] HCATrans 148. Kiefel CJ said "Independent legal advice can never overcome a case of undue influence, duress and perhaps not even unconscionability". The respondent had conceded that this was the case.

Verbal vs written advice

It may be sufficient for the purposes of the FLA to give verbal rather than written advice. However, problems which may arise in the event

that a professional negligence claim is made or a party applies to set the agreement aside include:

- written file notes may be insufficient to show that the advice was explained fully
- a party may forget or may not properly hear or understand
- advice may be so general that it is misleading or it may be later alleged to be so
- advice may not be sufficient to overcome an application to rescind the agreement for equitable or statutory unconscionability (s 90K(1)(b) and (e), and 90UM(1)(e) and (h)), and
- a party may enter into an agreement despite advice not to do so. There may be many reasons for this, including depression or guilt about a relationship breakdown, or personal or family pressures to marry. The verbal advice may not be properly heard nor remembered.

A legal practitioner giving a certificate of independent legal advice is not required to give a letter of advice. It is, however, best practice that this occur to:

- avoid any misunderstandings about the advice
- avoid a disagreement about whether or not the advice was given, and
- protect the legal practitioner if the party later claims that the legal practitioner was negligent.

It might be wise to only accept instructions on condition that the client is prepared to pay for comprehensive written advice and acknowledges receipt of that advice.

Examples

Balzia & Covich **[2009] FamCA 1357**

The wife unsuccessfully argued that her legal advice was not independent. She was taken by the husband to see the solicitor and she asserted that the solicitor was mainly her husband's solicitor. Collier J accepted that the husband was told by the solicitor to go away on the first occasion the wife saw the solicitor and that the husband had his own legal representation. The agreement was found not to be a valid agreement on other grounds.

***Weldon & Asher* (2014) FLC ¶93-579**

The wife's sister referred the husband to Mr P. The wife's lawyer, who was the wife's sister, and Mr P, the lawyer who gave the advice to the husband, previously worked in the same firm. The husband alleged that Mr P had been selected by the wife's sister as someone who would "ask no questions" and "just sign without thought or advice". This allegation was inconsistent with the correspondence from Mr P seeking amendments to the agreement. Justice Thackray was satisfied that there was no conflict of interest, that Mr P was entirely independent and that Mr P acted in accordance with the husband's interests and instructions.

***Adame & Adame* [2014] FCCA 42**

The husband paid for two of the three lawyers seen by the wife. The solicitor who signed the Certificate of Independent Legal Advice on behalf of the wife was located and instructed by the husband and the file was opened in his name and emails were sent to his address, the husband not having provided the solicitor with the wife's email address. The independence of the solicitor was accepted by Jarrett J who was satisfied that, contrary to the wife's evidence, the agreement was signed by the wife without the husband being present. However, Jarrett J found that the advice did not meet the requirements of s 90G(1) on another ground, because the legal practitioner who gave the advice required by s 90G(1)(b) was not the legal practitioner who signed the certificate. The legal practitioner who signed the certificate did not give the advice required under the Act (despite signing the certificate) and said that he was only concerned with the "commercial terms" of the agreement and whether those terms reflected the parties' intentions.

¶20-185 Advice required

Financial agreements entered into under the *Family Law Act 1975* (FLA) require a high standard of legal advice. The advice required under s 90G(1), 90J(2), 90UJ(1) and 90UL(2), seems to be more than an explanation of the meaning of the agreement. It should include:

- assessment of the party's entitlements under the FLA
- a weighing up of the party's entitlements under the FLA against other considerations which may justify other arrangements
- explanation of the meaning of the agreement as a whole and its

parts, and

- recommendations as to whether the party should or should not execute the agreement and the reasons for these recommendations.

In other contexts, the minimum equitable requirement of independent legal advice is either to:

- explain the real effect of any documents on the party's rights and position (see *Willis* v *Barron* (1902) AC 271), or

- take "care that the client understands fully the nature and consequences of the act and the consequences of that act" (*Re Coomber* (1911) 1 Ch 723 at p 729).

Sections 90G(1), 90J(2), 90UJ(1) and 90UL(2) are all similarly worded. Section 90G(1) sets out the circumstances in which a financial agreement is binding. In relation to legal advice it requires:

> "(a) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
>
> (b) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
>
> (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse part".

A checklist of topics to be covered in legal advice is at ¶20-195.

The main effects of the changes stemming from the *Federal Justice*

System Amendment (Efficiency Measures) Act (No 1) 2009, which commenced on 4 January 2010, are:

1. Although a statement of legal advice must be given to the client and a copy is given to the other spouse party or to the other spouse party's legal representative, it is no longer mandatory for a financial agreement to have the statements annexed.

2. It is mandatory, subject to s 90G(1A), 90J(2A), 90UJ(1A) and 90UL(2A), that each spouse party receives independent legal advice. It is not enough that statements of legal advice be signed by each of their lawyers to the effect that a spouse party has been provided with independent legal advice about the matters specified, being:

   • the rights of that party, and

   • the advantages and disadvantages at the time the advice was provided to the party of making the agreement.

3. A statement of legal advice must be signed by each legal practitioner.

4. Legal practitioners can provide signed statements about the giving of prior independent legal advice to spouse parties to financial and termination agreements either before or after the parties sign the agreement.

The effect of inadequate or incomplete advice has been a matter of dispute. There are conflicting decisions in such cases as *Parker & Parker* [2010] FamCA 664, *Ruane & Bachmann-Ruane* [2009] FamCA 1101, *Pascot & Pascot* [2011] FamCA 945, *Hoult & Hoult* (2011) FLC ¶93-489, *Bilal & Omar* (2015) FLC ¶93-636, *Abrum & Abrum* [2013] FamCA 897 and *Logan & Logan* (2013) FLC 93-555.

On 26 July 2013, the Full Court upheld both parties' appeals in *Hoult & Hoult* (2013) FLC ¶93-546. In *Hoult & Hoult* and *Logan & Logan* (2013) FLC ¶93-555, the Full Court was prepared to look behind the Certificate or Statement of Independent Legal Advice to ascertain

whether the advice was given.

In *Ruane*, Cronin J found that the requirement was simply for the parties to obtain legal advice. This did not mean the advice had to be accepted, and followed, or even that it had to be correct.

Consistently with *Hoult*, *Logan* and *Ruane*, although it was not required to determine the issue, the Full Court in *Wallace & Stelzer* (2013) FLC ¶93-566 indicated it preferred the line of authority which did not require the advice to be accurate. It said (at [103]):

> "Although there appeared to be some suggestion in the husband's case before us that in a case such as the present the court is required to consider the accuracy of the legal advice provided, we did not understand that issue to be ultimately pressed. But in any event we note that in the recent Full Court decision of *Logan & Logan* …, and relying on *Hoult*, it was held that the only enquiry necessary is as to whether advice was given, and not as to the content of that advice".

The certificates signed by the parties' solicitors in *Wallace & Stelzer* recorded that advice had been given about the four matters that were prescribed prior to the 2003 amendments coming into effect. However, the deed itself contained a recital to the effect that the parties had received advice on the two matters prescribed following the 2003 amendments. Notwithstanding that the deed itself was compliant, the requirements of the legislation were not met because of the defect in the certificates.

The trial judge found that the January 2010 amendments had the effect of curing the defects in the certificates, and the amendments were constitutionally valid notwithstanding their retrospective effect. Both of these findings were upheld by the Full Court.

The Full Court considered two other, seemingly irreconcilable, provisions in the legislation concerning the requirement for certificates/statements signed by the parties' legal advisors. Prior to the January 2010 amendments, it was necessary for certificates to be annexed to a financial agreement, signed by the solicitors who had provided legal advice to each party stating the advice that had been

provided. The January 2010 amendments removed this requirement and instead now require that each party be provided with a signed statement by the legal practitioner stating that the requisite advice was given, and a copy of the statement must be given to the other party. The difficulty was that while item 8(6) expressly provided that these new requirements did not apply to financial agreements entered into before the commencement of the January 2010 amendments, item 8A(3) purported to prescribe how these new requirements could be met in the case of such agreements. The provisions seemingly could not both stand.

Murphy J grappled with this dilemma in *Senior & Anderson* (2011) FLC ¶93-470 and accepted that one or other of the provisions had to be treated as having no effect, leading him to formulate two alternative versions of s 90G and prefer a version which ignored item 8(6) and only gave effect to item 8A(3). The Full Court in *Wallace & Stelzer* agreed that one of the provisions had to be treated as having no effect, but decided that item 8(6) should be ignored.

Examples

***Wallace & Stelzer* (2013) FLC ¶93-566**

The agreement was entered into after the 2003 amendments and before the commencement of the January 2010 amendments. An application for leave to appeal to the High Court was refused as Hayne, Kiefel and Bell JJ found that "there is no reason to doubt the correctness of the conclusions reached by the Full Court of the Family Court of Australia". A useful summary of the findings in *Wallace & Stelzer* was given by Thackray J in *Weldon & Asher* [2014] FCWA 11.

***Bilal & Omar* (2015) FLC ¶93-636**

The Full Court followed *Wallace & Stelzer*. The decision of the lower court, *Omar & Bilal* [2011] FMCAfam 430, was made before the Full Court decided *Wallace & Stelzer*. The trial judge found that the lawyer had abrogated his responsibility to give legal advice on the agreement to an interpreter and the lawyer was not present when the interpreter took the wife through the agreement. The agreement was found not to meet the requirements of s 90G(1). On appeal, the Full Court accepted that there were reasons why the trial judge could have made findings that the wife's evidence lacked credibility or was untruthful. She changed her position from arguing that the advice was inadequate to arguing, that the advice was not given at all. The Act did not require that the advice be adequate or correct, but only that the advice was given. The appeal was allowed and the matter remitted for trial.

***Logan & Logan* (2013) FLC ¶93-555**

The wife deposed that she was not, at any time prior to the execution of the agreement,

provided with any legal advice as to the effect of the agreement on the parties' rights and the advantages and disadvantages in making the agreement. The Full Court unanimously agreed with the Full Court in *Hoult* that an inquiry into the content of the legal advice was not required but only as to whether the advice was given. The obligation thrown on the wife by the Certificate was not to prove that the advice had not been given but to throw the matter into doubt, leaving the onus of satisfying the court that the advice had been given on the husband. The husband's appeal was upheld because the error made by the Federal Magistrate in the allocation of the onus of proof infected her Honour's decision as a whole. It was not apparent how she was able to arrive at the finding that the wife's evidence was insufficient to reasonably satisfy her that s 90G(1)(b) had not been complied with.

***Kostres & Kostres* [2008] FMCAfam 1124**

The husband argued that the financial agreement ought to be set aside on various grounds, including that the certificates provided by the solicitors did not comply with s 90G(1)(b), as they were given when both parties believed that the bankrupt was an undischarged bankrupt so the advice was incorrect. However, there was no evidence that the solicitors had this belief.

On appeal, the Full Court in *Kostres & Kostres* (2009) FLC ¶93-420 found the agreement void on other grounds.

***Collagio & Collins* [2015] FamCA 263**

The wording in the certificates was broader than required by the Act. The certificates set out that the legal practitioners had given advice on matters which included "the effect of this agreement on the rights of the parties" rather than the rights of the particular client of each legal practitioner. Foster J said (at [57]):

> "The reference to 'the parties' as contended by counsel for the de facto husband reflected that the advice provided by each solicitor included the requisite advice to their own client but also advice as to the effect of the agreement on the other party. Thus demonstrating a perhaps more expansive level of advice provided over and above the particular advice required to the individual client".

He rejected the argument that the agreement should be found not to be binding because the wording of the Act was not followed. He considered that the advice certified to have been given was perhaps greater than required.

***Raleigh & Raleigh* [2015] FamCA 625**

Justice Watts declared that a financial agreement entered into between the parties in 2003, eight days before the wife gave birth to the first child of the marriage, was not binding. She had conferred with her solicitor for less than 15 minutes.

An issue was that the certificates annexed to the financial agreement indicated that advice was given on non-existent rights. The parties disagreed as to who had the forensic onus to prove that the wife was given the requisite advice. The husband said that an acknowledgement as to advice in the 2003 financial agreement shifted the onus to the wife. The wife submitted that she was not provided with the advice pursuant to s 90G(1)(b)(i) and (ii) of the Act required by the wording of the legislation applicable at the date the 2003 financial agreement was signed.

The certificate was stated to be for the purpose of s 90C but in the body of the agreement it said that the wife had been advised inter alia as to "the effect of the

agreement on the rights of the parties to apply for an order under Part 90C of the Family Law Act 1975" (not s 90C).

The wife did not deny that there was compliance with s 90G(1)(iii) and (iv) of the Act. She was advised that it was not prudent for her to make the agreement in light of circumstances that were reasonably foreseeable (namely the imminent birth of their first child) and that the provisions of the agreement were not fair and reasonable.

Watts J distinguished the facts from those in *Hoult* where the certificate and the agreement indicated that the requisite advice had been given and the forensic onus had shifted to the wife.

The file note of the wife's solicitor indicated that the 15 minutes of conference time included time for the solicitor to give advice in relation to wills and testamentary dispositions, execute the agreement and certificate, and dictate the file note. The time available to give any requisite advice was therefore significantly less than 15 minutes.

Watts J quoted from *Hoult* (where there was no file note of the consultation) where the majority (with Thackray J dissenting) said (at [267] quoted at [62] in *Raleigh*):

> "We do not accept that the absence of documentation is logically or necessarily 'consistent' with a failure to give the required advice. The fact that it may be prudent practice to make a file note of having given the advice cannot be translated to either a finding that the advice was not given or even that it was consistent with the advice not being given, particularly when all the evidence of the solicitor is taken into account, and the force of the certificate and the recitals in the agreement is recognised".

Watts J noted (at [63]):

> "In this case, there is no 'force of the certificate' and there is a file note contemporaneously dictated at the end of the conference. The fact that nothing is said about essential matters in that file note is of some relevance".

The evidence did not establish that the wife's solicitor took any financial history from the wife or discussed with the wife what rights she actually had under Pt VIII of the Act, and in particular s 79, and how a court might approach a case after the parties had children. The file note and a letter sent after the agreement was signed did not cover these matters. Although the solicitor told the wife the agreement did not make provision for her rights, Watts J was not satisfied that the wife's solicitor put himself in a position to know what those rights might be, or that the solicitor told the wife what those rights might be. The husband was therefore unable to discharge the onus of establishing that the wife's solicitor provided independent legal advice to the wife about the effect of the agreement on the wife's rights. Watts J was satisfied that s 90G(1)(b)(ii) had been complied with despite the wording of the certificate being "financially or otherwise" but he eluded to the possibility of other arguments which could have been put before him as to why the agreement should be held not to be binding, but they were not argued before him.

¶20-190 Validating an agreement which does not meet the requirements

If the requirements of s 90G(1)(b), (c) and (ca), 90J(2)(b), (c) and (ca), 90UL(1), (b), (c) and (ca) or s 90UL(2)(b), (c) and (ca) *Family Law Act 1975* (Cth) (FLA) are not met, a financial agreement can still be binding if:

(a) the agreement is signed by all parties

(b) one or more of paras (1)(b), (c) and (ca) are not satisfied in relation to the agreement

(c) a court is satisfied that it would be unjust and equitable if the agreement were not binding on the spouse parties to the agreement (disregarding any changes in circumstances from the time the agreement was made) (s 90G(1A)(c), 90J(2A)(c), 90UJ(1A)(c) and 90UL(2A)(c))

(d) the court makes an order under s 90G(1B) or s 90UL(2B) declaring that the agreement is binding on the parties to the agreement, and

(e) the agreement has not been set aside by a court.

Parties are able to argue that the court can look beyond the statements of legal advice. If the advice was not given or not properly given, the court may, however, still find the agreement is binding. The agreement may still be "saved" under s 90G(1A) (or in similar provisions with respect to the other agreements).

The court can use the equitable principles under s 90KA or s 90UN to consider whether the agreement should be binding because the court is satisfied that it would be unjust and inequitable if the agreement was not binding.

At the rehearing of *Senior & Anderson* [2011] FamCA 802, Young J applied the transitional provisions (applicable to agreements entered into on or after 14 January 2004 and before 4 January 2010) as set out in Murphy J's judgment in the Full Court (*Senior & Anderson* (2011) FLC ¶93-470 discussed further at ¶20-185) finding that the option of declaring the agreement binding under s 90G(1A)(c) was

unavailable as the agreement was compliant with s 90G(1)(b) but not with s 90G(1)(c).

In *Parker & Parker* [2010] FamCA 664, Strickland J declared that the agreement was not binding. He was not satisfied that the effect and implications of an amendment were explained to the wife in the same way that the terms of the agreement were explained to her when she signed the original agreement. Advice of a general nature was insufficient. An appeal was heard in *Parker* (2012) FLC ¶93-499 by a differently constituted Full Court than in *Senior & Anderson*. The appeal was allowed by a 2:1 majority and remitted for re-hearing on whether s 90G(1A) could be used to "save" the agreement. The three judges expressed differing opinions about the effect of s 90G(1A).

The Full Court in *Hoult & Hoult* (2013) FLC ¶93-546 dealt with two appeals:

1. The wife appealed against the decision reported in *Hoult & Hoult* [2011] FamCA 1023 that the agreement was not binding within the meaning of s 90G(1)(b).

2. The husband appealed against the declaration made in *Hoult & Hoult* [2012] FamCA 367 that within s 90G(1A)(c) it would be unjust and inequitable if the agreement was not binding on them.

Strickland and Ainslie-Wallace JJ disagreed with Thackray J's criticisms of the wife's legal practitioner's conduct in giving advice. They found (at [260]) that "the trial judge erred in finding that the requisite advice was not given", erred in his assessment of the wife's credibility and that it was not tenable for him to find that the legal practitioner's evidence was "generally unreliable".

Their Honours also disagreed with Thackray J on the relevance of the absence of file notes. They said that the absence of file notes was not logically or necessarily "consistent" with a failure to give the required advice. They also disagreed with Thackray J that the wife's evidence about the absence of legal advice was "consistent" with the evidence concerning the length of the consultation.

Both appeals were allowed. The view of the majority was that in

relation to s 90G(1A), the trial judge considered the justice and equity of the bargain in s 79 terms. It was not apparent how he applied that test and what criteria he used to find (at [317]) that the bargain did not offend “ordinary notions of fairness”.

The majority was clear (at [313]) that the “justice and equity, or the fairness of the terms of the agreement cannot be considered in the exercise of the discretion”.

Examples

The Estate of the late Ms Fan & Lok **[2015] FamCA 300**

The financial agreement was expressed to be pursuant to s 90B, but it was executed by the husband after the marriage and so ought to have been pursuant to s 90C. Justice Rees found that the agreement could be rectified to be expressed pursuant to s 90C, but the certificates could not be rectified. After concluding that there was no basis on the evidence for her to consider rectification of the certificates, she then considered whether the agreement could be “saved” under s 90G(1A). She took into account that for the past six years the parties had acted in complete disregard of the provisions of the agreement and found that the nature and extent of the non-compliance with the requirements of s 90G(1)(b)–(ca) was not sufficient to prevent the exercise of her discretion pursuant to s 90G(1A)(c). She found that it would be unjust and inequitable if the husband was not held to his agreement.

¶20-195 Topics to be covered in advice — Practical tips

The advice which ideally should be given can be put under several headings:

1. As required by s 90G(1)(b), 90J(2), 90UJ(1) or s 90UL(2) *Family Law Act 1975* (Cth) (FLA):

    (a) The effect of an agreement on the rights of the party. Advice should be given as to both property and spousal maintenance entitlements if the party did not enter into the agreement.

    (b) At the time that the advice was given, what were the advantages and disadvantages to the party of making the agreement?

For example, if:

- the parties have children
- the parties have vastly different incomes and earning capacities
- the parties have significant assets in their personal names
- there are inheritances or are likely to be inheritances
- one of the parties applies for a property settlement in circumstances where the parties are legally married but separate voluntarily rather than by intention
- one party has significant superannuation
- the parties separate after a short relationship or after a long relationship.

This advice ideally should not be given without:

- full financial disclosure by both parties. Preferably this should be within the agreement so that the facts upon which the advice was given is easily established
- estimates or formal valuations of assets. If values are not agreed, a valuation by an accountant, land valuer or other expert may be required. Parties who cannot agree on values may decide not to incur these extra costs. The different values should be set out in the agreement. The written advice should refer to the possible repercussions of the absence of agreement as to values.

Parties may try to contract out of their rights to seek disclosure, but the agreement may be at risk of being set aside under s 90K or s 90UM (see ¶20-280).

In relation to item (a) above, the client needs to be advised

as to the rights which are being given up or varied in relation to property, maintenance or other matters dealt with in the agreement. Detailed advice may be required about the particular clauses.

In relation to item (b) above, possible matters about which the client ought to be advised may be, depending upon the terms of the agreement:

Advantages

1. The main advantage is that the agreement is binding (unless the court sets aside or varies it, or finds that it is not binding) and the client achieves their objective or objectives which may be:
    - certainty as to their property entitlements in the event that they separate
    - to quarantine certain assets from claims by their partner
    - to quarantine any likely inheritance
    - fixing the level and period of spousal maintenance, and/or
    - disposing of all spousal maintenance claims.
2. The agreement prevents a family law court from making orders regarding property and/or maintenance.
3. The agreement gives the client control over what will occur in the event of their separation.
4. The agreement finalises the spousal maintenance rights of the other party so that if the parties separate, no claim can be made against the client.

Disadvantages

1. The client and the legal practitioner do not know what the

financial positions of the parties may be in the future. If they separate, their property and/or maintenance entitlements under the Family Law Act may have been better than under the agreement.

2. The client and the legal practitioner do not know what contributions each party will make in the future. If they separate, the client's property entitlements under the FLA may be better than they are under the agreement.

3. The legal practitioner does not know what future legislative amendments will be made and what case law developments there will be. The agreement may be unenforceable or invalid for reasons the legal practitioner cannot predict now.

4. The client may have to commence proceedings to enforce the agreement in the event of a dispute. The outcome of the enforcement proceedings is unpredictable now as the circumstances of the parties may have changed.

5. The legal practitioner has no control over the advice given by the other legal practitioner and cannot totally ensure that the other legal practitioner meets the legislative requirements.

6. The agreement is not a replacement for a will. It may be taken into account by a court, but should not be relied upon in the absence of a will.

7. The agreement, if it is a Pt VIIIAB agreement, will terminate if the parties marry each other. A new agreement will be required.

8. As circumstances change, a new agreement may be required to cover the changed circumstances if they were not anticipated by the agreement. If one party does not want to enter into a new agreement, the parties will be bound by the agreement they entered into before.

9. Court proceedings to set aside a financial agreement may be commenced by a party on such grounds as failure to disclose, duress and changes in circumstances regarding the care of children. These proceedings may or may not be successful but are likely to be financially and emotionally stressful.

10. Court proceedings may be commenced by one party to such a declaration that the agreement is not binding. Again, these proceedings may or may not be successful, but are likely to be financially and emotionally stressful.

11. If the parties do not follow the agreement, a court may refuse to enforce it.

2. Other matters to deal with in the advice include:

1. Although not legislatively required since January 2004, it is still helpful for a party to be advised as to whether the provisions of the agreement are just and equitable, given the parties' circumstances at the date of the agreement and reasonably foreseeable eventualities.

2. Is an agreement the most appropriate method of protecting the party's interests? Other methods may be better (see ¶20-070) or even no action at all.

3. The circumstances in which a financial agreement can be set aside.

4. Whether the agreement deals with or should deal with:

- maintenance or property or both

- all foreseeable circumstances. For example, the agreement may specifically provide that it not apply if there are children, the marriage or de facto relationship is of a certain length or a party becomes incapacitated.

The particular difficulties of giving advice in pre-nuptial agreements were discussed by Murphy J in *Hoult & Hoult* (2011) FLC ¶93-489 (at [65]):

> "But, at least in the case of a pre-nuptial (i.e. s 90B) agreement, it is by no means clear what is contemplated by the requirement in s 90G that advice must be given as to 'the advantages or disadvantages of the agreement at the time that the agreement was made'. That advice must, as it seems to me, depend, at least in part, upon the myriad of circumstances which may (or may not) arise in the course of the parties' married lives (including, indeed, whether they separate at all, in which case the terms of the agreement providing for respective entitlements will not become operative). How is the justice and equity (in s 79 terms) of the agreement to be determined at the time it is signed if it does not become operative until separation occurs? If advice as to 'the advantages and disadvantages' is not to be given by reference to prospective s 79 entitlements, what criteria or reference point or points are the measure of 'advantage' or 'disadvantage'? The terms of an agreement might be seen to be wholly just (or 'advantageous') if separation was to occur a week later and wholly unjust (or disadvantageous) if separation was to occur 25 years later. The terms of an agreement may be seen to be wholly just (or advantageous) if the parties have modest assets at the time it is made but be seen to be wholly unjust (or disadvantageous) should, 20 years later, one of the parties acquire very significant wealth. Permutations are innumerable".

¶20-200 Duty to third parties

It is possible that a legal practitioner acting for one party may have a duty of care to the other party to the agreement. The situation may be analogous to the preparation of a will. If so, a duty of care may be found to exist. A legal practitioner sometimes has a duty of care to third parties in the preparation of wills. For example, if a legal practitioner allows a beneficiary to witness a will, and the beneficiary fails to receive the bequest, the legal practitioner is negligent.[5]

The extent to which this duty of care extends to beneficiaries not aware of a will's contents and not involved in its preparation was considered in *Hill* v *Van Erp* (1997) 71 ALJR 487. The High Court held that a legal practitioner has a duty of care not to cause economic loss to a beneficiary. It found that the necessary relationship of proximity existed. The legal practitioner was responsible to ensure that the client's intentions were carried out. The proposed beneficiary was foreseeable. The legal practitioner had to exercise reasonable care.

The duty of care to the beneficiary does not extend to non-testamentary transactions, such as gifts during the life of the testator. The duty to the beneficiary cannot override the duty to the client, the testator.[6]

In *Hawkins v Clayton* [1988] HCA 15, Deane J considered that, if a legal firm has custody of a will, that firm has a continuing responsibility for the safe custody of the will. A similar duty of care may arise in relation to the safekeeping of financial and termination agreements.[7]

The question arose in *Noll & Noll* [2011] FamCA 872. The wife applied to set aside a s 90C agreement on the basis that she did not receive independent legal advice. The husband applied to join the wife's lawyers to the proceedings. If the financial agreement was declared not to be binding or set aside, the husband wanted the wife's former law firm to be liable for any loss suffered by him. The trial judge refused the husband's application on the grounds that the case did not fit the guidelines set by the Full Court in *Warby & Warby* (2002) FLC ¶93-091 in relation to accrued jurisdiction.

The husband's appeal was reported as *Noll & Noll* (2013) FLC ¶93-529. The Full Court did not decide whether the husband's claim against the wife's legal practitioners had merit but found that accrued jurisdiction was not attracted. Apparently, the husband sought leave to appeal to the High Court but the parties resolved the dispute on a final basis by consent.

The contrary position regarding accrued jurisdiction was taken in *Ruane & Bachmann-Ruane* [2012] FamCA 369. An appeal was dismissed by the Full Court in *F Firm & Ruane & Ors* (2014) FLC ¶93-611. The Full Court in *Noll* distinguished *Ruane* (at [55]) because in

“that case … a financial agreement between the parties had already been declared to be non-binding”.

In *Reed & Reed* [2016] FCCA 1338, Riethmuller J had to consider the competing authorities of *Noll & Noll* (2013) FLC ¶93-529 and *F Firm & Ruane & Ors* (2014) FLC ¶93-611.

The applicant brought proceedings to enforce a financial agreement. The respondent sought to set aside the financial agreement under s 90K and property settlement orders under s 79.

The applicant sought to join the partners of the law firm that prepared the financial agreement on his behalf and the solicitor who provided advice to the respondent. Riethmuller J granted both these applications.

In *Noll*, the Full Court rejected the application by the husband to join the wife’s solicitors to the proceedings. In *F Firm*, the Full Court dismissed the appeal by the wife’s legal representatives to their joinder to the property settlement proceedings following a finding that the agreement was not binding. The wife claimed for breach of duty of care or breach of fiduciary duty. In *F Firm*, Thackray J was critical of *Noll* and considered that it was wrongly decided. May J agreed, but was not prepared to overrule *Noll*. May & Thackray JJ both agreed that the test for whether there was accrued jurisdiction was not that the non-federal claim was “essential” to the determination of the claim, but “the need to identify one justiciable controversy or matter”.

Riethmuller J said (at [37]–[39]):

> “It seems that the point of distinction between *Noll* and *F Firm* is that in *Noll’s* case a claim by the party seeking to uphold the financial agreement solely against the other party’s former solicitor was not categorised as being part of a single justiciable controversy rather that it was completely disparate, completely separate and distinct, or distinct and unrelated to the proceedings under the *Family Law Act*. In this case, it is apparent (based on the decision in *F Firm*) that the claims by the applicant against his own former solicitors with respect to the financial agreement are within the accrued jurisdiction of the court based upon the original

jurisdiction under the *Family Law Act*.

This adds a different complexion to the case. On this basis the decision in *Noll* must be distinguished on its facts from the present proceedings. If I be wrong in this regard, then it appears that I am bound to follow *Noll* with respect to the claim against the wife's former solicitor until such time as it is overturned, although it does appear there is considerable force in the arguments set out by Thackray J in *F Firm & Ruane*.

I conclude that the FCCA also has accrued jurisdiction with respect to the claims against the proposed second through fourth respondents as a result of its original jurisdiction to deal with the financial agreement pursuant to *Family Law Act*".

Footnotes

5 *Whittingham* v *Crease & Co* (1978) 88 DLR (3d) 353.

6 *Carr-Glynn* v *Frearsons* [1997] 2 All ER 614.

7 *Hawkins* v *Clayton* [1988] HCA 15.

¶20-207 Rectification

Rectification is an equitable remedy which enables a written agreement to be amended. This is done to accurately reflect the common intention of the parties. The parties must have agreed to all the terms of the contract prior to executing the written agreement. It is, therefore, the document and not the written agreement which is rectified. Usually, the mistake is a common mistake, ie by both parties. In rare circumstances rectification can be ordered because of a unilateral mistake. For a unilateral mistake one party must have been aware (or should have been aware) that the other was mistaken and failed to correct that mistake.

The husband in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411, *inter alia*, relied on rectification in a dispute as to whether a financial agreement existed and was binding. Murphy J found that s 90KA *Family Law Act 1975* (Cth) (FLA) could be used to invoke equitable principles and determine whether a financial agreement is "valid, enforceable or effective" but not to determine whether it is binding under s 90G(1). The agreement executed by the wife was materially different to that executed by the husband as no schedule of assets was attached when the wife executed the agreement. His Honour refused to rectify the agreement to include the schedule of assets. He said (at [153] and [155]):

> "Whilst it may be true that the parties each had an intention to enter an agreement that was intended to operate in the manner envisaged by s90G and s71A, that is not the end of the necessary inquiry as to the mutuality of their intention … Here, the inclusion, or exclusion, of specified property must be central to the intention of the parties. If the core intention of the parties is to exclude matters the subject of agreement from the operation of Pt VIII, mutuality of intention about (relevantly) the specific property to be excluded is central to the true intention of the parties".

Extrinsic evidence is admissible to establish the agreement reached by the parties before entering into the written contract and the mistake made.

All three judges in *Senior & Anderson* (2011) FLC ¶93-470 said that the body of the agreement could be rectified under s 90KA to refer to s 90D rather than s 90C. However, although not dealt with by the Full Court, it is arguable that the advice required before marriage (under s 90B) and prior to separation (under s 90C) is different to that required after separation (under s 90C) and after divorce (s 90D). For example, s 90D(2)(a) refers to "how all or any of the property or financial resources that either or both of the spouse parties had or acquired during the former marriage is to be dealt with", thus excluding the ability of the agreement to deal with assets acquired post-divorce.

Cases decided after the 2010 amendments in which the agreement was rectified and found to be binding include *Ryan & Joyce* [2011]

FMCAfam 225, *Senior & Anderson* [2010] FamCA 601 (but on appeal was upheld in (2011) FLC ¶93-470), *Wallace & Stelzer* [2011] FamCA54. In these cases, the errors were such matters as incorrect references to s 90C rather than s 90D, inconsistencies, incorrect names of parties, incorrect dates and incorrect certificate/statement.

Examples

***Balzia & Covich* [2009] FamCA 1357**

Collier J held he could rectify the financial agreement so that it referred to s 90C rather than s 90B, but he could not rectify the certificates which referred to s 90B. The parties married just prior to the agreement being executed by them both.

***Saintclaire & Saintclaire* (2015) FLC ¶93-684**

The Full Court distinguished the facts from those in *Senior & Anderson*. The Full Court said that the misdescription in *Senior & Anderson* was that the parties were incorrectly named in the certificates. The court could not be satisfied that the requisite legal advice was given to the parties. In *Saintclaire*, the misdescription was as to the category of financial agreement. There were two difficulties with this argument:

1. It was apparent from the wording of the certificates, and confirmed in the agreement itself, that the legal advice given was as to the effect and the advantages and disadvantages of the deed to which the certificates were attached, regardless of whether the agreement was described incorrectly as a s 90B financial agreement.

2. This submission was not raised before the trial judge. The question of what advice is given is a question of fact, or at least, a mixture of fact and law, and on that basis it could not be argued first on appeal.

The Full Court was satisfied that the intention of the parties was plainly evident and that the reference to s 90B in the recitals should be read as a reference to s 90C.

***Parke & Parke* [2015] FCCA 1692**

Two clauses in a financial agreement created ambiguity and uncertainty. Pursuant to one clause, the respondent's half interest in a real property was excluded property which she retained in the event of a separation. However, pursuant to another clause, the respondent was required to transfer her 50% share to the party's son X within 60 days of a separation. An additional problem was that X refused to accept a transfer of the respondent's half interest in the property and the agreement did not have a default provision setting out what was to occur in the event that X refused to accept the transfer. The trial judge found that the clauses were essential terms of the agreement because they dealt with what was to happen in the event that the parties separated. They could not be severed from the agreement.

***Parker and Parker* [2010] FamCA 664**

The agreement was amended by the husband after the wife signed the agreement and her solicitor signed the certificate. The wife initialled the amendment but the certificate was not amended by the wife's lawyer. The trial judge did not permit rectification and

held the agreement was not binding. On appeal, a majority of the Full Court in *Parker and Parker* (2012) FLC ¶93-499 allowed the appeal and remitted the matter for rehearing as 90G(1A) had not been correctly applied.

***Senior and Anderson* (2011) FLC ¶93-470**

The trial judge rectified the agreement which incorrectly referred to s 90C rather than s 90D and in which the names of the parties were incorrectly named in one part of the certificates. The majority upheld the appeal for different reasons and remitted the matter for rehearing. May J, dissenting, considered that it was unjust and inequitable for the agreement not to be binding.

¶20-210 Jurisdiction

The issue of geographic jurisdiction is increasingly important. People are more mobile, not only within Australia but also internationally. Industries such as telecommunications, science, computers, engineering, law and accounting offer experiences and incomes overseas which may not be possible in Australia. After separation, the primary caregiver often wants to return to Australia.

Most financial and termination agreements include a provision that the law of Australia governs the agreement. The effect of such a provision cannot be simply stated. The effect differs depending on the law of the other jurisdiction, where the parties reside and where the assets (particularly real estate) are located. If another jurisdiction is more appropriate to decide the parties, entitlements that jurisdiction may consider itself bound to apply Australia law, or it may not. If there is an expectation that the parties may reside or acquire property in another jurisdiction, consideration should be given to making an agreement in the other jurisdiction at the same time as the Australian agreement is made.

Jurisdiction is more complex in relation to de facto relationships even if all property is in Australia. Parties need to meet geographical hurdles to be within the *Family Law Act 1975* (Cth) (FLA) (eg s 90UA, 90UE). As Western Australia has not referred its powers, parties who have assets in that state or live in that state for part of their relationship may have to manoeuvre through the jurisdictional requirements of the *Family Court Act 1997* (WA) as well as the FLA (see Chapter 22).

ENDING OR AVOIDING A FINANCIAL AGREEMENT

¶20-220 Ending a financial agreement — termination and setting aside

The *Family Law Act 1975* (Cth) (FLA) provides that a financial agreement will "end" in three circumstances. It can be:

- "terminated" under s 90J or s 90UL
- "set aside" under s 90K or s 90UM
- found not to be binding under s 90G(1) or s 90UJ(1), which means it was never effective.

A party can apply to the court for an order that a financial agreement be set aside in circumstances where that party already believes that the contract has been rescinded, breached or is otherwise unenforceable. A court may set aside an agreement if it is "void, voidable or unenforceable" (s 90K(1)(b) or s 90UM(1)(e)).

It is important to raise all grounds upon which a party intends to rely to either seek to set aside a financial agreement or find it not to be binding at the proper time, rather than have one ground heard and determined and then raise another. In *Jess & Garvey* (2018) FLC 93-827, the Full Court considered whether *Anshun* estoppel applied where the wife had not raised all causes of action upon which she later tried to rely at an early stage in proceedings issued by the husband to enforce a s 90B financial agreement.

An application for special leave to appeal to the High Court was refused in *Jess & Garvey* [2018] HCASL 202 on the ground that the appeal did not "enjoy sufficient prospects of success".

The lessons from *Jess & Garvey* are as follows:

1. A party may be estopped from raising other grounds upon which an agreement should not be enforced, where one ground has

already been raised and dismissed.

2. The party seeking enforcement of an agreement should, at an early stage, invite the other party to raise all possible arguments. This forces the other party to set out their case, locks them in, and once these arguments are determined means that it is likely that different arguments cannot be raised later.

¶20-230 Agreements ceases to be effective

There are several situations where a financial agreement ceases to be effective. These are:

- the parties enter into a termination agreement under s 90J or s 90UL *Family Law Act 1975* (Cth) (FLA)

- the parties include in another financial agreement a clause that terminates the previous financial agreement (s 90B(4), 90C(4), 90D(4) or s 90UB(4), 90UC(4) or s 90UD(4))

- it is set aside on one of the grounds listed in s 90K(1) or s 90UM(1) — see ¶20-280

- Pt VIIIAB agreements cease to be binding if the parties marry each other (s 90UJ(3))

- a court makes a declaration that the agreement is not binding as it does not comply with s 90G(1) or s 90UJ(1) and it is not validated under s 90G(1A) or s 90UJ(1A).

In relation to Pt VIIIAB, agreements a “Pt VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other” (s 90UJ(3)). Unless the parties have also entered into a s 90B agreement (in contemplation of marriage) or subsequently enter into a s 90C agreement (during marriage) they will have the usual rights of married couples to property and spousal maintenance and not their rights under the Pt VIIIAB agreement.

¶20-235 Onus of proof

The *Family Law Act 1975* (Cth) does not state who bears the onus of proof when one party is seeking to uphold a financial agreement and one party is seeking to show that it is not binding or should be set aside.

In several cases, the court has specifically stated that the onus is on the party seeking the protection of the agreement, eg *Balzia & Covich* [2009] FamCA 1357, *Senior & Anderson* [2010] FamCA 601 and *Parker & Parker* [2010] FamCA 664.

The Full Court in *Hoult & Hoult* (2013) FLC ¶93-546 determined that the onus was on the person seeking to establish that a financial agreement is binding. Once a party relies on the Certificate or Statement of Independent Legal Advice to establish that the requisite legal advice had been given, the onus falls to the other party to establish that the advice had not been given. While the Certificate or Statement is prima facie evidence of compliance with the request to provide legal advice, it was open to go behind the Certificate or Statement.

These views were confirmed by the Full Court in *Logan & Logan* (2013) FLC ¶93-555. In *Logan*, the wife said that she was not provided with the requisite advice. She did not call her solicitor to give evidence and her denial of receipt of legal advice was not challenged in cross-examination by the husband. The husband did not call the wife's solicitor either and the file note from the solicitor's final attendance upon the wife when she signed the agreement did not indicate that the advice was given. The Full Court had difficulty extending the rule in *Browne & Dunn* (1984) 6 R 67 (HL) to the facts in *Logan*, where the evidence which was not directly challenged in cross-examination, was the cornerstone of the party's case. The Full Court said (at [55]):

> "Thus, the question becomes whether this evidence satisfies the forensic obligation thrown on the wife by the presentation of the certificate. In answering that question it must be remembered that the obligation was not to prove that the advice had not been given, but to throw the matter into doubt, leaving the onus of

> satisfying the court that the advice had been given on the husband".

However, Cronin J in *Jeeves & Jeeves (No 3)* [2010] FamCA 488 held that the wife, who was seeking to set aside the agreement, had the onus of proof.

In relation to which party carried the burden of proof, Thackray J said in *Hoult & Hoult* (2013) FLC ¶93-546 (at [60]–[62]):

> "In my view, the onus of establishing that an agreement is binding falls upon the party asserting that fact because … an agreement is binding 'if, and only, if' the prescribed matters are established. It follows that the party relying upon the agreement must establish the existence of all those matters, including the giving of the requisite legal advice to both parties.
>
> I recognise the potential forensic difficulty faced by a party who seeks to uphold a financial agreement when the other party claims not to have received the prescribed legal advice. However, the fact there is difficulty in proving something within the knowledge of only the other party and their solicitor does not mean the legal burden of proof passes to the party who seeks not to be bound by the agreement.
>
> Importantly, however, I consider that once the party seeking to rely upon the agreement produces in evidence the certificate signed by the other party's solicitor, there is a forensic obligation on the other party to adduce evidence which would disprove, or at least throw into doubt, the inference or conclusion to be drawn from the certificate (especially when read with the recital in the agreement to the same effect)".

Strickland and Ainslie-Wallace JJ agreed with Thackray J, particularly with the final paragraph of the above.

¶20-237 Waiver of legal professional privilege

Legal professional privilege protects communications between a lawyer and a client. Disclosure is not required if the dominant purpose

of the advice is for use in existing or anticipated legal proceedings. The privilege is that of the client and the privilege can be expressly or impliedly waived.

The risk of inadvertently waiving legal professional privilege is high in applications to set aside financial agreements.

Burnett FM in *Bell and Bell* [2009] FMCAfam 595 summarised the law in relation to waiver of legal privilege as:

> "First, in the context of out of Court communication the principles governing waiver of legal professional privilege are grounded in common law.
>
> Second, the question to be decided by reference to the principles of imputed waiver is whether, whatever the subjective intention of the party referring the other to the subjective material, the objective fact that that reference was incompatible with the continued insistence by the respondent upon legal professional privilege and had made such insistence unfair in the circumstances.
>
> Third, in considering unfairness it does not mean that all the decision-maker has to do is weigh up the respective fairness of the positions of the client and its opponent to decide the question of waiver according to generalised considerations. Considerations of fairness may be relevant to whether there is an inconsistency between the conduct said to amount to waiver and the maintenance of privilege.
>
> Fourth, that question of fairness is itself one of fact and degree.
>
> Fifth, fact and degree in part can be assessed by reference to the purpose or object for which the material is purported to have been disclosed and used, such as whether it was being used by a party to litigation for forensic advantage.
>
> Sixth, the disclosure of the conclusions reached in, or course of action recommended by, an advice can amount to a waiver of privilege in respect of premises relating to opinions which have been disclosed, notwithstanding the reasoning hasn't been disclosed.

> Seventh and finally, disclosure of one conclusion but not another in an advice does not necessarily amount to a waiver in respect of the non-disclosure conclusions. However, if conclusions and reasonings are so inter-connected that they cannot be separated or isolated then it may be that the whole of the advice on which the conclusions are based must be considered to have been waived".

In *Bell*, the parties entered into two agreements, one under s 90B in 2002 and a further one under s 90C *Family Law Act 1975* (Cth) (FLA) in 2007. The wife sought that both agreements be set aside on the ground that they were induced by fraud.

Burnett FM found that the wife by her conduct had effected a disclosure waiver of legal professional privilege.

More recently, the principles of legal professional privilege and the exceptions to the claim of privilege were summarised by Hogan J in *Bloomfield & Grainger and Anor* [2017] FamCA 32 (at [21]–[22]) as:

> "It is, I think, sufficient to record that authority relevantly establishes that:
>
> a. legal professional privilege is accorded to a document produced for use in litigation or for the obtaining or giving of legal advice because 'it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers'; and
>
> b. only those communications passing between a legal adviser and his or her client in professional confidence are privileged — a communication made by a client for assistance in the commission of a crime or fraud lies outside any legitimate professional relationship; and
>
> c. legal professional privilege does not attach to a communication which is for the purpose of committing a fraud, the meaning of which — for these purposes — is not narrow but encompasses actions like those undertaken by a person for the purpose of ensuring a creditor is unable to

recover, or which communications are for the purpose of putting assets beyond the reach of legitimate claims of secured creditors; fraud ‘in this context embraces a range of legal wrongs that have deception, deliberate abuse or misuse of legal powers, or deliberate breach of legal duty at their heart’ — that is, fraud in this context ‘includes all forms of fraud and dishonesty such a fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances’; and

d. a communication between a client and the client’s lawyer for the purpose of the client putting assets beyond the reach of the legitimate claims of secured creditors is a fraud on justice — as the purpose is a fraud on the creditor, there is no public interest in protecting any such communication; and

e. even if no crime or fraud was contemplated, if the communication was made to further illegal purposes, for the purpose of frustrating the processes of the law, to further an abuse of public power or as a step in or preparatory to, or in aid of, the carrying out of a fraud in respect of which civil courts will give relief, the communication is outside legal professional privilege and this privilege does not attach to such communication; and

f. if a party resisting a claim of legal professional privilege can show reasonable grounds for believing the communication, effected by the document for which legal professional privilege is claimed, was made for some ulterior, illegal or improper purpose — that is, for some purpose contrary to the public interest — the claim of legal professional privilege may not be upheld; and

g. whilst it is unnecessary to prove the ulterior purpose, the crime or the alleged fraud so as to displace legal professional privilege (or, perhaps, more accurately, to establish that it does not in fact attach):

    i. more is required than mere pleading or mere surmise

and conjecture: vague or generalised contentions of crimes or improper purposes are insufficient; there must be more than what it is hoped may be proved; and

ii. the party resisting the claim of legal professional privilege must establish or identify circumstances which point sufficiently to the bona fides and credibility of the allegation; and

iii. allegations of facts which, if not disputed or met by other facts, lead a reasonable person to see a strong probability that there was fraud or crime or ulterior purpose may be sufficient; and

iv. there has to be something ‘to give colour to the charge’; some prima facie evidence that the allegation has some foundation in fact — for example, is there evidence (including that in the documents for which the claim of legal professional privilege is made) which, if accepted, raises a prima facie case of the ulterior or illegal purpose/s, the crime or the alleged fraud such that the communication falls outside the privilege, or, does the evidence establish a prima facie case that the communication was made in furtherance of a crime or commission of a fraud?

The approach summarised briefly above reflects the conclusion that the public interest in the law refusing to countenance even the possibility that legal professional privilege is used to cloak criminal or fraudulent activities outweighs the public interest in protection being accorded to professional confidences between a client and that person’s legal representatives”. (footnotes removed)

¶20-240 Consequences of termination or setting aside

The main consequence of terminating a financial agreement, at least a

Pt VIIIA agreement, is that either party or any other interested person can apply for orders under the *Family Law Act 1975* (Cth) (FLA) in relation to financial matters which were covered by the agreement.

The court is given specific powers if a financial agreement is terminated. It may make any orders on the application of a party to the financial agreement or "any other interested person … as it considers just and equitable for the purpose of preserving or adjusting the rights of persons who were parties to that financial agreement and any other interested persons" (s 90J(3) or s 90UL(3)).

If an agreement is set aside, the court can make a property or maintenance order under s 90UM(6) or s 90K(3). These provisions appear to be designed to help ensure that the parties are not hindered in obtaining relief by the time which has elapsed since separation.

With respect to Pt VIIIA, s 44(3B)(c)(ii) allows a further 12 months for maintenance or property proceedings to be instituted after a financial agreement is set aside or found to be invalid. Leave may be granted out of time under s 44(3)(d) if the court is satisfied under s 44(4):

> "(a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or
>
> (b) in the case of proceedings in relation to the maintenance of a party to a marriage — that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit".

Until 26 October 2018, the position was different for de facto couples. Parties to a marriage could consent to proceedings being instituted out of time but the parties to a de facto relationship could not consent. Under s 44(5), a property or spousal maintenance application under Pt VIIIAB could only be made within two years after the end of the relationship. Unlike for married couples, there was no reference to the time running from the date on which a Pt VIIIAB financial agreement is set aside. While s 90UM(6) enabled a court which has set aside a Pt

VIIIAB financial agreement to make orders, there was not the automatic safety net of a further 12 months for an application to be made. This safety net is now in s 44(5)(a)(ii), and de facto parties can consent to a property settlement application being made more than two years after the end of the relationship under s 44(5)(b).

Leave may be granted to a party to apply after the end of the application period. The wording of s 44(6) is similar to s 44(4) save that it does not refer to marriage.

Parties who separated prior to the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* ("the Amendment Act") may choose for Pt VIIIAB and VIIIB and s 114(2A) to apply to their relationship by both signing a "choice" to opt into the FLA under item 86A of the Amendment Act and enter into a financial agreement under the FLA. If the agreements is subsequently set aside the FLA will still apply.

¶20-250 Terminating a financial agreement

A financial agreement can be "terminated" in two main ways. These are set out in s 90J of the *Family Law Act 1975* (Cth) (FLA). They are:

- including a provision to that effect in another financial agreement (s 90B(4), 90C(4), 90D(4), 90UB(4), 90UC(4) or s 90UD(4))

- making a written agreement to that effect, known as a termination agreement (s 90J(1)(b) or s 90UL(1)(b)).

In addition, a Pt VIIIAB financial agreement ceases to be binding if the parties marry each other (s 90UJ(3)).

A financial agreement can cease to be effective in other circumstances, such as when a court declares it not to be binding as it does not meet the requirements of s 90G(1) or s 90UJ(1).

Note

Sections 90J and 90UL of the FLA provide two options for the termination of a financial agreement. These sections do not include the obvious third option of parties including a sunset clause in a financial agreement that the agreement will terminate in certain circumstances. For example, the parties may want the agreement to terminate if they cohabit for more than a certain number of years, have a child, purchase a home in joint names or one party is out of the workforce for a certain period due to ill-health, injury, pregnancy, caring for children of the marriage or relationship, etc. The validity of sunset clauses is untested.

It might have been preferable if parties were expressly permitted under the FLA to include a clause terminating the financial agreement in listed circumstances.

To achieve the same outcome, if appropriate, a financial agreement can be drafted carefully with two parts:

1. the first part applies until a certain event occurs or does not occur

2. after that time, the second part of the agreement applies. The parties' rights under Pt VIII or Div 2 of Pt VIIIAB of the FLA could be restored, unaffected by the agreement. Alternatively, the parties' rights after that time are affected to a lesser extent than in the first part.

¶20-260 Termination agreement

The requirements for a binding termination agreement are the same as for a financial agreement (see ¶20-010). The requirements are set out in s 90J(2) and 90UL(2) of the *Family Law Act 1975* (Cth). The requirements are:

- the agreement must be in writing (s 90J(2)(b) and 90UL(2)(b)

- the agreement must be between the parties to a financial

agreement (s 90J(2)(a) and 90UL(2)(a))

- the agreement must be signed by both parties (s 90J(2)(a) and 90UL(2)(a))

- before signing a financial agreement each spouse party must be provided with independent legal advice from a legal practitioner about:
  - the effect of the agreement on the rights of that party
  - the advantages and disadvantages, at the time the advice was provided, to the party of making the agreement (s 90J(2)(b) and 90UJ(2)(b))

- the legal practitioner providing the advice must before or after signing the agreement sign a statement stating that the advice was given, whether or not the statement is annexed to the agreement (s 90J(2)(c) and 90UJ(2)(c))

- a copy of the statement provided to the spouse party must be given to the other spouse party or to a legal practitioner for the other spouse party (s 90J(2)(ca) and 90UJ(2)(ca))

- the agreement must not have been terminated or set aside by a court (s 90J(2)(d) and 90UL(2)(d)).

¶20-270 New financial agreement

Parties cannot vary part of a financial agreement with a new financial agreement. They must sign a fresh agreement, which replaces the old agreement entirely. The whole agreement between the parties, including any parts of the old agreement which are still the same, must be included in the new agreement. A clause terminating the first agreement must also be included (s 90B(4), 90C(4), 90D(4), 90UB(4), 90UC(4) and 90UD(4)).

Example

> "The financial agreement executed by the parties on 15 March 2010 ceases to have any force and effect upon the execution of this Agreement by both parties".

It may be advisable to include a clause which sets out the status of the first agreement if the second agreement is found to be void, voidable or unenforceable. Does the first one revive? Will it remain terminated? It may be preferable in certain circumstances for the termination of the first agreement to be in a separate termination agreement to increase the likelihood of the termination being valid.

¶20-280 Setting aside financial and termination agreements

A financial agreement may be set aside on one of the grounds listed in s 90K(1) or s 90UM(1) of the *Family Law Act 1975* (Cth) (FLA). An agreement may also be found not to be binding because of a failure to meet the requirements of s 90G(1) or s 90UJ(1). See ¶20-020. These are different concepts.

Setting aside an agreement is a two-step process. First, a ground must be established under s 90K(1) or s 90UM(4). Then the court has a discretion as to whether or not to set the agreement aside. If part of an agreement is found to be void, voidable or unenforceable, the court may decide not to set aside the whole of the agreement under s 90K(1)(b) or s 90UM(1)(e) if that part of the agreement which is void, voidable or unenforceable is severable.

A court may, under s 90K(1), order that a financial agreement or a termination agreement be set aside:

> "if, and only if, the court is satisfied that:
>
> (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
>
> (aa) either party to the agreement entered into the agreement:
>
> (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or

creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or

(ab) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose of defrauding another person who is a party to a de facto relationship with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement — a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB".

The grounds for setting aside Pt VIIIAB financial agreements (s 90UM) are slightly different from those for setting aside Pt VIIIA financial agreements. Section 90UM(1) includes the following different grounds:

"(c) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship (the other de facto relationship) with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 90SM, or a declaration under s 90SL, in relation to the other de facto relationship; or

(iii) with reckless disregard of these interests of that other person; or

(d) a party (the agreement party) to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a marriage with a spouse party; or

(ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under s 79, or a declaration under s 78, in relation to the marriage (or

void marriage); or

(iii) with reckless disregard of those interests of that other person;

(k) if the agreement is a Part VIIIAB financial agreement covered by s 90UE — s 90UM(5) applies". (This provision deals with agreements made in non-referring states and territories).

The effect of setting aside a Pt VIIIAB financial agreement is different to the effect of setting aside a Pt VIIIA financial agreement. The differences are discussed at para ¶20-240.

Section 90K(1)(ab) was inserted from 21 November 2008 to cover third parties who are parties to the financial agreement as well as spouse parties.

Financial agreements can be set aside in similar but not totally equivalent circumstances to s 79 or s 90SM orders and maintenance agreements. These circumstances are:

- s 90K(1)(a) and 90UM(1)(a) — these are similar terms to s 79A(1)(a). Section 79A(1)(a) is less stringent. On 27 December 2000, after the words "suppression of evidence", the phrase "including failure to disclose relevant information" was inserted. This appears to be a lower threshold to establish non-disclosure than previously under s 79A(1)(a). It is also a lower threshold than under s 90K(1)(a) and 90UM(1)(a), which refers to "non-disclosure of a material matter"

- s 90K(1)(aa) and 90UM(1)(b) — were added to give creditors the ability to apply to set aside financial agreements in a broad range of circumstances. Creditors have similar rights under s 79A(2), (4) and (5).

- s 90K(1)(d) and 90K(1)(g) — these are similar to, but have less stringent requirements than s 79A(1)(d)

- s 90K(1)(b), (c), (e) and (f), and 90UM(1)(e), (f) and (h) — there are no comparable provisions in s 79A and 90SN.

A financial agreement can be declared binding even if the grounds in s 90G(1)(b), (c) and (ca) or s 90UJ(1)(b), (c) and (ca) are not met if the court is satisfied that it would be unjust or inequitable if the agreement was not binding on the parties, see ¶20-185.

An important distinction in NSW from other states is that NSW agreements are subject to the *Contracts Review Act 1980* (NSW). Agreements under the FLA are not necessarily subject to similar legislation in other states. However, in *Noll and Noll* [2011] FamCA 872, the argument was put, but not resolved that the *Fair Trading Act 1999* (Vic) was relevant.

¶20-290 Application by third party to set aside a financial agreement

Third parties can, in certain circumstances, apply to set aside a Pt VIIIA or Pt VIIIAB *Family Law Act 1975* (Cth) (FLA) financial agreement. This is important because parties may try to use a financial agreement to defraud or defeat the claims of creditors.

Section 90K(1)(ab) was inserted from 21 November 2008 to enable financial agreements to deal with third parties who are parties to the financial agreement as well as spouse parties.

The ability of a third party creditor (not a party to the agreement) to set aside a financial agreement was questioned in *ASIC v Rich & Anor*.[8] These problems were addressed in the *Family Law Amendment Act 2003* so that creditors or government bodies acting in the interests of a creditor have the right to apply to set aside a financial agreement (see para (eab) in the “matrimonial cause” definition in s 4(1), 4A(1), 4A(2), 90K(1)(aa) and para (f) in the “de facto financial cause” definition in s 4(1), 4A(1), 4B and 90UM(1)(b)).

In *Official Trustee in Bankruptcy & Galanis* [2014] FamCA 832, Rees J found that the trustee in bankruptcy of a discharged bankrupt did not have standing under s 90K(1)(aa) FLA to apply to set aside a financial agreement made subsequent to the bankrupt’s discharge. The ability of a creditor to apply, despite an intervening bankruptcy, was confirmed. The trustee appealed. An application for the hearing of the

appeal to be expedited was dismissed in *Official Trustee in Bankruptcy & Galanis* [2015] FamCAFC 212. The trustee's appeal was unsuccessful in (2017) FLC ¶93-760.

Those questions were considered further by the Full Court in *Grainger & Bloomfield* (2015) FLC ¶93-677. For a court to have jurisdiction in proceedings to set aside the agreement under s 90K(1)(aa), the Full Court said that the proceedings must be between the parties to the agreement and either a creditor of one of those parties or "a government body acting in the interests of a creditor". It was not contended before the Full Court in *Grainger* that the Official Trustee was within the definition of "a government body" in s 4A FLA, although this was argued and rejected by Rees J in *Galanis*.

O'Reilly J, quoting Ryan J in *ASIC* v *Rich & Anor* (2003) FLC ¶93-171, said that the rights of the unsecured creditors of the partnership, insofar as they may wish to sue the partners or either of them at [113] "… remain to be determined according to law … perhaps bankruptcy law".

Examples

***Costello & Condi* [2012] FamCA 355**

A receiver of a former legal partnership of which the husband was a partner prior to its dissolution was found to have no standing to apply to set aside a financial agreement.

***Commissioner of Taxation & Hong* [2016] FamCA 435**

The Commissioner of Taxation was seeking to set aside a financial agreement. Justice Hogan granted interim injunctions against the parties to the agreement, being satisfied that the applicant, the Commissioner of Taxation, had an arguable case and that there was a real risk of dissipation of assets and/or property absent the making of orders and there appeared to have been a change of position of significant amounts of funds in relatively short recent periods and that the applicant had not been provided with an indication of the parties' intention to enter into a financial agreement. The balance of convenience, taking into account the impact if assets were sold and the net sale proceeds dissipated out of Australia, favoured the making of the orders. The orders were made against both respondents. Although one respondent had not been served, Hogan J was satisfied that the applicant had attempted to inform him of the application through three different firms of lawyers.

Footnotes

8 *ASIC* v *Rich & Anor* (2003) FLC ¶93-171.

¶20-300 Discretion whether to set aside

The court has a discretion under s 90K(1) and 90UM(1) of the *Family Law Act 1975* (Cth) (FLA) to set aside a financial or termination agreement. It may refuse to do so even if a ground under s 90K(1) or s 90UM(1) is established.

Factors that might influence a court not to exercise its discretion to set aside are probably similar to the factors which could influence a court as to whether or not to order revocation of a contract.

FRAUD

¶20-310 Fraud under the *Family Law Act 1975*

Fraud arises under several grounds for setting aside a financial agreement. These are s 90K(1)(a), 90K(1)(aa), 90UM(1)(a), (b), (c), (d), 79A(1)(a) and 90SN(1)(a) of the *Family Law Act 1975* (Cth). It is unclear, however, whether the meaning of fraud in each section is the same.

Section 90K(1)(a) allows a court to set aside a financial or termination agreement on the ground that:

> "the agreement was obtained by fraud (including non-disclosure of a material matter) …".

Section 90K(1)(aa) and 90UM(1)(b) refer to the defrauding or defeating of creditors. It is more specific in its application than s 90K(1)(a) or s 90UM(1)(a).

Section 79A(1)(a) refers to "miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance". The words in parenthesis were inserted by the *Family Law*

Amendment Act 2000. It is unfortunate that the opportunity was not taken by parliament to ensure that the definitions of fraud in s 79A and 90K were either identified as being clearly the same or clearly different. Section 79A(1)(a) in one sense appears to be a more difficult test to satisfy than s 90K(1)(a) and, in another sense, an easier test.

Section 90K(1)(a) and 90UM(1)(a) specifically define fraud to include non-disclosure of a "material matter" whereas s 79A(1)(a) does not define "fraud" but defines "suppression of evidence" to include non-disclosure of "relevant information".

The inclusion in s 79A(1)(a) of fraud and "suppression of evidence" as two separate grounds appears to require a greater degree of disclosure than s 90K(1)(a).

However, s 79A(1)(a) has an additional test not included in s 90K(1)(a). The non-disclosure must have caused a "miscarriage of justice". The phrase "miscarriage of justice" is the purpose of the section, and "fraud" is a possible instance of it. In s 90K(1)(a), fraud is the main purpose.

Section 90K(1)(a) and 90UM(1)(a) are limited to fraud. These sections do not, as s 79A(1)(a) does, refer to "duress, suppression of evidence … the giving of false evidence or any other circumstance". Duress is clearly caught up by "void, voidable or unenforceable" in s 90K(1)(b) but the other terms are not referred to specifically in s 90K(1)(a) or s 90UM(1)(a).

Cronin J said in *Jeeves and Jeeves (No 3)* [2010] FamCA 488 (at [485]):

> "The simple use of the word 'Fraud' in s 90K must be read widely because of the inclusion of the reference to non-disclosure of a 'material matter'. Thus it encompasses knowledge and intention relating to financial matters that, if known, would create a different picture to that portrayed on the surface. It is hardly distinguishable from the s 90K(1)(e) reference to conduct that was in all of the circumstances unconscionable. Fraud no longer means just the unlawful use of pressure to enter into such an arrangement".

He found (at [488]) that the wife did not enter into the financial

agreement on the basis of an inducement that what she was presented with was a true and accurate representation of the parties' financial circumstances. She did not believe the husband to be truthful.

The wife unsuccessfully appealed.

¶20-320 Definition of fraud

There are three concepts of fraud:

1. common law
2. equitable, and
3. statutory.

Fraud under s 79A(1)(a), 90K(1)(a) and 90UM(1)(a) of the *Family Law Act 1975* (Cth) (FLA) is statutory fraud. Common law and equitable fraud arise under s 79A(1)(a), 90K(1)(b), 90KA(a), 90UM(1)(e) and 90UN(a).

In *Green & Kwiatek*,[9] the Full Court of the Family Court adopted the classic common law definition of Lord Herschell LC in *Derry* v *Peek* (1889) 14 AC 337 (at p 374):

> "Fraud in this context consists of a false statement of fact which is made by one party to a transaction to the other knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false, with the intent that it should be acted upon by the other party and which was in fact so acted upon".

Example

***Jeeves & Jeeves* [2010] FamCA 488**

There was no fraud because the wife didn't believe the husband to be truthful.

Classic common law fraud requires actual dishonesty. It is a subjective test.[10]

Fraud in equity is a far broader concept than at common law. An intention to deceive is not necessary before equity will intervene.[11] Negligent or reckless non-disclosure can be fraudulent. It includes that which is abhorrent to good conscience. According to Kitto J in *Blomley v Ryan*,[12] an equitable jurisdiction to set aside transactions arises:

> "whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands".

Statutory fraud may also be wider than common law fraud. The Full Court in *Green & Kwiatek*[13] considered that statutory fraud "connotes equitable fraud". See also *Fryda & Johnson (No 2)*.[14]

Equitable fraud was defined by Lord Denning MR in *Barclays Bank Ltd v Cole*[15] relying upon *Derry v Peek*:

> "'Fraud' in ordinary speech means the using of false representations to obtain an unjust advantage: see the definition in the *Shorter Oxford English Dictionary*. Likewise in law 'fraud' is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false … In any case 'fraud' involves a false representation".

A financial agreement made with the intention of defeating the rights of third parties such as creditors can be set aside under s 90K(1)(aa) FLA. The intention to defraud must only be held by one party.

Footnotes

9 *Green & Kwiatek* (1982) FLC ¶91-259.

10 *John McGrath Motors (Canberra) Pty Ltd* v *Applebee* (1964) 110 CLR 656.

11 *Nocton* v *Lord Ashburton* [1914] AC 932.

12 *Blomley* v *Ryan* (1956) 99 CLR 362 at p 415.

13 *Green & Kwiatek* (1982) FLC ¶91-259 at p 77,456.

14 *Fryda & Johnson (No 2)* (1981) FLC ¶91-058.

15 *Barclays Bank Ltd* v *Cole* [1966] 3 All ER 948 at p 950.

¶20-330 Duty to disclose

Neither Pt VIIIA nor Div 2 of Pt VIIIAB *Family Law Act 1975* (Cth) (FLA) sets out a duty of disclosure in relation to financial agreements. The duty in relation to financial proceedings is in the Family Law Rules 2004 (Ch 13 — especially r 13.04(1)) and the Federal Circuit Court Rules 2001 (Pt 24 — especially r 24.03(1)) and applies once proceedings have commenced, or in the Family Court, under the pre-action procedures. There is no duty to disclose in relation to financial agreement set out in the Rules of either court.

The duty to disclose in financial agreements is almost a negative one — if a party does not disclose their financial circumstances, the agreement is at greater risk of being set aside under s 90K(1)(a) or s 90UM(1)(a), or perhaps s 90K(1)(e) or s 90UM(1)(h).

The common law and equitable doctrines are also incorporated by s 90K(1)(b), 90KA, 90UM(1)(e) and 90UN(a).

Rule 13.04(1) requires that in any financial statement, there be a “full and frank disclosure of the party’s financial circumstances”. This suggests that silence and failure to disclose material facts amount to statutory fraud upon the court or the other party. However, r 13.04 only applies to “a financial case”, which is defined in the dictionary so as not to include the making of financial and termination agreements. Financially weaker parties are probably better protected with a sworn

financial statement annexed to a financial or termination agreement than with a mere summary of assets and liabilities.

At common law, mere silence or non-disclosure is usually not fraud. There is no duty of disclosure between bargaining parties.[16] However, there are exceptions to this principle. For example, traditionally the law has required that in “family arrangements” all material facts are disclosed.[17]

Common law fraud includes non-disclosure if it is found that the failure to disclose materially altered the impression given by the disclosed facts.[18]

Strauss J in *Suters and Suters*[19] did not find it necessary to decide whether non-disclosure amounted to statutory fraud. He accepted that non-disclosure was sufficient for equitable fraud:

> “Suppression or non-disclosure of material facts has long been treated as such fraud in equity as would entitle a Court of Equity to set aside a transaction”.

The ultimate penalty for a party failing to disclose particulars of their financial circumstances was imposed on the husband in *Tate v Tate*.[20] During four years of litigation and 25 court appearances the wife tried to force the husband to comply with inspection and valuation orders. He either did not comply or was late in doing so. The Full Court upheld the order of the trial judge striking out his response and refusing him the right to cross-examine.

In *Oriolo & Oriolo*,[21] the Full Court held:

> “We consider that there is a clear obligation on a party to proceedings in this Court to make a full and frank disclosure of all relevant financial circumstances”.

See also *Weir & Weir* (1993) FLC ¶91-092.

The Full Court of the Family Court in *Kennedy & Thorne* (2016) FLC ¶93-737 confirmed that the obligation to make full and frank disclosure under Pt VIII FLA was not transposed to the entering of financial agreements under Pt VIIIA. The Full Court pointed out that the safeguard was that if there is inadequate disclosure, the legal advice given to the other party can be, for example, not to enter into the agreement or only enter into it upon receipt of specific financial information.

Furthermore, it was fatal to the wife’s argument that she could not point to any detriment suffered by her as a consequence of her claims of non-disclosure, given that her legal advice was not to sign it. Her lawyer described the agreement as “the worst agreement I have ever seen”. There was no indication that the advice would have altered if the husband’s worth had been fully disclosed.

In the High Court appeal, reported as *Thorne v Kennedy* (2017) FLC ¶93-807, disclosure was not in issue.

Examples

***Grant & Grant-Lovett* [2010] FMCAfam 162**

The fact that the parties had been married for 12 years did not reduce the parties' duty to disclose. There was insufficient evidence of disclosure and very little disclosure in the agreement. Altobelli FM found that the wife had failed to disclose her interest in a trust.

***Kapsalis & Kapsalis* [2017] FamCA 89**

The wife chose not to make enquiries of the husband about his financial position before she signed a cohabitation agreement in 2004 under the State legislation, although she agreed that she had every opportunity to do so. She agreed that she understood when she signed the agreement that she would receive nothing if she and the husband separated. She conceded in cross-examination that, had she been told the husband's assets were worth $20m rather than $3 to 4m, she would still have entered the agreement. She knew he had a house and corporate assets, but made no enquiry as to the value of them before entering into a second agreement, this time under s 90B FLA one year later.

Rees J found (at [25]) "that nothing in the husband's disclosure of his assets induced her to enter into the Agreement … . She was determined to enter into the Agreement no matter what his asset position was".

***Ainsley & Lake* [2016] FCCA 2132**

The wife sought enforcement of a financial agreement and the husband sought that it be set aside pursuant to s 90K(1)(a). The agreement was entered into after separation. The wife did not disclose her superannuation of $35,000 in the agreement although she had told her lawyers of its value and they had confirmed this in a letter. The husband knew that the wife had superannuation but believed it to be about $6000. There was a blank space left in the schedule next to the words "Ms Ainsley's superannuation".

The husband defaulted under the agreement. He breached two obligations and his total defaults amounted to at least $38,241.

Judge Henderson found that the wife failed "to disclose a material fact, albeit without any intention to defraud in the usual meaning of such a phrase" (at [14]). He accepted that fraud under s 90K(1)(a) had a broader meaning than the general understanding of its meaning. The wife had an obligation to disclose, and it was not the husband's obligation to find out the wife's financial position.

The agreement was set aside although the asset pool was small, the husband had knowledge that the wife had some superannuation and he had failed to comply with the terms of the agreement. His breaches were irrelevant to the discrete issue in the case.

Footnotes

16 *Yerkey* v *Jones* (1939) 63 CLR 649.

17 *Gordon* v *Gordon* (1821) 36 ER 910; *Greenwood* v *Greenwood* (1863) 46 ER 285.

18 *Ames* v *Milward* (1818) 129 ER 532.

19 *Suters and Suters* (1983) FLC ¶91-365 at p 78,458.

20 *Tate* v *Tate* (2000) FLC ¶93-047.

21 *Oriolo & Oriolo* (1985) FLC ¶91-653 at p 80,256.

¶20-340 "Material"

The term "material" used in s 90K(1)(a) of the *Family Law Act 1975* (Cth) and 90UM(1)(a) also arises in s 90K(1)(d) and 90UM(1)(g). It is also used as a test for a sufficient change of circumstances to justify the re-opening of the residence issue. It is discussed in more detail at ¶20-460.

VOID, VOIDABLE OR UNENFORCEABLE

¶20-350 Introduction

Sections 90K(1)(b) and 90UM(1)(e) of the *Family Law Act 1975* (Cth) (FLA) allow a court to set aside a financial agreement or a termination agreement if, and only if, the court is satisfied that "the agreement is void, voidable or unenforceable". These sections incorporate all the principles of common law and equity which might render a contract "void, voidable or unenforceable" into the decision-making process of the court regarding the setting aside of agreements.

The three concepts are:

- **Void**: If an agreement is void it never effectively existed. A financial agreement is unlikely to be found to be void because of the requirement for legal advice.

- **Voidable**: The contract can be pronounced void by one of the

parties or held to be void by a court. It is not void unless action to void the contract is taken. Agreements may be voidable because of misrepresentation, mistake, duress, undue influence, or unconscionability.

- **Unenforceable**: This means that the contract is valid but for some reason cannot be enforced. An agreement may be unenforceable for public policy reasons or breach of contract.

The aggrieved party cannot personally set aside a financial or termination agreement. Setting aside an agreement requires a court order. Prior to seeking relief under s 90K(1)(b) or s 90UM(1)(e), an agreement may need to be revoked to make it "void, voidable or unenforceable". The court must first find that the purported revocation is effective at common law before s 90K(1)(b) or s 90UM(1)(e) is applied by the court. Even where an applicant satisfies common law principles and establishes that the agreement is "void, voidable or unenforceable", the court still has a discretion whether to set aside the agreement.

Grounds for finding a contract void or voidable which are particularly relevant to financial agreements are:

1. **Uncertainty**: If an essential term is too vague the agreement will be void.

2. **Incompleteness**: If the parties have failed to reach agreement on an essential term the agreement will be void. Incompleteness was discussed in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411.

3. **Duress**: See ¶20-355.

4. **Undue influence**: See ¶20-355.

5. **Unconscionability**: See ¶20-360.

6. **Misrepresentation**: An alternative to fraud. It is often easier to establish. Misrepresentation is a positive, pre-contractual statement of fact made by one party to a contract which is false

and which has the effect of inducing the other party to enter into the contract. The statement does not need to be material to the contract but it is not sufficient that it is a "mere representation" or "puff".[22] See ¶20-365.

7. **Mistake**: Occurs where one or both parties are under a misapprehension about something which forms the basis of their agreement. See ¶20-365.

8. **Fraud**: This is discussed in more detail at ¶20-310 and ¶20-320.

9. **Incapacity**: This arises where a party lacks the capacity to enter into contracts. The categories are: minors (under 18), those with mental incapacity, and bankrupts.

10. **No agreement** (no *consensus ad idem*).

Footnotes

22 *Carlill* v *Carbolic Smoke Ball Co* [1893] 1 QB 256.

¶20-355 Duress and undue influence

Duress, undue influence and unconscionable conduct have overlapping characteristics. Duress is a form of pressure. It causes a reasonable person to act in a particular way, usually to the benefit of the person applying the pressure.[23] The pressure must be illegitimate. There is contrary authority as to whether the act must be illegal. The concept of "lawful act duress" and whether it exists in Australia was not considered by the High Court in *Thorne* v *Kennedy* (2017) FLC ¶93-807, although the issue was flagged in the special leave application reported as *Thorne v Kennedy* [2017] HCATrans 148.

Thorne v Kennedy is discussed in detail at ¶20-357.

In *G v G*,[24] the husband appealed against a decision by the Family

Court not to enforce a pre-nuptial agreement not under Pt VIIIA of the *Family Law Act 1975* (Cth). The wife signed the agreement two days before the wedding. She was opposed to any agreement but wanted to formalise their 13-year (non-cohabiting) relationship. The husband would not marry without one. Nicholson CJ said that the trial judge "was entitled to take into account her findings as to the unilateral imposition by the husband of his will on the wife".[25]

In view of the obligations imposed on legal practitioners under s 90G(1)(b) and 90UM(1)(e), there is a view that those grounds relating to duress, undue influence and unconscionability will be more difficult to establish than in general agreements where legal advice is not required.

Examples

***Cameron & Cameron* (1988) FLC ¶91-946**

A wife sought revocation of approval of a s 87 maintenance agreement. One of her arguments was that the agreement was void as unfair pressure was placed on her by her husband using the children of the marriage as a weapon. There was, however, little communication between parties. They had solicitors acting for them. Kay J rejected this argument, largely because she had independent legal advice.

The parties and Kiefel CJ in the transcript of *Thorne* v *Kennedy* [2017] HCATrans 148 agreed that independent legal advice was not a bar to a finding of duress.[26]

***Blackmore & Webber* [2009] FMCAfam 154**

The financial agreement was set aside as the pressure placed on the wife by the husband to sign the agreement was "illegitimate" in accordance with the test in *Crescendo Management Pty Ltd* v *Westpac Banking Corporation (1988)* 19 NSW LR 40. The husband produced the agreement for the wife's signature less than five days before the marriage and threatened her that the marriage would not take place unless she signed it. At the time, the wife was pregnant, about to return to Thailand in circumstances where her family expected her to return as a married woman, and she was faced with the risk of not being able to return to Australia as her visa was about to expire.

***Moreno & Moreno* [2009] FMCAfam 1109**

The agreement was set aside on the basis of, *inter alia*, duress. The wife feared for her visa status if her marriage did not continue and that motivated her to sign the agreement. She did not want to return to Russia as a failure, with a failed marriage. She wanted her marriage to work. Her past experience was that the husband would continue to behave aggressively and that if she left him he would likely advise the authorities and her visa would be cancelled, forcing her to return to Russia. This duress was found to be of such a level as to be unconscionable conduct. The agreement was set aside.

***Kostres & Kostres* [2008] FMCAfam 1124**

The agreement was signed by the parties two days before the wedding but this was not a ground on which the husband sought to set the agreement aside. On appeal, the Full Court (reported at (2009) FLC ¶93-420) found the agreement was void for uncertainty. Rectification was refused.

***Tsarouhi & Tsarouhi* [2009] FMCAfam 126**

A financial agreement was found to have been entered into by the wife under duress and the husband took unconscionable advantage of the wife's special disadvantage. The wife took money from the parties' joint home loan account by forging the husband's signature. The Federal Magistrate assumed the wife took $21,480. If these funds were notionally added back to the pool and treated as received by her, the financial agreement resulted in the wife receiving 21% of a pool of $311,500 after 23 years of marriage. Two children aged 10 and 17 lived with the husband and the 22-year-old lived with the wife. The wife signed the agreement based on a desire to halt the prosecution.

***Wallace & Stelzer* [2011] FamCA 54**

Duress was argued, but was not proven. It was not raised in the appeal judgment reported at (2013) FLC ¶93-566. The court found:

- the husband instigated the discussions about a financial agreement
- the amount to be paid to the wife was the amount that the husband first offered
- the agreement was discussed over at least six months including two months of arm's length negotiations
- the husband was fully aware of the terms
- the husband received advice in accordance with s 90G
- the wedding was small, and on the husband's evidence, the date could have been changed
- the husband was capable of independent thought. Although the agreement was signed shortly before the wedding, it was not signed in an atmosphere of crisis or threat. He was not so infatuated by the wife that he was emotionally or pathologically dependent upon her
- the husband had the ability to form a judgment about the agreement and that it was in his own best interests
- the husband was not at any special disadvantage and was trying to protect his own financial position
- the husband indicated to the wife that he would not marry her unless she signed an agreement, and
- the parties had been in a de facto relationship for over seven years prior to the date of the agreement and their marriage. It was not an "ink on the tuxedo" agreement.

Benjamin J found (at [169]) that at the time the agreement was executed its terms and provisions were well known to the husband and in his conscious thought. The husband believed he was bound by it. After separation he was advised that the certificate attached to the agreement was incorrect in form and he decided to challenge the agreement. His Honour found that the agreement was binding.

***Raleigh & Raleigh* [2015] FamCA 625**

A financial agreement entered into between the parties in 2003, eight days before the wife gave birth to the first child of the marriage, was not binding. She had conferred with her solicitor for less than 15 minutes.

Watts J found that the agreement was a bad bargain for the wife and that her solicitor was correct in advising her not to sign it. However, he also found that the relationship between the husband and wife was one where the husband actually had influence over the wife and a capacity to influence the wife inappropriately. The husband exerted undue influence to procure the wife entering into the agreement.

Footnotes

23 See *Moreno & Moreno* [2009] FMCAfam 1109.

24 *G* v *G* (2000) FLC ¶93-043.

25 Ibid per Nicholson CJ at p 87,676.

26 *Cameron & Cameron* (1988) FLC ¶91-946 at p 76,843.

¶20-357 *Thorne v Kennedy*

In its first examination of financial agreements, the High Court in *Thorne v Kennedy* (2017) FLC ¶93-807 set aside two financial agreements, casting considerable doubt on the viability of financial agreements which are a bad bargain for one of the parties. One agreement was executed before the wedding and the second was executed after the wedding. Unanimously, the High Court set aside the two agreements for unconscionable conduct. The plurality also set them aside for undue influence, finding it was unnecessary to decide whether there was duress. Helpfully, the High Court explained the

distinctions between the three concepts, as the concepts are often confused and used interchangeably. The question is, in clarifying the law, did the High Court set such a low bar that it will be impossible for a financial agreement to withstand an application to set it aside?

The facts of *Thorne v Kennedy*

The wife was aged 36 years and the husband was 67 years when they met online in mid-2006. The wife was living overseas, spoke Greek and very little English. She had no children and no assets of any substance, while the husband was an Australian property developer with assets worth at least $18 million. He was divorced from his first wife, and had three adult children.

During their courtship, the husband promised the wife that he would look after her like “a queen”. In February 2007, the wife travelled to Australia with the husband and moved into his penthouse. The husband made it clear to the wife prior to her coming to Australia that he wanted to protect his wealth for his children and that, if they were to get married, she would have to sign a legal agreement to that effect. The wife, however, did not learn the terms of the first agreement until shortly before the wedding. By that stage, the wife’s parents and sister had arrived in Australia from Europe for the wedding. The husband told the wife that if she failed to sign the first agreement, the wedding was off.

The first of the two agreements was given to the wife 10 days before the wedding. The wife only expressed concern about the testamentary provisions — not the separation provisions (of course, despite s 90H, she should have been more concerned about the terms of his Will). She did not believe there was any likelihood either party would initiate a separation. The wife’s solicitor advised the wife orally and in writing not to sign the first agreement, telling her that it was all in the husband’s favour. After some minor changes to the testamentary, provisions of the first agreement requested by the wife’s solicitors were agreed to by the husband, the wife received further advice on the amended first agreement. Her solicitor again advised her not to sign it. The wife gave evidence that she understood her solicitor’s advice to be that it was the worst agreement that the solicitor had ever

seen.

If the parties separated, the agreement provided that the wife was to receive $50,000 plus CPI provided they were married for at least three years, which the wife's solicitor described as "piteously small". In the event of the husband's death, the wife would receive an apartment worth up to $1.5 million, a Mercedes and a continuing income. Despite her solicitor's strong advice, the wife nevertheless signed the first agreement four days before the wedding. The first agreement contained a recital that within 30 days the parties would sign another agreement in similar terms.

In November 2007, the wife signed the second agreement, revoking the first agreement but otherwise in the same terms. The wife's solicitor urged her not to sign the second agreement. During the meeting with her solicitor, the wife received a telephone call from the husband asking her how much longer she would be. The wife's solicitor had the impression that the wife was being pressured to sign the second agreement.

The husband signed a separation declaration after the couple had been married for slightly less than four years.

Litigation history

The wife commenced proceedings in the Federal Circuit Court, seeking orders under the *Family Law Act 1975* (Cth) (FLA) that both agreements be declared not to be binding and/or to be set aside, and orders for a property settlement and spousal maintenance. The husband died part way through the hearing and the husband's legal personal representatives were substituted for him in the proceedings.

In March 2015, Demack J in *Thorne & Kennedy* [2015] FCCA 484 made orders that neither agreement was binding and set them both aside. Judge Demack held (at [94]) that the wife had:

> "signed the Agreements under duress borne of inequality of bargaining power where there was no outcome to her that was fair and reasonable".

On 26 September 2016, the Full Court of the Family Court (Strickland, Aldridge and Cronin JJ) in *Kennedy & Thorne* (2016) FLC 90-737

allowed an appeal by the husband's estate. The Full Court found that both agreements were binding on the parties, holding that there had *not* been duress, undue influence or unconscionable conduct by the husband.

The High Court granted special leave to the wife to appeal from the decision of the Full Court of the Family Court. The grounds of appeal were that the Full Court erred in law in failing to find the financial agreements were not binding and they should be set aside on the ground of duress, undue influence or unconscionable conduct.

What did the High Court decide?

The plurality in the High Court consisted of Kiefel CJ, Bell, Gageler, Keane and Edelman JJ. They held that the findings and conclusion of the trial judge should not have been disturbed by the Full Court and both agreements were voidable due to both undue influence and unconscionable conduct.

The plurality said that the trial judge used duress interchangeably with undue influence, and considered that undue influence was (at [2]) "a better characterisation of her findings". The plurality decided that it was not necessary to consider whether the agreement should be set aside for duress.

In two separate judgments, Nettle and Gordon JJ concurred that the agreements should be set aside for unconscionable conduct, but did not agree that they should be set aside for undue influence.

Requirements of duress

The plurality commenced by considering the requirements of duress, although it held that it was not necessary to decide whether the agreements should be set aside for duress. The plurality described the requirements for duress (at [26]):

> "Duress does not require that the person's will be overborne. Nor does it require that the pressure be such as to deprive the person of any free agency or ability to decide. The person subjected to duress is usually able to assess alternatives and to make a choice. The person submits to the demand knowing 'only too well' what he or she is doing" [footnotes removed, but relying strongly

on *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40]

> "The focus is upon the effect of a particular type of pressure on the person seeking to set aside the transaction".

Requirements of undue influence

The High Court plurality referred (at [30]) to "the difficulty of defining undue influence" and that "the boundaries, particularly between undue influence and duress, are blurred". Undue influence occurred when a party was "deprived … of 'free agency'" [footnotes removed].

One reason why defining undue influence is so difficult is that it can arise from widely different sources, only one of which is excessive pressure. The pressure need not be illegitimate or improper.

The plurality noted (at [14]) that there were different ways to prove the existence of undue influence. One method of proof was by direct evidence of the circumstances of the particular transaction. That was the approach relied upon by the trial judge and the High Court. The other method was where there was a relationship which gave rise to a presumption of undue influence. The plurality rejected the proposition that the wife was entitled to the benefit of a presumption of undue influence because of the relationship of fiancé and fiancée, as that presumption no longer existed.

In *Johnson v Buttress* (1936) 56 CLR 113 at 134; [1936] HCA 41, Dixon J described how undue influence could arise from the "deliberate contrivance" of another (which naturally includes pressure) giving rise to such influence over the mind of the other that the act of the other is not a "free act". The plurality accepted this analysis, and said (at [32]):

> "The question whether a person's act is 'free' requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them. Pressure can deprive a person of free choice in this sense where it causes the person substantially to subordinate his or her will to that of the other party … It is not necessary for a conclusion that a person's free will has been substantially subordinated to find that the party

> seeking relief was reduced entirely to an automaton or that the person became a ‘mere channel through which the will of the defendant operated’. Questions of degree are involved. But, at the very least, the judgmental capacity of the party seeking relief must be ‘markedly sub-standard’ as a result of the effect upon the person’s mind of the will of another”. [footnotes omitted]

The plurality noted (at [14]) that there were different ways to prove the existence of undue influence. One method of proof was by direct evidence of the circumstances of the particular transaction and that was the approach relied upon by the trial judge and the High Court. The other method was where there was a relationship which gave rise to a presumption of undue influence. The plurality rejected the proposition that the wife was entitled to the benefit of a presumption of undue influence because of the relationship of fiancé and fiancée, as that presumption no longer existed.

Requirements for unconscionable conduct

The parties agreed that the applicable principles of unconscionable conduct in equity were set out by the High Court in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25. No submissions were made as to whether the statutory concept of unconscionable conduct in s 90K(1)(e) might differ from the equitable concept in s 90K(1)(b) and the High Court did not determine that issue.

A finding of unconscionable conduct requires (at [38]) that the innocent party is subject to a special disadvantage “which seriously affects the ability of the innocent party to make a judgment as to [the innocent party’s] own best interests”. The other party must also unconscientiously take advantage of that special disadvantage, and have known or ought to have known of the existence and effect of the special disadvantage.

The plurality quoted favourably from *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461, where Mason J emphasised the difference between unconscionable conduct and undue influence:

> “In the latter the will of the innocent party is not independent and

> voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position'".

The trial judge's decision

The plurality found that the trial judge was at a considerable advantage in assessing the parties and their personalities, particularly where issues of undue influence and unconscionable conduct were involved. In *Kakavas*, the High Court said that where a transaction is sought to be impugned for vitiating factors, such as duress, undue influence or unconscionable conduct, it is necessary for a trial judge to conduct a "close consideration of the facts". It was essential for an appellate court to scrutinise the trial judge's findings in light of the advantages enjoyed by the trial judge.

The trial judge posed the hypothetical question of why the wife would sign an agreement when she understood the advice of her solicitor to be that the agreement was the worst that the solicitor had ever seen. The trial judge also asked why, despite the advice of her solicitor, the wife failed to conceive of the notion that the husband might end the marriage.

The trial judge described duress ([2015] FCCA 484 at [68]) as "a form of unconscionable conduct". The plurality said that this did not mean that duress was subsumed within the doctrine of unconscionable transactions, but the trial judge used "unconscionable" in the sense described by Gaudron, McHugh, Gummow and Hayne JJ in *Garcia v National Australia Bank Ltd* [(1998) 194 CLR 395 (at [34])] as "to characterise the result rather than to identify the reasoning that leads to the application of that description".

The trial judge concluded that the wife was powerless to make any decision other than to sign the first agreement, and referred to the inequality of bargaining power and a lack of any outcome for the wife that was "fair or reasonable". However, the trial judge also explained that the wife's situation was "much more than inequality of financial position", setting out six matters which, in combination, led her to the conclusion that the wife had "no choice" or was powerless:

1. her lack of financial equality with the husband
2. her lack of permanent status in Australia at the time
3. her reliance on the husband for all things
4. her emotional connectedness to their relationship and the prospect of motherhood
5. her emotional preparation for marriage, and
6. the “publicness” of her upcoming marriage.

These six matters were the basis for what the plurality described as the “vivid” description by the trial judge (quoted at [47]) of the wife’s circumstances:

> “She was in Australia only in furtherance of their relationship. She had left behind her life and minimal possessions … She brought no assets of substance to the relationship. If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community. The consequences of the relationship being at an end would have significant and serious consequences to Ms Thorne. She would not be entitled to remain in Australia and she had nothing to return to anywhere else in the world.
>
> Every bargaining chip and every power was in Mr Kennedy’s hands. Either the document, as it was, was signed, or the relationship was at an end. The husband made that clear”.

As to the second agreement, the High Court plurality noted (at [48]) that the trial judge held that it was “simply a continuation of the first — the marriage would be at an end before it was begun if it wasn’t signed”. In effect, the trial judge’s conclusion was that the same matters which vitiated the first agreement, with the exception of the time pressure caused by the impending wedding, also vitiated the second agreement.

The Full Court’s decision

The Full Court found that the agreements were fair and reasonable

because:

- the husband had told the wife at the outset of their relationship, and she had accepted, that his wealth was intended for his children, and

- the wife was concerned only that provision would be made for her in the event the husband predeceased her.

The Full Court held that the wife was not subject to undue influence and that the husband's conduct was not unconscionable.

The High Court plurality, noting (at [54]) the advantages enjoyed by the trial judge in evaluating the evidence, said that with one exception, none of the findings of fact by the trial judge was overturned by the Full Court. That exception was the Full Court's rejection of the trial judge's finding that there was no outcome available to the wife that was fair or reasonable. The High Court found that the Full Court erred in rejecting this finding. It was open to the trial judge to conclude that the husband, as the wife knew, was not prepared to amend the agreement other than in minor respects. Further, the High Court plurality said (at [55]) that the description of the agreements by the trial judge as not being "fair or reasonable" was not merely open to her, it was "an understatement". The unchallenged evidence of the wife's solicitor was that the terms of the agreements were "entirely inappropriate" and wholly inadequate.

In circumstances where the Full Court accepted almost all of the findings of fact, and had erred in not accepting there was no outcome available to the wife which was fair and reasonable, the High Court plurality said that the Full Court ought to have found that the wife was subject to undue influence, albeit misdescribed by the trial judge as duress.

The plurality's conclusion

The plurality set out six general factors which it identified as being relevant to whether a financial agreement should be set aside for undue influence (at [60]):

1. whether the agreement was offered on a basis that it was not

subject to negotiation

2. the emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or to end an engagement

3. whether there was any time for careful reflection

4. the nature of the parties' relationship

5. the relative financial positions of the parties, and

6. the independent advice that was received and whether there was time to reflect on that advice.

These factors were not only important to the determination in this case, but also give guidance as to what is relevant in future applications to set aside financial agreements for undue influence.

In relation to unconscionable conduct, the High Court plurality relied on *Amadio* and said (at [64-65]) that the adjective "special" in the requirement for "special disadvantage" is "used to emphasise that the disadvantage is not a mere difference in the bargaining power but requires an inability for a person to make a judgment as to his or her own best interests".

The trial judge found that the wife's powerlessness and lack of choice but to enter into the agreements pointed inevitably to the conclusion that she was at a special disadvantage. The husband was aware of the wife's special disadvantage and it was, in part, created by him:

- He created the urgency with which the pre-nuptial agreement was required to be signed and the haste surrounding the post-nuptial agreement and the advice given about the latter agreement.

- She had no reason to anticipate an intention on his part to insist upon terms of marriage that were as unreasonable as those contained in the agreements, even though she knew in advance that there was to be some type of document.

- The wife and her family members had been brought to Australia for the wedding by the husband and his ultimatum was not accompanied by any offer to assist them to return home.

The High Court plurality said these matters increased the pressure which contributed to the substantial subordination of the wife's free will in relation to the agreements. The husband took advantage of the wife's vulnerability to obtain agreements which, on the uncontested assessment of the wife's solicitor, were "entirely inappropriate" and wholly inadequate.

Minority judgments

There were two separate minority judgments, being of Nettle and Gordon JJ. Both agreed that the two agreements should be set aside for unconscionability, but not for undue influence.

A bad bargain?

Perhaps the most important aspect of the High Court judgment is its attitude to unfair agreements or to "a bad bargain". The Full Court of the Family Court has said, in relation to whether a financial agreement should be found to be binding under s 90G(1A), that parties are free to enter into "a bad bargain". By contrast, the High Court did not agree that in relation to s 90K(1)(b) and (e) "a bad bargain" will always be upheld, and in fact found that a bad bargain may contribute to a finding that it should be set aside. The terms of the agreements were very unfavourable to the wife and the plurality considered their terms to be relevant to a finding of undue influence. It said (at [56]) that the trial judge:

> "was correct to consider the unfair and unreasonable terms of the pre-nuptial agreement and the post-nuptial agreement as matters relevant to her consideration of whether the agreements were vitiated. Of course, the nature of agreements of this type means that their terms will usually be more favourable, and sometimes much more favourable, for one party. However, despite the usual financial imbalance in agreements of that nature, it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly

unreasonable even for agreements of this nature".

Interestingly, it was only Gordon J who compared the outcome for the wife under the agreement to the outcome under the FLA. It is unclear by what benchmark the plurality and Nettle J judged the agreements as being "unfair and unreasonable" to the wife.

¶20-360 Unconscionability

Unconscionability is a ground for setting aside a financial agreement. It arises twice under each of s 90K(1) and 90UM(1) of the *Family Law Act 1975* (Cth) (FLA). It is referred to expressly in s 90K(1)(e) and 90UM(1)(h) and also arises in the more general wording of "void, voidable or unenforceable" in s 90K(1)(b) and 90UM(1)(e).

A person acts unconscionably if the person knows, or ought to know, of the existence of the disabling condition or circumstance, and its effect on the innocent party, and takes advantage of that disabling condition or circumstance.

In the leading case of *Commercial Bank of Australia Limited v Amadio*,[27] Deane J held that the requirements of unconscionable conduct are:

- "a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them"

- "that the disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept the weaker party's assent to the impugned transaction in the circumstances"

- usually, but not necessarily, there is inadequate consideration moving from the stronger party, and

- once "such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable".

Other points to note about unconscionable conduct are:

- the plaintiff must come to the court with "clean hands"[28]
- adequacy of consideration is a relevant factor but not decisive
- a mere difference in the bargaining power of the parties does not constitute a special disadvantage or disability, and
- the disabling condition or circumstance must seriously affect the ability of the weaker party to judge that party's own best interests.

It is impossible to list all the situations which may constitute a special disadvantage or disability. They include poverty, sickness, age, sex, infirmity of body or mind, drunkenness, and illiteracy or lack of education.

There is considerable Australian case law on setting aside guarantees for unconscionable conduct. Much of this law is relevant to financial agreements.

In *Saintclaire & Saintclaire* (2015) FLC ¶93-684, the Full Court found that the trial judge was in error in not distinguishing between "actual undue influence" and "unconscionable conduct".

Examples

***Tsarouhi & Tsarouhi* [2009] FMCAfam 126**

The agreement was found to have been entered into under duress and should be set aside. It should also be set aside for reasons of unconscionability. The husband took advantage of the wife's fear of prosecution and knew that the wife was signing the agreement in the expectation that the prosecution would be halted. He knew that it would not be halted.

***Hoult & Hoult* [2011] FamCA 1023**

Murphy J found that there were circumstances which rendered the wife in a position of "special disadvantage". However, he found that there was not unconscionability because:

- the agreement had been negotiated for some time
- there had been earlier drafts and discussions, and
- the understandable desire to formalise the agreement, while ultimately occurring in circumstances of haste and where the wife felt under pressure, was not

unconscientious behaviour by the husband.

Murphy J set aside the agreement on other grounds although this was overturned by the Full Court in (2013) FLC ¶93-546.

***Teh & Muir* [2017] FamCA 138**

The respondent was found to have been suffering from a significant disadvantage or disability at the time of entering into the financial agreement, namely dementia and demonstrable symptoms of Alzheimer's disease. The applicant was aware of the respondent's impediment and his susceptibility to her demands. The applicant knew that the respondent had little or no idea of what he was signing. The agreement was found not to be binding pursuant to s 90UJ(1) as the parties were never in a de facto relationship, but further or in the alternative it was set aside under s 90UM.

Examples of special disadvantage or disability in cases decided with respect to financial agreements include:

- Fear of prosecution — *Tsarouhi & Tsarouhi* [2009] FMCAfam 126
- Creation of false sense of necessity for agreement to protect family home from creditors — *Adame & Adame* [2014] FCCA 42
- Dementia and demonstrable symptoms of Alzheimer's disease — *Teh & Muir* [2017] FamCA 138.

Footnotes

27 *Commercial Bank of Australia Limited* v *Amadio* (1983) 151 CLR 447 at pp 474–475.

28 *Adenan* v *Buise* [1984] WAR 61.

¶20-365 Mistake and misrepresentation

A mistake occurs where one or both parties are under a misapprehension about something which forms the basis of their agreement. "Mistake" was argued but not found in *Stoddard & Stoddard* [2007] FMCAfam 735. A unilateral mistake was found on the

part of the husband in *Sullivan & Sullivan* [2011] FamCA 752, where the wife signed an agreement under s 90B *Family Law Act 1975* (Cth) and did not know that the agreement was not signed by the husband prior to the marriage.

Example

***Phak & Xu* [2015] FamCA 939**

Both parties believed an investment which the wife was to retain was valuable. The parties were found to have shared a common mistake as, although they believed the property had value of $1m, this was a mirage.

A misrepresentation is a false statement which may or may not be deliberate. Points to note include:

1. A statement of opinion is generally insufficient.

2. There must be a positive statement or act. Mere silence is insufficient. There are exceptions to this general proposition.

3. Misrepresentations of law do not usually entitle a party to rescind.

Examples

***Parke & Parke* [2015] FCCA 1692**

The financial agreement was set aside for non-disclosure or suppression of facts amounting to a misrepresentation. The applicant represented that Schedule 1 contained a list of all of his assets. That was untrue. He omitted the Parke Super Fund of which both parties were members although the respondent did not know of the existence of the fund or even that she had a member's account.

The finding of the misrepresentation being false, rather than unintentional, was strengthened by the conduct of the applicant in the financial agreement proceedings where he had provided no disclosure of the fund and its existence was only discovered by the respondent as a result of a subpoena to the applicant's accountant.

The respondent knew that she and the applicant were shareholders of a company with assets of approximately $170,000 but failed to insist that these assets be included in the schedules to the agreement. She was also warned by her lawyers that there was a "high likelihood" that the applicant had not made complete disclosure of his assets but she gave "adamant instructions" that she wanted to proceed with the marriage and with the agreement. Howard J was unable to find that the respondent was induced by these misrepresentations.

A Full Court appeal by the husband was never heard, as the husband died and his legal

personal representative discontinued the action.

***Phak & Xu* [2015] FamCA 939**

The parties were found to have shared a common mistake as to an investment. Both parties believed an investment in suburb E which the wife was to retain was valuable and created valuable legal rights with respect to two home units yet to be built. Benjamin J rejected the husband's argument that the loss was simply a commercial risk which arose subsequent to the execution of the agreement and that the wife should bear the loss. Benjamin J accepted that, although at the time the parties entered the agreement they believed the suburb E transaction had a value of $1m it was a mirage, because it was (at [196]) "simply flim flam, a confidence trick, a fraud scheme".

¶20-370 Validity, enforceability and effect of agreements

Most principles of contractual law arise under s 90K(1) and 90UM(1) of the *Family Law Act 1975* (Cth) (FLA). Section 90KA (and its Pt VIIIAB equivalent s 90UN) provides an additional or alternative means by which a court can consider contractual principles. It is largely seen as the provision which enables family law courts to enforce financial agreements. Use of these principles expands the court's options, particularly with respect to remedies for the innocent party. It may not be in the innocent party's interests for the agreement to be set aside under s 90K(1) or s 90UM(1). Other remedies may be more desirable.

Section 90KA provides:

> "The question whether a financial agreement or a termination agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts, and, in proceedings relating to such an agreement, the court:
>
> (a) subject to paragraph (b), has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction; and
>
> (b) has power to make an order for the payment, by a party to

the agreement to another party to the agreement, of interest on an amount payable under the agreement, from the time when the amount became or becomes due and payable, at a rate not exceeding the rate prescribed by the applicable Rules of Court; and

(c) in addition to, or instead of, making an order or orders under paragraph (a) or (b), may order that the agreement, or a specified part of the agreement, be enforced as if it were an order of the court".

Section 90UN is similarly worded in relation to Pt VIIIAB financial and termination agreements.

The purpose of s 90KA was described by Murphy J in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411 (at [119]) as:

> "If the parties to a marriage (or parties to a prospective marriage) enter an agreement which otherwise meets the criteria for the formation of a valid and enforceable contract and which purports to determine how, in the event that their marriage breaks down, their financial affairs should be determined, the principles of contract (and equity) will determine the parties' rights with respect to that contract. So much is clear, in my view, from s 90KA".

The Full Court of the Family Court discussed the practical effect of s 90KA in *Kostres & Kostres* (2009) FLC ¶93-420. The Full Court concluded ([128]–[129]):

> "We accept that in determining whether the agreement is valid, enforceable or effective, the general law relating to contracts, as well as principles of equity, are to be applied. That must be done to give effect to the parties' intentions at the time of the making of the agreement, and in the context of the statute. The legislature has been careful to include strict requirements if a financial agreement is to be binding, including the requirement of independent legal advice. In those circumstances it is clear the legislature envisaged, because of the nature of these agreements and the removal of the Court's supervisory role, that parties would receive legal advice about the necessity for their intentions to be

accurately and clearly reflected in the actual terms of the agreement.

While, for the purpose of construing the agreement a court should, as in the context of a commercial agreement, apply an objective test of a reasonable bystander to the construction of an agreement, it cannot give meaning to an agreement whose terms are so imprecise or ambiguous the parties' intent cannot be discerned. This is particularly so when regard is had to provisions of Part VIIIA in the overall context of the Act".

See also *Senior and Anderson* [2010] FamCA 601; (2011) FLC ¶93-470 and *Fevia & Carmel-Fevia* (2009) FLC ¶93-411.

Principles which may arise under s 90KA and 90UN include:

- capacity
- breach
- frustration, see ¶20-420
- intention to rescind, see ¶20-390
- variation, waiver, election, laches and estoppel — see ¶20-380
- uncertainty — see ¶20-375, and
- rectification — see ¶20-207.

Contract law must, therefore, be considered when drafting, signing, interpreting, acting on, enforcing, terminating and setting aside a financial agreement. The amendments to the FLA stemming from the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* mean that, even if the legal advice requirements of a financial or termination agreement are not met, the court can consider whether it is unjust and inequitable for the agreement not to be binding upon the parties. In an enforcement application, s 90KA or s 90UN will be relevant (s 90G(1A), 90J(2A), 90UJ(1A) and 90UL(2A)).

Possible remedies available under s 90KA and 90UN include

damages for breach, enforcement of a provision “as if it were an order of the court” (s 90KA(c) or s 90UN(c)), severance of part of the agreement, specific performance, injunctive relief, the doctrines of estoppel, laches, etc, to deny enforcement, rectification and implied terms.

The husband in *Fevia & Carmel-Fevia* (2009) FLC ¶93-411 relied on the equitable principles of rectification and part performance. He submitted that the contract could be rectified if his primary arguments were not accepted. Murphy J rejected this argument.

Examples

***Lincoln (deceased) & Miller* [2016] FamCA 547**

Carew J found that she had no power under the FLA to make a declaration as to the validity of the financial agreement as there was no enforcement application before her.

***Fan & Lok* [2015] FamCA 816**

The wife’s estate sought to enforce a financial agreement. In earlier proceedings, *The Estate of the late Ms Fan & Lok* [2015] FamCA 300, the husband was unsuccessful in his applications to either have the agreement set aside or have it found not to be binding. The two decisions raised the question of the distinction between seeking that an agreement be set aside or declared not to be binding and an application opposing its enforcement. This arises particularly where there is a determination in the earlier proceedings that it would be unjust and inequitable for the agreement not to be binding.

The power of the court to enforce orders is discretionary rather than absolute, and the husband sought that the court exercise its discretion in his favour and not enforce the agreement.

Although not expressly referred to, the court is directed by s 90G(2) and 90UJ(4) that it “may make such orders for the enforcement of a financial agreement that is binding on the parties to the agreement as it thinks necessary”, reinforcing the discretionary nature of enforcement.

A pre-nuptial financial agreement (under s 90B) provided that in the event of separation a property at suburb C was to be sold and the proceeds used to discharge a mortgage for which one of the security properties was a property in the name of the wife in suburb G. The wife died shortly after separation. The husband arranged for the suburb C property to be transferred into his sole ownership by right of survivorship.

The applicant was the executrix of the wife’s estate and was one of the wife’s children. She sought orders to enforce the agreement.

In the first case, the husband sought to set the agreement aside. He unsuccessfully argued that either the agreement was impracticable to be carried out or that there had been a material change in circumstances.

The certificates of advice set out that the parties received advice in relation to a s 90B agreement when in fact it was a s 90C agreement. Rees J did not deal with the

argument that the agreement may have still been valid (eg *Wallace & Stelzer* (2013) FLC ¶93-566), but exercised her discretion under s 90G(1A)(c) and made a declaration that it would be unjust and inequitable if the agreement was not binding on the husband.

In the second case, the husband sought that the application for enforcement be dismissed. He submitted that the court should exercise its wide discretion and find that it was not just and equitable to enforce the financial agreement by requiring him to sell his property at suburb C as the agreement envisaged that he would retain that property.

Rees J noted that the contention made by the husband, that it was not just and equitable to enforce the terms of the agreement, was the subject matter of the determination she had made in the earlier proceedings. She found (at [22]) "… that *res judicata* estoppel arises in relation to the submission that it is not just and equitable to enforce the agreement".

In case she was wrong about issue estoppel, Rees J dealt with the husband's other arguments and dismissed them.

Rees J found that she could enforce the agreement. She considered that an order which provided for the sale of the suburb C property, in the event that the husband failed to comply with his obligation to pay the amount owing under the mortgage, was available to the court in the exercise of its wide powers pursuant to s 90KA. If she was wrong about this, she was also satisfied that the court had an inherent power, as stated by the Full Court of the Family Court in *Molier & Van Wyk* (1980) FLC ¶90-911, to impose consequential provisions for the sale of the suburb C property to ensure that the orders made requiring the husband to discharge the mortgage were carried into effect.

In addition, Rees J relied on r 20.05(a) of the Family Law Rules 2004 which expressly provides that the court may make an enforcement order, in relation to an obligation to pay money, for the seizure and sale of real property.

Although the husband was unsuccessful it may be possible, on a different set of facts, to distinguish between a declaration that it was unjust and inequitable not to hold a party to an agreement and the broad discretion to enforce.

See also *Cole & Abati* (2016) FLC 93-705; *Lincoln (Deceased) & Miller* [2016] FamCA 457; *Chatterjee & Woodby-Chatterjee* [2016] FamCA 486.

¶20-375 Uncertainty

Uncertainty was defined by Lord Wright in *G Scammell & Nephew Ltd* v *HC & JC Ouston* (1941) AC 251 (at pp 268–269) as where:

> "the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at

> substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used … It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain".

Points to note about uncertainty include:

- courts are reluctant to strike down an agreement which parties intend to be binding.

- difficulties of interpretation and ambiguity do not necessarily render a contract void for uncertainty. Courts endeavour to uphold contracts wherever possible (*Upper Hunter CDC* v *Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at pp 436–437 per Barwick CJ).

- courts try to objectively ascertain the parties' intentions (*Upper Hunter CDC v Australian Chilling & Freezing Co Ltd* (above)).

Clauses and agreements otherwise void for uncertainty may be saved by:

- applying an external standard such as the standard of reasonableness (eg *King* v *Ivanhoe Gold Corp Ltd* (1908) 7 CLR 617)

- if the parties have acted on the agreement, their actions may clarify the uncertainty, and

- severing the uncertain part from the contract if it is not an important part (*Life Insurance Co of Australia Ltd* v *Phillips* (1925) 36 CLR 60; *Whitlock* v *Brew* (1968) 118 CLR 445).

These points were discussed by the Full Court of the Family Court in

Twigg & Twigg v *Kung* (1994) FLC ¶92-456. The Full Court quoted Fogarty J in *Weiss* v *Barker Gosling* (1993) FLC ¶92-399 (at p 80,080) and then said (at p 80,716):

> "Courts will endeavour to avoid a construction which leads to invalidity, especially if the contract has in the meantime been acted upon … These cases demonstrate a tendency to uphold contracts despite a lack of clarity in the words employed by the parties. Although most of these cases involved substantial commercial agreements, this should not be seen … as being a development confined to commercial contracts".

Examples

***Kostres & Kostres* (2009) FLC ¶93-420**

The Full Court found that a financial agreement was void for uncertainty. The agreement was entered into two days before the marriage. At the time, both parties mistakenly believed that the husband was an undischarged bankrupt. They did not tell their lawyers this. The parties' mistaken belief about the husband's status led to them acquiring assets in the wife's name rather than in the parties' joint names. Both parties sought that words be "read into" cl 6 of the agreement.

The Full Court was not satisfied that it could read words into the agreement.

***Senior & Anderson* (2011) FLC ¶93-470**

A majority of the Full Court upheld the appeal and remitted the matter for rehearing. May J, dissenting, considered that the certificates could be rectified. In relation to the reference in the agreement to the incorrect section, (ie s 90C rather than s 90D), all three judges considered this could be rectified.

With respect to the erroneous and inconsistent names in the certificates, May J considered these were in a different category to the careless reference to the incorrect section. She held that a failure to observe s 90G(1) cannot be rectified by s 90KA but can be rectified under construction principles or, if she was wrong, the agreement was binding (s 90G(1A)(c)). She particularly disagreed with Strickland J's view (at [142]):

> "It is clear to me that the certification must, on its face, comply with the terms of the section. A court could not be satisfied of that requirement in circumstances where, as here, the certificate refers to the provision of advice to a person named as 'A' but, thereafter, refers to advice being provided to a person named 'B'".

***Parke & Parke* [2015] FCCA 1692**

The operative part of the agreement did not indicate whether or not the parties were dealing with "all" of their property or "some" of their property. Section 90B of the *Family Law Act 1975* (Cth) (FLA) allows either option. Howard J resolved this uncertainty by referring to the recitals.

A further uncertainty could not be resolved and led to the agreement being set aside. One clause required the respondent to transfer her interest in the K property to the

parties' son X, and under another clause the respondent was entitled to retain it. A complicating factor which was not foreseen, at least by the applicant when the agreement was entered into, was that X refused to accept a transfer of the respondent's half interest in the property and the agreement did not have a default provision setting out what was to occur in the event that X refused to accept the transfer. The trial judge found that the clauses were essential terms of the agreement because they dealt with what was to happen in the event that the parties separated. He set the agreement aside, as the clauses could not be severed from the agreement. The agreement was, however, set aside under s 90K(1)(b), (c) and/or (e), on the grounds of unconscionable conduct and breach of essential terms.

The husband's appeal was discontinued by the husband's legal personal representative after the husband's death.

***Garvey & Jess* [2016] FamCA 445**

The court rejected the argument that the financial agreement was void for uncertainty as the parties only had an "agreement to agree". The agreement provided that in the event of a breakdown of the relationship, the parties would "equally divide the joint assets". The wife submitted that to make the agreement binding there needed to be a "meeting of minds" about how to give effect to the "equal division".

The deed was not void for uncertainty because it evinced an intention for the parties:

- to be legally bound
- to oust the jurisdiction of the court pursuant to Pt VIII
- to divide the assets in the proportion provided for in the deed.

The court said (at [41]):

> "In determining the question whether a financial agreement is valid, enforceable or effective, s 90KA empowers the Court to apply the *principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts*. Section 90G(2) empowers the Court to make *such orders for enforcement … as it thinks necessary* and a sale or division *in specie* are, in my view, 'such orders'".

¶20-380 Variation, waiver, election, laches and estoppel

A contract may be unenforceable due to the operation of variation, waiver, election, laches or estoppel. These concepts are quite different. They may arise under s 90K(1)(b) or s 90UM(1)(e) and s 90KA or s 90SN *Family Law Act 1975* (Cth). They are, however, more likely to be argued under s 90KA in answer to an enforcement application rather than by the innocent party being proactive and seeking to set the agreement aside under s 90K(1)(b) or s 90SM(1)(e). In summary, they are:

1. **Variation**: an agreed change to the contract. It requires writing or consideration to be effective.

2. **Waiver**: occurs where the contract has not been varied but one party does not insist on his or her strict legal rights. Writing or consideration are not required. A waiver may be withdrawn upon reasonable notice.[29]

3. **Election**: to affirm a contract after a serious breach will result in the loss of the right to terminate. The “electing” must be by unequivocal words or conduct by a party with full knowledge of the facts.

4. **Laches**: where a party loses the right to insist on performance of the contract or damages for non-performance due to unreasonable delay or negligence. It is an equitable defence rather than the basis of a claim. By delaying the institution of proceedings the party has either acquiesced in the conduct of the party at fault or caused the party at fault to alter position relying reasonably on the other party’s acceptance of the status quo.

5. **Acquiescence**: involves delay or refraining from proceedings for a sufficient time that those rights have been abandoned.

6. **Estoppel**: can totally extinguish the right to terminate for serious breach. An estoppel requires inter alia:

    • an unequivocal statement or assurance (although it can be implied) that the innocent party will not insist on his or her strict legal rights to terminate for the existing breach

    • actual reliance by the party in default on the statement or assurance, and

    • an element of detriment. The defaulting party, by acting in reliance on the statement or assurance, must be in a worse position than if the statement or assurance had not been made.

The distinction between these concepts can be very difficult. It may be possible and advisable to plead some of them in the alternative.

In *Fevia & Carmel-Fevia* (2009) FLC ¶93-411, Murphy J considered an estoppel argument by the husband.

In *Woodcock v Woodcock*,[30] the parties intended to formalise their agreement with consent orders. They did not do so but acted on the informal agreement. An estoppel defence was raised to an application for a property settlement and spousal maintenance. The Full Court quoted at length from *Waltons Stores (Interstate) Limited v Maher*,[31] which is the leading Australian case on estoppel. Brennan J said in *Waltons Stores*:

> "A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to".[32]

The Full Court rejected the application of estoppel to rights to apply for spousal maintenance.[33]

Examples

***Schokker & Edwards* (1986) FLC ¶91-723**

After approximately 11 years of marriage, the parties had an informal property settlement. The wife refused to sign a s 87 maintenance agreement. In an affidavit filed in maintenance proceedings a year later the wife said "I do not wish to further pursue a property settlement". Her solicitors wrote a letter to the bank, from which the husband was trying to borrow some money to complete his obligations under the agreement, to confirm that she would make no further claim on the husband for property settlement or spousal maintenance.

About one year later, the wife filed a s 79 application. By then, the husband had resigned from his employment and had slightly more assets than he anticipated. The trial judge awarded the wife a further $11,000. A majority of the Full Court determined that this was not just and equitable as the wife had twice unequivocally declared that she would not seek a further property settlement. It was unjust and inequitable for her to make a claim and for an order to be made in her favour. The husband acted on that assurance and opted to receive a capital sum in lieu of future rights to superannuation and long service leave. He invested that sum along with the capital of his present wife in

a joint venture, which would probably involve a loss to both of them if there was a forced sale.

***Plut & Plut* (1987) FLC ¶91-834**

The husband agreed to transfer a house worth $95,000 to the wife in consideration of their marriage. If they separated, the property would remain hers. The parties separated about six weeks after the marriage. The husband sought to have the house transferred back to him. The wife argued that the husband was estopped from relying on s 79, 85A and 87 because she had relied upon his representations, married him and so acted to her detriment. The Full Court found that as the parties cannot, by contract, oust the court's jurisdiction under s 79, then they cannot do so by raising an estoppel.

Footnotes

29 *Hartley* v *Hymans* [1920] 3 KB 475.

30 *Woodcock* v *Woodcock* (1997) FLC ¶92-739.

31 *Waltons Stores (Interstate) Limited* v *Maher* (1988) 164 CLR 387.

32 Ibid at p 413.

33 *Woodcock* v *Woodcock* (1997) FLC ¶92-739 at p 83,960.

¶20-390 Breach and intention to rescind

Default in the performance of obligations in a financial agreement may mean that the innocent party can terminate the contract for breach.

There are two kinds of breach:

1. Actual breach occurs where one party either:

    1.1. refuses to or cannot perform acts which are due to be performed, or

    1.2. does not exactly perform the acts required under the

contract.

2. Anticipatory breach occurs where, before the time when performance is due, either:

2.1. one party states that the major obligations will not be performed, or

2.2. one party acts in a way which precludes the possibility of major obligations being performed.

A further requirement is usually that the innocent party elects to terminate the contract as a result of the breach.

Generally, unless and until the innocent party faced with an anticipatory breach elects to terminate the contract, it is on foot. The innocent party's unequivocal words or conduct must show that the contract is at an end.

The principles applied in determining whether a party to a contract has repudiated the contract such that the other party can terminate it were set out by Strickland and Ryan JJ in *Donald & Forsyth* (2015) FLC ¶93-650 (at [67]):

- there must be either a breach or an anticipatory breach of an essential term of the contract, or a sufficiently serious breach of a non-essential term (*Koompahtoo Local Aboriginal Land Council and Anor v Sanpine Pty Limited and Anor* [2007] HCA 61; (2007) 233 CLR 115), and

- the other party must be ready and willing to complete the contract (*Foran v Wight* [1989] HCA 51; (1989) 168 CLR 385).

The trial judge found that the husband's position that he would not participate in his share of the cost of repairs to a property amounted to a repudiation of the contract.

The Full Court, in two separate judgments, found that the husband's anticipatory breach of the agreement related to a non-essential term and that anticipatory breach was not sufficient grounds to justify the wife rescinding the agreement.

Justices Strickland and Ryan found that the essential term was that the house be marketed in good repair. The husband did not seek to breach that term. If the husband maintained his resistance to having his half-share of the costs of repair deducted from the proceeds of sale, then the obvious remedy for the wife was in damages. It was also apparent that at the time of the purported termination of the agreement by the husband, the wife was not ready and willing to complete the agreement as she did not want to sell the property. Therefore, she was not able to rescind the agreement.

The husband was entitled to seek orders for enforcement of the agreement.

An intention to rescind an agreement can be implied from conduct.

A court looking at whether or not an intention to rescind a financial agreement can be implied from conduct will usually refer to the case law on s 79A of the *Family Law Act 1975* (Cth). Section 79A(1A) has been interpreted to allow an intention to set aside s 79 orders to be implied. There is no similar provision with respect to financial agreements. Termination of a Pt VIIIA financial agreement by consent must be in accordance with s 90J. Section 90UL applies to Pt VIIIAB financial agreements. There is still, however, the possibility of using contractual principles to set aside the agreement.

Examples

***Sykes & Sykes* (1979) FLC ¶90-652**

The Family Court considered that the parties themselves had intended to revoke a pre-nuptial agreement because they acted contrary to its terms.

***Sommerville & Sommerville* (2000) FLC ¶93-042**

Nicholson CJ set aside s 79 orders under s 79A(1A) because the parties by their conduct had impliedly consented to setting them aside.

The original orders were made in 1991, the parties reconciled by June 1992, and then finally separated in October 1996. During the period in which the parties were reconciled their asset positions changed completely. Both parties at separate times sold their respective homes. They jointly bought vacant land on which they built a new home. The wife's business suffered a significant downturn. She transferred her interest in the new home to the husband to protect it from her creditors. The husband later transferred the home to a company. The wife's business failed and she voluntarily declared herself bankrupt. At the time of final separation the main asset was the new home, in the company name, valued at about $200,000.

The husband argued that the original orders were a final determination and the court had no jurisdiction to re-open the settlement. The court disagreed. Alternatively, the husband contended that the wife's contributions since reconciliation should be seen in the context of a short marriage. The wife should receive no more than 15% on the basis of contributions and there should be no further adjustment for s 75(2) factors. Again, the court disagreed.

The court took into account the whole of the relationship and split the net assets equally between the parties.

¶20-400 Impracticable performance

Section 90K(1)(c) and 90UM(1)(f) of the *Family Law Act 1975* (Cth) allow a court to set aside a Pt VIIIA or Pt VIIIAB financial or termination agreement if it is satisfied that "in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out".

Financial and termination agreements are, because of s 90K(1)(c) and 90UM(1)(f), less binding than ordinary commercial contracts.

¶20-410 Meaning of "impracticable"

The term "impracticable" is not defined in the *Family Law Act 1975* (Cth) although it is used in s 90K(1)(c), 90UM(1)(f) and 79A(1)(b).

Very few reported cases deal with impracticability in relation to financial agreements. The authorities mostly deal with s 79A, 90SN and 87(8)(d). One case involving a financial agreement was *Parke & Parke* [2015] FCCA 1692. The husband has appealed, but the appeal was not determined as at 1 July 2016. The impracticability arose in relation to two matters:

1. The wife was required by the agreement to transfer her interest in three properties to the parties' adult son, X. X refused to accept the transfers and the agreement was silent as to a default provision.

2. The husband had dissipated the wife's superannuation. The agreement was silent about the wife's superannuation

> entitlements. The agreement which was entered into by the parties in 2001 purported to deal with the parties' "property and financial resources" at the date of the agreement, or at a later time.

In 2008, the wife had $120,000 in a self-managed superannuation fund. In 2011, her entitlements were reduced to nil. The parties separated in 2013. The wife did not know she had formerly had any entitlements until the litigation in relation to the financial agreement commenced.

In *Rohde & Rohde*,[34] it was observed that when dealing with "impracticable" in the context of s 79A(1)(b):

> "(a) It is not enough that circumstances have arisen since the order was made which make it *unjust* for the order or part of the order to be carried out; the onus is upon the applicant to establish to the reasonable satisfaction of the Court, that in the circumstances that have arisen … it is *impracticable* for the order or part of the order to be carried out.
>
> (b) The word 'impracticable' means, gleaning a definition from the *Shorter Oxford Dictionary*, 'not practicable'; 'that cannot be carried out or done'; 'practically impossible'; 'unmanageable'; 'intractable'.
>
> (c) 'Impracticability' is a conception different from that of 'impossibility': the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice" (per Veale J, in *Jayne* v *National Coal Board* (1963) 2 All ER 220).

In relation to s 87 agreements and 79 orders, courts have tried to restrict the meaning of "impracticable" from having the broader meaning of "difficult".[35] A wide meaning severely limits the advantages of entering the agreement or order. In relation to financial agreements, in particular, a wide meaning also reduces the risk and liability of professional negligence claims against legal practitioners.

It may become "difficult" or "extremely difficult" for one party to carry

out an express or implied promise not to apply for financial provision under Pt VIII or Div 2 of Pt VIIIAB. However, this difficulty of itself cannot be impracticable performance.

Examples

***La Rocca & La Rocca* (1991) FLC ¶92-222**

The potential bankruptcy of the husband did not lead to the orders being "impracticable" under s 79A. Kay J considered that the parliament was concerned with the happening of events, which could not be reasonably foreseen, which will cause an injustice to one of the parties.

***Cawthorn v Cawthorn* (1998) FLC ¶92-805**

A husband unsuccessfully argued that the deterioration in his financial circumstances meant that s 79 orders were "impracticable". The court said that his financial circumstances were such that it was difficult but not impracticable for him to comply with the orders. In any event, the problems were "self induced".

***Fellows v Fellows* (1988) FLC ¶91-910**

The parties entered into a s 87 deed. The deed set a reserve price for the sale of a dairy property. The deed did not anticipate that a sale at that price would not occur. Examining the term "impracticable" in s 87(8)(d), Nathan J of the Supreme Court held:

> "I am of the opinion that the deed has not been frustrated by some intervening act of frustration as is known to the law of contract. The simple fact is that the agreement failed to contemplate or deal with the situation of the dairy farm not being able to fetch the reserve price. It was based upon a predicate, which has not, and cannot be fulfilled. The parties failed, or chose not to put their minds to this eventuality. It follows then that … s 87(8) [is of no] … avail to the defendant".[36]

***Sanger & Sanger* (2011) FLC ¶93-484**

The Full Court upheld the decision of the Federal Magistrate to refuse the husband's application to set aside the financial agreement for impracticability. The husband argued that the agreement was predicated on the basis of a business he owned having a value of $400,000 whereas, having been placed in voluntary liquidation it had no value and the former matrimonial home sold for $649,000 when its estimated value when the parties entered into the financial agreement was $800,000. The Full Court said (at [82]):

> "We agree with the submissions of Counsel for the wife that there is a material distinction between an agreement which is unable to be put in practice, and is thus impracticable, and an agreement which, although producing a potentially different outcome to that for which a party hoped, is able to be implemented, or put into practice".

Footnotes

34 *Rohde & Rohde* (1984) FLC ¶91-592 per Gee J at p

79,768.

35 *Fellows* v *Fellows* (1988) FLC ¶91-910 at p 76,601.

36 Ibid.

¶20-420 Doctrine of frustration

Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC*[37] stated the modern concept of "frustration" as:

> "[occurring] whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract … It was not this that I promised to do".

This interpretation was adopted by a majority of the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*.[38]

In Australian contract law, there is a doctrine of frustration, but not of impracticability. The doctrine of frustration arises under s 90K(1)(b) and 90UM(1)(e) of the *Family Law Act 1975* (Cth) in relation to an agreement being "void, voidable or unenforceable", and under s 90KA in relation to "the validity, enforceability and effect of contracts". The question that arises is whether this differs from "impracticability" under s 90K(1)(c) and 90UM(1)(f).

Kay J in *La Rocca and La Rocca*,[39] when dealing with s 79A considered that the concepts of impracticability and frustration were similar. However, the Full Court in *Cawthorn v Cawthorn*[40] distinguished them.

It is therefore, unclear how broad the concept of "impracticability" is

and whether it is broader or narrower than “frustration”.

Footnotes

37 *Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696 at p 729.

38 *Codelfa Construction Pty Ltd* v *State Rail Authority of New South Wales* (1982) 149 CLR 337.

39 *La Rocca and La Rocca* (1991) FLC ¶92-222 at p 78,538.

40 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805 at p 85,060.

¶20-430 Self-induced impracticability

In determining whether an agreement is impracticable, there may be an issue as to whether the impracticability was caused by the party seeking to set aside the agreement. If that party was at fault, or it could be said that the impracticability was self-induced, the agreement will not be set aside.

There is a distinction between a party defaulting and a party being at fault for the default. In *Cawthorn v Cawthorn*,[41] the Full Court distinguished the behaviour of the defaulting party in *Cawthorn* from the behaviour of the defaulting party in *Monticone & Monticone*[42] where:

> “the husband had made every effort to comply with the orders that had been made and eventually achieved success, albeit not within the time prescribed by the order. In the present case, the evidence discloses that the husband has not complied with any of the orders of the court, apart from his initial payment of $5,000. The trial Judge found he had lived comfortably, reduced his indebtedness, paid for the wedding of a daughter but made no

effort to fulfil his obligations under these orders. He appears to have treated the orders of this court and indeed the wife with what might be described as cool contempt. In our view, it is quite clear, upon the evidence, that the husband was capable of making a significant attempt to satisfy his obligations under the orders, had he so chosen.

To obtain the relief that he seeks, the husband must establish to the court that his cause is one, which is just and equitable. One of the principal maxims of equity is 'he who comes into equity must come with clean hands'. The husband's hands are, in our view in the circumstances of this case, very far from clean. We would accordingly decline to grant relief pursuant to s 79A(1)(c)".

Footnotes

41 *Cawthorn* v *Cawthorn* (1998) FLC ¶92-805.

42 *Monticone & Monticone* (1990) FLC ¶92-114.

¶20-440 Drafting to avoid s 90K(1)(c) or s 90UM(1)(f)

Section 90K(1)(c) and 90UM(1)(f) of the *Family Law Act 1975* (Cth) encourage parties and their lawyers to anticipate changes in circumstances. If the agreement covers possibilities which in fact occur, the agreement will be more difficult to set aside under s 90K(1)(c) or s 90UM(1)(f).

For example, changes in circumstances, which might be anticipated, are:

- a bank loan not being obtained
- a mortgagee not consenting to a transfer
- a maintenance payer losing his or her job, and

- a house being sold by a certain date.

If an agreement is silent about an event which occurs, this may cause a stalemate and perhaps significant hardship to one or both parties.

Some lawyers include a clause in the agreement that the parties intend to be bound despite the occurrence of certain future difficulties such as unemployment, incapacity and fluctuating interest rates. This attempt to establish that these difficulties were foreseen is intended to influence a court determining whether performance is impracticable. It cannot, however, usurp the authority of the court. Arguably the court is more likely to be influenced by specific provisions which cover certain circumstances, rather than a general statement purporting to cover all possible future difficulties.

¶20-450 Change of circumstances in relation to children

Section 90K(1)(d) and 90UM(1)(g) of the *Family Law Act 1975* (Cth) (FLA) provide that changed circumstances in relation to a child may be a ground to set aside a financial or termination agreement.

Section 90K(1)(d) requires that:

> "since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside …".

The meaning of s 90K(1)(d) and 90UM(1)(g) are clarified by s 90K(2) and 90UM(4). The term "caring responsibility" is also used in s 79A(1)(d) and 90SN(3). Section 90K(2) defines it as where:

> "(a) the person is a parent of the child with whom the child lives; or
>
> (b) a parenting order provides that:
>
> (i) the child is to live with the person; or

(ii) the person has parental responsibility for the child".

It must be established that:

- there has been a change in circumstances relating to the care, welfare and development of a child
- the change in circumstances is "material"
- the change will cause either the child or the person with caring responsibility for the child to suffer hardship if the agreement is not set aside (s 79A(1)(d)).

The court still has a discretion as to whether or not to set the agreement aside even if the above are all established.

Example

***Fewster & Drake* [2015] FamCA 602**

Justice Foster set aside the agreement under s 90K(1)(d). The parties cohabited for about 10 years. At the time of entering the agreement, a child was expected and there had been two miscarriages. A second child was born two years after the agreement.

The agreement provided in substance for the parties to retain their respective assets as at the date of the agreement and for any after-acquired joint property to be divided, after reimbursement of contributions with interest calculated at a daily rate, in the same proportions as the contributions. The wife retained her spousal maintenance rights.

Foster J said that it was not difficult to see that the wife would have little expectancy to any interest in after-acquired joint property when, at the time of the agreement, she had no prospective capacity to make any contribution.

***Pascot & Pascot* [2011] FamCA 945**

The financial agreement was entered into when the parties were the parents of one child and the prospective parents of a second child. There was no consideration in the agreement to the possibility of a third child and no evidence that this was discussed during the parties' negotiations.

The agreement assumed that the wife would be able to support herself and the children with an unspecified appropriate level of child support paid by the husband. This created hardship for the wife, thus satisfying the second leg of s 90K(1)(d).

The husband's appeal against the order setting aside the agreement was allowed as:

- The evidence did not establish how the wife's circumstances had changed as a result of birth of or the care, development and welfare of the second child,
- The order did not permit a comparison to be undertaken between the financial

position of the child, or the wife, under the agreement and the position that would exist if the agreement was set aside, and

- There could be no determination that hardship would ensue if the agreement was not set aside.

***Kapsalis & Kapsalis* [2017] FamCA 89**

Justice Rees followed *Fewster & Drake*. She rejected the wife's submission that the mere circumstance of the birth of children was sufficient to amount to a change in circumstances since the making of the agreement. The agreement itself contemplated that the parties would have children and, that the agreement would still be binding. She agreed with the Full Court in *Fewster* that the birth of a child is within the ordinary realms of expectation of a marriage and so is the care, welfare and development of a child.

***Milavic & Banks (No 2)* [2016] FamCA 884**

Justice Macmillan found that there was a "material change in circumstances" within s 90UM(1)(g). A child was born with autism after the signing of the financial agreement. It was found by Macmillan J (at [94]) that "the fact that since the parties entered into the Agreement, the younger child has been diagnosed with autism, adding significantly to what is required of the parties for his care physically and emotionally and to some extent financially, is a material change relating to his care welfare and development".

However, she declined to set aside the agreement on that ground.

The child spent limited time with the husband although the wife paid the husband child support. Insofar, as there were additional costs arising from the child's autism, the wife was meeting the lion's share of those expenses, there was no dispute that the wife had the capacity to meet the child's expenditure or that she would not do so. There was also evidence of government funding to meet the child's needs.

***Masters & Cheyne* [2016] FamCAFC 255**

This case involved an application to set aside a binding child support agreement, not a financial agreement. However, it involved a consideration of the meaning of "hardship" and "exceptional" within s 136(2)(d) of the *Child Support Assessment Act 1989* which is similar to the wording of s 90K(1)(d) (FLA) except that in the latter the change needs only to be "material" not "exceptional".

Over 3½ years after the parties entered into the binding child support agreement, the only child who was still under the age of 18 commenced spending six nights per week with his father and one night per week with his mother in anticipation of the mother's relocation. The time he spent with his mother reduced even further when the mother moved from the Hunter region of New South Wales to Melbourne.

All three judges upheld the appeal on the basis that a finding that the husband would suffer "hardship" was not reasonably open to the trial judge although the circumstances were "exceptional".

The husband argued that he would suffer hardship. He had an income of $192,080 per annum, and excess of income over expenses even if he made the payment of $242 per week by way of child support. He had net assets of about $1.16m. His primary submission to establish hardship was that it would take him longer to pay off his mortgage.

All three judges agreed that the trial judge had not erred in finding that there were "exceptional circumstances" but that the finding of "hardship" was not reasonably open.

¶20-460 Meaning of "material"

The change in circumstances in relation to children required by s 90K(1)(d) or s 90UM(1)(g) of the *Family Law Act 1975* (Cth) (FLA) must be "material".

The term "material" also occurs in s 90K(1)(a) and 90UM(1)(a).

The meaning of "circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage" under s 79A(1)(d) is discussed at ¶18-020. This test appears to be far more stringent than the requirement for "a material change in circumstances" under s 90K(1)(d) and s 90UM(1)(g).

The term "material" is used under the FLA in the context of the change necessary to re-open decisions about where a child lives.[43] Examples of changed circumstances considered sufficiently "material" to justify re-opening this issue include:

- the use of bad language and "dirty expressions" by a child after residing with one parent[44]
- a happy remarriage and recovery from former mental problems by a non-custodial wife[45]
- remarriage and stabilising accommodation by a non-custodial wife, together with the child commencing school[46]
- remarriage enabling the non-custodial spouse to provide a warm family environment[47]
- psychological and physical changes in children as they grow up.[48]

Footnotes

43 *Houston & Sedorkin* (1979) FLC ¶90-699 at pp 78,727–

78,728.

44 *Burton & Burton* (1979) FLC ¶90-622 at p 78,217.

45 *Houston & Sedorkin* (1979) FLC ¶90-699 at p 78,732.

46 *Rice & Asplund* (1979) FLC ¶90-725 at p 78,906.

47 *F & N* (1987) FLC ¶91-813 at p 76,136.

48 *Newling & Newling: Mole (Applicant)* (1987) FLC ¶91-856 at p 76,467.

Part E — Financial support for children

CHILD SUPPORT AND MAINTENANCE

INTERNATIONAL ASPECTS

Editorial information

Written by Grant T Riethmuller and updated by Kay Feeney

BACKGROUND

¶21-000 Overview

Financial support for children in Australia is generally determined by an administrative assessment of child support by the child support branch of the federal Department of Human Services (CSA). The former Child Support Agency ceased to be an independent government agency after it was fully integrated into the Department of Human Services from 31 October 2011, although it is still referred to as the Child Support Agency (CSA). An administrative assessment is made using the formula set out in the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act).

Information contained in the child support register about parties, children and care arrangements can be disputed by lodging an objection. The parties are also able to apply for a departure from the

formula assessment in “special circumstances” (see ¶21-090). A delegate of the registrar initially hears departure applications. Departure decisions can also be the subject of objections. Decisions by the objections officer are subject to appeal to the Administrative Appeals Tribunal (AAT). Appeals from the AAT lie to the Federal Circuit Court (and also to the Family Court) on questions of law.

Other applications must be made directly to the court, such as applications for lump sum child support and to discharge or vary a child support agreement. When paternity is in dispute, the parties may apply directly to the court for declarations (usually the court orders DNA testing, if the parties have not already undertaken testing by agreement, which usually resolves the paternity issues).

There are various circumstances where children are not covered by the formula assessment scheme (see ¶21-220 to ¶21-250):

- children who have reached 18 years of age (and have completed that year of high school) who require ongoing support due to special needs, or in order to finish their education

- claims for financial support from step-parents. Step-parents do not automatically have a duty to financially support children, and

- some international cases, such as children with overseas maintenance orders, or parents who live overseas in a non-convention country.[1]

In the above cases, if the parties are unable to agree they must apply to the court for an order under the provisions of the *Family Law Act 1975* (Cth) (FLA). However, the order can still be registered for collection by the CSA (see s 17–18A of the *Child Support (Registration and Collection) Act 1988* (Cth)). The process has recently been developed further following the introduction of the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2018*.

Footnotes

1 See the Family Law Regulations 1984, Pt III to IV and Schedules.

¶21-010 History

Prior to the introduction of the administrative assessment scheme in 1989, the child maintenance system was a traditional common law system that required carers to apply to a court for a maintenance order under the provisions of the *Family Law Act 1975* (Cth) (FLA). This commonly occurred in the Family Court and the state magistrates' courts.

The orders made by the courts were generally for relatively low amounts, which did not adequately reflect the true costs of caring for children. In addition, the carer was generally left with the difficulty of enforcing the child maintenance order against the payer.[2]

Effective enforcement rates were low and the process expensive. Those seeking to enforce often had no resources to fund court proceedings as they were commonly without significant income and had the burden of children to financially support. Estimates published at the time of the introduction of the child support assessment scheme indicated that around 30% of child maintenance orders were actually met in full, demonstrating an extremely low compliance rate.

While the law and polite society frowned upon non-compliance with child maintenance orders, little was done to systematically enforce the obligations imposed by the orders until the introduction of the child support scheme. A further difficulty was that, in many cases, parents made arrangements to maximise their access to social security, shifting part of the costs of caring for children away from parents and onto the state. It was also clear that the amounts generally ordered were far less than any of the estimates of the costs of caring for children.

The first significant step in the child support scheme was the introduction of the *Child Support Act 1988* (Cth), which later became

the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act).

The effect of the Registration and Collection Act was to create the Child Support Agency (CSA) to carry out the collection of child maintenance on behalf of payees. The beneficiary of a child maintenance order could simply register the order with the CSA for collection. The effect of registration was to make the debt a debt owed to the Commonwealth of Australia, enforceable by the CSA. Other provisions of the legislation provide for the money received by the CSA to be paid to the beneficiary of the orders.

The second phase of the child support scheme was the introduction of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act), which provided for the administrative assessment of child support. In many ways, the actual impact of this legislation has been greater than that of the Registration and Collection Act.

The Assessment Act allows the carer of dependent children to lodge a form at Centrelink or the CSA in order to seek administrative assessment of the amount of child support that ought to be paid. The child support assessment is then calculated by the CSA using one of the formulas set out in the Assessment Act, based upon the number of children involved and the taxable incomes of the parties and the amount of time their children spend with them. The taxable incomes of the parties are made available to the CSA by the Australian Taxation Office (ATO).

The introduction of the administrative assessment process has brought about significant changes to the socio-legal structure of Australian society, in that:

- the administrative process has made payment of child support a normal feature of separation. The process for applying for child support is now so simple that it is rare for a person with dependent children to not seek an assessment: indeed, they must apply if seeking social security payments

- the payer now has the onus of applying to the court if unsatisfied with the administrative assessment (as altered by an

administrative process available under the Assessment Act) rather than the expensive litigation-based process the carer of children had to undertake before the Act commenced

- the effect of the formula has been to significantly increase the average child support weekly payment for a dependent child, and

- enforcement rates are now over 70% (and still slowly increasing) compared to the pre-scheme enforcement rates of less than 30%.

In a more general sense, the effect of the scheme has been to greatly increase the amount of financial support children receive, and has largely removed the need to litigate. It also meant that payment of child support is rarely a “bargaining chip” in other negotiations between separating couples.

Reforms

In May 2006, the federal government announced that it would introduce reforms to the child support scheme in three stages. The reforms were enacted in the following pieces of legislation:

(a) *Child Support Legislation Amendment (Reform of the Child Support Scheme) Initial Measures Act 2006*, the provisions of which commenced on 1 July 2006.

(b) *Child Support Legislation (Amendment) Reform of the Child Support Scheme — New Formula and other Measures Act 2006* with staggered commencement dates.

(c) Child Support Reform (New Formula and Other Measures) Regulations 2007, which commenced on 1 January 2008. The Regulations introduced transitional arrangements.

Further amendments to the reforms were enacted by the *Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Act 2007*.

The changes to the child support legislation introduced on 1 July 2006 included increasing the minimum annual rate of child support. The

concept of earning capacity in s 117 of the Assessment Act was amended and the percentage accrediting rate for prescribed non-agency payments increased from 25% to 30%.

The Child Support Reform (New Formula and Other Measures) Regulations 2007 introduced transitional arrangements to ensure that parents had all appropriate rights of, and processes for, review and appeal in relation to their amended administrative assessments, in the same way that they had in relation to their existing administrative assessments.

The third phase of the amendments in the *Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006* commenced on 1 July 2008. The Act amended the Assessment Act to provide a new formula for assessing the level of parents' child support liabilities for their children (see ¶21-030 and following).

The Explanatory Memorandum states that the formula is based on Australian research on the costs of children, better reflects community values around shared parenting and better balances the best interests of parents and children. The formula treats both parents' incomes and living costs more equally and takes into account the fact that older children cost more. It also ensures that children from first and second families will be treated more equally.

In 2018, the federal government introduced the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2018*.

The child support amendments are in four parts and are summarised as follows:

1. Part 1 amends the Child Support Assessment Act and the Family Assistance Act to extend the interim period that applies for recently established court-ordered care arrangements and to provide incentives for the person with increased care to take reasonable action to participate in family dispute resolution where a care dispute relates to an older court order, a parenting plan or a written agreement.

2. Part 2 amends the Child Support Assessment Act to allow the

Registrar to take into account an amended tax assessment in an administrative assessment of child support if it results in a higher taxable income or, where it results in a lower taxable income, if certain conditions are met based on the reason for the amended tax assessment and the timeliness of action taken to obtain an amended tax assessment.

3. Part 3 amends the Child Support Assessment Act to allow for courts to set aside child support agreements made before 1 July 2008, as well as allowing all child support agreements to be set aside without having to go to court if certain circumstances change.

4. Part 4 amends the Child Support Registration and Collection Act and makes other consequential amendments to align the Registrar's ability to recover a child support overpayment from a payee with the methods for recovering a child support debt from a payer; to ensure that backdated reductions to a child support assessment collected by the Secretary will be recoverable; and to include new provisions in relation to backdating of assessments, proving a fairer basis for retrospectively creating a child support overpayment or underpayment due to some changes of circumstances.

Footnotes

2 In some states the carer was able to register the maintenance order with the local clerk of the court who would take some relatively simple enforcement steps such as imposing garnishees.

ADMINISTRATIVE ASSESSMENTS

¶21-020 When administrative assessment is available

The central feature of the assessment scheme is administrative assessment of child support. That is, the liability to pay child support arises upon the registrar accepting an application for administrative assessment.[3] The assessment is calculated in accordance with the appropriate formula in Pt 5 of the *Child Support (Assessment) Act 1989* (Cth) (the Assessment Act). This assessment may then be registered for collection under the *Child Support (Registration And Collection) Act 1988* (Cth) (Registration and Collection Act) or enforced privately.

Where an application can be made for administrative assessment of child support, the court cannot make child maintenance orders under s 66E of the *Family Law Act 1975* (Cth) (FLA). However, this does not preclude a court from making orders for the payment of money to facilitate parenting orders (such as payments for fares to facilitate the child's travel to spend time with a parent).[4]

Parents and carers are unable to contract out of the provisions of the scheme,[5] although they may enter into child support agreements under the Assessment Act.

The duty of parents to maintain their children is clearly stated in s 3 of the Assessment Act as being of greater priority than all other commitments, other than self-support or the duty to maintain others. The objects of the Assessment Act are set out in s 4. The principal object is "to ensure that children receive a proper level of financial support from their parents". Importantly, a further object is to ensure that children share in the standard of living of their parents, that support levels are determined in accordance with legislatively fixed standards and that persons with the care of children should be able to receive support without resorting to court proceedings.

An administrative assessment is available if the child and carer are both eligible under s 23 of the Assessment Act. To obtain an assessment, the carer or liable parent must apply to the registrar on the approved form (s 25, 25A and 27 of the Assessment Act).

Note

Eligible children include:

- children born after 1 October 1989 (s 19)
- children whose parents separated after 1 October 1989 (s 20), and
- children with a sibling born after 1 October 1989 to the same parents (s 21).

Excluded children include:

- children over 18 years of age (s 24(a)(ii))
- children who are members of a couple (s 24(a)(iii))
- children under the care of a person under a child welfare law referred to in reg 4 of the Child Support (Assessment) Regulations 1989 (s 22),[6]
- children who are neither Australian citizens, nor present in Australia on the day an application is made (s 24(b)), nor in a reciprocating jurisdiction.[7]

The Child Support (Assessment) Amendment (Territories) Regulation 2016 removed Norfolk Island, Christmas Island and Cocos (Keeling) Islands from reg 4 of the *Child Support (Assessment) Regulations 1989*. This amendment came into effect from 1 July 2016.

Caution

Special provision is made for children who turn 18 years during their last year of school. In these cases the assessment can

continue until the child completes that year of full-time schooling (s 151B). However, the carer must make an application to continue the assessment before the child attains 18 years. Note s 151C(2)(b)(ia), which provides that the Registrar must accept an s 151B application if, and only if, the Registrar is satisfied, among other things, that a suspension determination under s 150F provides that child support is not payable in respect of the day before the child's 18th birthday. This means that the Registrar can accept an application for a child support assessment to continue beyond a child's 18th birthday, despite an assessment not being in force on the day before the child's 18th birthday as a result of a s 150F suspension (due to a care change which occurred after the application was made under s 151B).

Note

Eligible carers include (s 7B):

- the sole or principal provider of ongoing daily care for a child
- a person who has at least shared care of a child (35%–65% of nights), and
- a person who provides the required level of care, but is not a parent or legal guardian, provided that a parent or legal guardian does not object to that person providing care.

In practice, most applications are made by carers at the same time as they apply for social security. This is because Centrelink requires persons seeking financial support for children to take reasonable action to obtain child support. The reasonable action test is satisfied by making application to the Child Support Agency (CSA) for an administrative assessment of child support.

The Norfolk Island Legislation Amendment Act 2015 and the *Territories Legislation Amendment Act 2016* came into effect from 1 July 2016. The amendments mean that residents of Norfolk Island, Christmas Island and Cocos (Keeling) Islands are "residents of Australia" for child support purposes. Residents of these external territories are able to apply for child support.

Parent

Only a "parent" may be a liable parent under the Assessment Act.[8] "Parent" clearly refers to a biological parent. However, its definition is extended by s 5 to adoptive parents (formal adoptions) and parents as defined in s 60H of the FLA in cases of artificial conception, and de facto partners of such parents (see s 60HA). Section 60HB gives effect to orders made under state surrogacy laws. Since 1 July 2009, parents with children from a previous same sex relationship can apply for child support even if they had children and separated before that date. This follows changes being made to the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* to remove discrimination against same sex couples including providing recognition for child support. The *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* redefined marriage as "union of two people" which allowed same-sex couples and their families to be entitled to receive benefits previously not accessible, including access to the Child Support Scheme.

Example

***B* v *J* (1996) FLC ¶92-716**

Artificial conception can occur informally. In *B v J*, the applicant provided sperm in a container, which was taken into another room and inseminated into the female respondent, thereby effecting conception artificially. Fogarty J found that the biological father, not having had vaginal intercourse with the mother, was not a parent for the purpose of the Assessment Act.

While a birth certificate naming the father will be the most common method of proving paternity, the registrar is also entitled to assume paternity in a variety of circumstances under s 29 of the Assessment Act.

Note

Paternity may be presumed by the CSA if:

(a) the child was born during the marriage

(b) the person's name is entered in a register of births or parentage information as a parent of the child

(c) a court has found that the person is a parent of the child

(d) the person has executed an instrument acknowledging that the person is the father or mother of the child

(e) the child has been adopted by the person

(f) the child was born to a woman within 44 weeks after a purported marriage which was annulled

(g) the child was born within 44 weeks after the period of cohabitation that was no longer than three months, or

(h) the child was born to a woman who cohabited with the man at any time during the period beginning 44 weeks and ending 20 weeks before the birth.

Paternity disputes

In cases where there is a dispute as to paternity, either party may apply to the court for a declaration as to eligibility for assessment under s 106A (declaration that a person should be assessed) or s 107 (declaration that a person should not be assessed) of the Assessment Act. The court will almost invariably order DNA testing at an approved laboratory pursuant to s 69W of the FLA. If a person refuses to participate in a DNA test, or facilitate the participation of a relevant child then the court may draw such inferences as are just in the

circumstances (s 69Y(2)).[9]

Caution

An order for parentage testing will not be ordered unless parentage is in issue. This requires some evidence to show that there is an "issue": that is, some reasonable basis for harbouring the doubt.

In *Duroux v Martin*,[10] the Full Court approved the trial judge's statement that:

> "I cannot envisage a situation where the Court will order parentage testing merely because it is requested to do so. In my view an applicant must have an honest, bona fide and reasonable belief as to the doubt. An objective test is not to be applied, for the evidence in such applications is seldom (if ever) sufficient to enable the Court to come to any objective conclusion, and if it were, parentage testing orders would not be necessary, but the Court will objectively assess the circumstances giving rise to the applicant's belief".

DNA testing no longer requires a blood sample. The testing laboratories provide a kit to be completed by a pathology laboratory. The samples required are obtained painlessly by swab from the inside of the cheek. DNA tests are usually very accurate (regularly showing a probability of parentage greater than 95%).[11]

Recovering child support in cases of non-paternity

Section 143 of the Assessment Act provides for orders that are "just and equitable" in cases where child support has been paid and the person is later found not to have had a liability to pay child support.

Section 143(1) provides that an amount may be recovered from a person (the payee) in a court having jurisdiction under this Act if:

(a) both of the following apply in relation to the amount:

(i) the amount was an amount of child support paid by another person (the payer) to the payee, and

(ii) the payer is not liable, or subsequently becomes not liable, to pay the amount to the payee, except because the payer ceases to be a resident of Australia or a reciprocated jurisdiction, or

(b) both of the following apply in relation to the amount:

(i) the amount was paid by another person (the payer) under a registered maintenance liability to the payee, and

(ii) the payee was not entitled to be paid the amount because of a decision that the registered maintenance liability should never have existed.

Section 143(1)(a)(ii) alters the amounts which can be recovered under s 143, by excluding the recovery of amounts that were overpaid due to a payer ceasing to be a resident. This ensures that in situations where the payer continued to make payments following a change in their residency status and also delayed notifying of the change, the payer could not then pursue recovery of the overpaid amount from the payee due to the backdating of the residency change to the assessment. Allowing recovery of these overpaid amounts is inequitable, given the payee is not responsible for notification of a change in the payer's residency and may not have known about the residency change.

Section 143(1)(b) is intended to extend the ability to apply for a court recovery order for overpayments of child support for registered maintenance liabilities (which can include other types of child maintenance liabilities that have originated outside the Child Support Assessment Act but collected under the Child Support Registration and Collection Act), where a decision is made that that liability should have never existed in the first instance.

Section 143(3A)(b) provides that, in addition to the other requirements under s 143(3A), if the court makes a finding that the payer is not a

parent of the child (including by overturning on appeal a declaration made under s 106A or making a declaration under s 107) then the court must have regard to the matters set out in s 143(3B). This reflects the changes under new s 143(1), with the result that the courts will consider the same matters when determining whether an amount should be repaid, where a payer is found not to be a parent of a child.

The relevant factors a court must have regard to are (s 143(3B)):

- whether the payee or the payer knew, or should reasonably have known, that the payer was not the parent of the child
- whether the payee or the payer engaged in any conduct (by act or omission) that directly or indirectly resulted in the application for administrative assessment of child support for the child being accepted by the registrar
- whether there was any delay by the payer in applying for a finding by a court that the payer is not a parent of the child
- whether there was any delay by the payer in applying under s 107 for a declaration once he or she knew, or should reasonably have known, that he or she was not the parent of the child
- whether there is any other child support that is, or may become, payable to the payee for the child by the person who is the parent of the child
- the relationship between the payer and the child, and
- the financial circumstances of the payee and the payer.

Footnotes

3 *Child Support (Assessment) Act 1989*, s 31.

4 *Love* v *Henderson* (1996) FLC ¶92-653.

5 *B* v *J* (1996) FLC ¶92-716.

6 Presently the child welfare laws of South Australia and Western Australia.

7 See Sch 2, Child Support (Registration and Collection) Regulations 1988.

8 *Tobin and Tobin* (1999) FLC ¶92-848.

9 *G* v *H* (1994) FLC ¶92-504; [1994] HCA 48.

10 *Duroux* v *Martin* (1993) FLC ¶92-432; [1993] FamCA 125.

11 For more information on DNA paternity testing, see Yaxley, R, "Genetic fingerprinting", (1988) 18 Family Law 403. Also, see http://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Child-support-and-maintenance/Proof-of-parentage

¶21-030 How administrative assessments are calculated

The basic principle underlying the child support formula is the proposition that parents should provide financial support for their children according to their capacity to do so, after basic self-support. To achieve this, the basic premise of the formula is to ensure that parents share rateably in the support of their children, based upon the level of care provided, and their respective incomes. This is fundamentally different from the underlying premise of the formulas used until 30 June 2008, which proceeded by taking the income of the payer, deducting an amount roughly equivalent to a single person's pension and sharing the balance with the children in accordance with fixed percentages.

The basic formula must be varied in a variety of circumstances, such

as in cases where:

- both parents pay child support to a third-party carer
- parents have obligations to children in more than one household, and
- parents have other dependent children not the subject of the specific assessment.

The practical application of the formula in a computerised environment requires a number of clearly identifiable elements to represent the elements used in the formula. For example, the formula must be recalculated from time to time to stay up to date, income amounts are gathered from the ATO computer system, etc. As a result, there are a number of elements used in the formulas that must be considered.

Minimum assessment

There is a minimum assessment rate (that commenced at $320 per annum in 2005) applicable to most cases (s 66 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act)). This minimum amount is increased each year pursuant to s 153A by an indexation figure. If a person is liable on more than three cases, the minimum assessment will be no more than $960 (as indexed since 2005). For 2019, the indexed minimum annual rate of child support is $433. It is possible to obtain an exemption from this provision in exceptional cases where the payer's total income (including gifts and allowances) is less than the minimum annual rate of child support multiplied by the number of the payer's child support cases (s 66A). If a parent has more than 14% of care, the minimum payment is not applicable as they will already be contributing to the cost of care in the time spent with the child in their care. Since August 2008 overdue child support has been able to be recovered from income support payments, and since 2018 overdue child support has been able to be recovered from social security pensions and benefits (s 72AA of the *Child Support (Registration and Collection) Act 1988* (Cth)). In addition, where a person has an unpaid carer debt in relation to a child, but is also receiving family tax benefit in relation to the child, deductions can be

made from the person's family tax benefit to repay the unpaid carer debt (s 72AB of the *Child Support (Registration and Collection) Act 1988* (Cth)). The maximum amount that can be deducted from income support payments is capped at three times the minimum rate of child support at that time (reg 5E of the Child Support (Registration and Collection) Regulations 1988).

If a paying parent is on a minimum annual rate and wants to reduce this to nil, they only have to supply their income for the period of time for which they want it reduced for. Note: It must be a period of at least two months (s 66A(1)(b)(ii)).

In cases where a person has an income amount less than the "pension PP (single) maximum basic amount" (less than the basic social security payment), they will receive a minimum assessment of $1,060 per annum (as indexed) pursuant to s 65A. For 2019, the indexed annual rate of child support is $1,443. The definition of "pension PP (single) maximum basic amount" is set out in s 5 as the sum of:

> "(a) the amount that would have been a person's maximum basic rate under Module B of the Pension PP (Single) Rate Calculator if the person was receiving parenting payment under the *Social Security Act 1991*; and
>
> (b) the amount that would have been the person's pension supplement under Module BA of the Pension PP (Single) Rate Calculator if the person was receiving parenting payment under that Act".

In these circumstances, the genuinely below the pension PP (single) level (see s 65B). This is called a fixed assessment.

Summary

- There are two types of minimum payments.
- If a parent receives an income support payment and has less than 14% of care for the children, they are assessed to pay

the minimum rate per child for a maximum of three children.

- If a parent has a low income and does not receive an income support payment, a fixed assessment is used.
- If a parent has an income that is lower than minimum annual rate of child support they would otherwise pay, then they may be able to reduce their assessment to nil.
- Parents must establish there is no purpose for avoiding paying child support in their income situation.

¶21-040 Formula elements

Child support period

The child support period is the basic unit of time used for a child support assessment (s 7A of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act)). It can be any length up to 15 months. In general, a child support period runs from the month after a tax return (affecting the assessment) is lodged until one month after the next tax return is lodged (hence the need for 15 months). However, there may be multiple rates of child support applicable during one period as a result of departure decisions, estimates, etc.

A child support period will start when an application is made, an agreement is registered, or at the end of a previous child support period. The underlying purpose of child support periods is to ensure that an assessment is based upon the most recent taxable income amount of the parties, as a new period will start shortly after a tax return is lodged.

Child support income amount

The “child support income amount” is the earnings of a parent above the allowances for self-support and other children. It is calculated by deducting their “self-support amount”, “relevant dependent child

allowance” and “multi-case allowance” from their “adjusted taxable income” (see s 41).

Adjusted taxable income

The “adjusted taxable income” is the income amount used for a party to a child support assessment (see s 43, 61(1) and 63(1) of the Assessment Act). It is based upon the taxable income of the party, with some alterations to ensure that the figure better represents the capacity of the party to provide financial support for the child. Section 43(1) of the Assessment Act provides for the “adjusted income amount” to be the total of:

> “(a) the parent’s taxable income for the last relevant year of income in relation to the child support period;
>
> (b) the parent’s reportable fringe benefits total for that year of income;
>
> (c) the parent’s target foreign income for that year of income;
>
> (d) the parent’s total net investment loss (within the meaning of the *Income Tax Assessment Act 1997*) for that year of income;
>
> (e) the total of the tax free pensions or benefits received by that parent in that year of income;
>
> (f) the parent’s reportable superannuation contributions (within the meaning of the *Income Tax Assessment Act 1997*) for that year of income”.

The term “tax free pension or benefit” is defined in s 5 and includes:

(a) a disability support pension (defined under Pt 2.3 of the *Social Security Act 1991* (Cth) (the Social Security Act))

(b) a wife pension (defined under Pt 2.4 of the Social Security Act)

(c) a carer payment (defined under Pt 2.5 of the Social Security Act)

(d) an invalidity service pension under Div 4 of Pt III of the *Veterans' Entitlements Act 1986*

(e) a partner service pension under Div 5 of Pt III of the *Veterans' Entitlements Act 1986*

(f) income support supplement under Pt IIIA of the *Veterans' Entitlements Act 1986*, and

(g) defence force income support allowance under Pt VIIAB of the *Veterans' Entitlements Act 1986* to the extent to which the payment:

– is exempt from income tax

– is not a payment by way of bereavement payment, pharmaceutical allowance, rent assistance, language, literacy and numeracy supplement or remote area allowance

– if the payment is a payment under the *Social Security Act 1991* — does not include tax exempt pension supplement (within the meaning of s 20A(6) of that Act), and

– if the payment is a payment under the *Veterans' Entitlements Act 1986* — does not include tax exempt pension supplement (within the meaning of s 5GA(5) of that Act).

The amount of the payment that is taken into account is the extent to which it is exempt from income tax and is not a payment by way of bereavement payment, pharmaceutical allowance, rent assistance, language literacy or numeracy supplement, or a remote area allowance.

Each of these amounts is taken from the relevant items on the person's tax return. Prior to the introduction of this provision, these amounts could be taken into account in departure applications.[12]

Since 1 July 2009, there have been changes to the definition of "income" so that the concept of adjusted taxable income includes additional components of reportable superannuation contributions and

total net investment losses.

The adjusted taxable income for child support purposes will consist of:

- taxable income
- reportable fringe benefits total
- target foreign income
- total net financial investment losses (not just negative gearing of real property)
- total tax re pensions or benefits, and
- reportable superannuation contributions.

This means that child support assessments will include these additional components.

On 1 January 2011, the Paid Parental Leave Scheme began. Parental leave pay counts as taxable income for family tax benefits (FTBs), child support purposes and for family assistance payments, but not for income support payments. It is important to note that one's taxable income may be adjusted, for the purposes of child support, where appropriate, to reflect their earning capacity.[13]

Self-support amount

The formula provides a self-support component for each parent called the "self-support amount" (s 45). This amount is set by reference to "male total average weekly earnings" (MTAWE) and is calculated as follows:

$$\frac{1}{3} \times \begin{array}{c}\text{Annualised} \\ \text{MTAWE figure} \\ \text{for the relevant} \\ \text{September quarter}\end{array}$$

However, a parent's self-support amount can be varied by determination (s 98S(1)(i)) or court order (s 118(1)(i)).

The annualised self-support amount for 2019 is $25,038.

Relevant dependent child allowance

In many families, there will be a child who is described in the administrative assessment process as a “relevant dependent child” (see s 5 and 46). A parent may have an adopted or a biological child in a new relationship. A parent must have at least “shared care” of the relevant dependent child. If the child is a step-child, there must be an order under s 66M of the *Family Law Act 1975* (Cth) (FLA).

The relevant dependent child amount is calculated using the income of the relevant parent, that parent’s cost percentage (calculated from the percentage of care), and the costs of children table amounts (see costs of children tables below). The parent claiming the relevant dependent child allowance will be assessed as having 100% of the care of the child for the purpose of determining the costs of the child in the table if they are living with the relevant dependent child’s other parent. However, only the income of the parent with the relevant dependent child is used to work out the allowance, rather than the income of both child support parents or the income of the parent’s new partner.

The parent’s cost percentage for the relevant dependent child is calculated using the same steps in the basic formula for considering the children who are the subject of the assessment. The additional step is to work out the costs of the relevant dependent child.

The calculation is based on the basic formula, with the resulting figure being used as a variable for a calculation of the basic formula. Although the legislation calculates the relevant dependent amount for each relevant dependent child separately, in practice wherever a parent has the same level of care for all relevant dependants, the cost in the step for determining the costs of the relevant dependent child could be worked out for all the children together. For most cases, parents have 100% care of their relevant dependants. The new formulas simply offer the capacity to work a comparable calculation for many situations.

To calculate the amount for a relevant dependent child the following

steps are taken:

1. Calculate the parent's child support income.
2. Work out the parent's cost percentage (based upon the care percentage — commonly 100%).
3. Work out the costs of the relevant dependent child.

Note

Only one parent's income is used — not the combined income of two parents. Multiply the costs of the child by the cost percentage. This is the relevant dependent child amount. At the beginning of the basic formula this amount, called the relevant dependent child amount, is deducted from the parent's adjusted taxable income to get the child support income and then the basic formula is applied.

Example

Richard pays child support for his son Michael who is aged 15 years.

Richard has two relevant dependent children, David, aged six years and Stephanie, aged four years.

David and Stephanie live with Richard and his partner, Margaret, 100% of the time.

Richard's taxable income is $50,000.

When Richard is assessed for child support for Michael, the relevant dependent child amount has to be calculated to be deducted from his adjusted taxable income to arrive at Richard's child support income. For a relevant dependent child there is an initial calculation to establish the cost of the relevant dependent children, which is then deducted from the child support income, along with the costs of self-support.

Richard's adjusted taxable income is $50,000. From that, the self-support amount of $24,154 is deducted. After deducting the self-support amount from the adjustable taxable income, the amount is $25,846. As David and Stephanie live with Richard full time, his percentage of care is 100%. The costs of the relevant dependent children are calculated using Richard's child support income of $25,846.

As it is a child support period starting in 2017, the appropriate costs of children tables are the 2017 tables (see costs of children table below). David is aged six years and

Stephanie is aged four years, therefore the appropriate table is the table for children aged 12 years and under.

Richard's child support income lies in the cost range of 24 cents for every dollar, totalling $6,203.04 (rounded here to $6,200).

$6,200 is deducted from $25,846 so that Richard's child support income, taking into account the two relevant dependent children, is $19,646.

The calculation for Michael can then be done using the basic formula. New cost of children tables are released each year.

Multi-case allowance

A parent's capacity to pay for children in one case is reduced by their obligation to support children in another case. The need to balance the competing demands placed on a payer where there are multiple child support cases is accounted for by providing a "multi-case allowance amount" which is used in calculating the "child support income" amount. This step reduces the amount that will become the parent's child support income.

The "multi-case allowance" is the total of the amount provided in the costs of children table for each child (see costs of children tables below), calculated as if all of the children being supported were in one case using only that parent's income (see s 47). The incomes of other carers of the multi-case children are not taken into account in determining the "multi-case allowance". To calculate the costs of each child there is an assumption that all of the other children are the same age as the child whose costs are being calculated (see s 55HA(5)(a)).

The parent's income and the age of the child in the relevant costs of children table (see costs of children tables below) are then looked at to find out what all of the children would cost if they were all the age of the child who is the subject of the assessment. That amount is divided by the total number of child support children. This process is followed for each child, and the total is the multi-case allowance.

However, even with the benefit of this allowance, there is a limit upon the amount of an assessment where there are multiple cases (the multi-case cap). The multi-case cap is the multi-case cost for the child who is the subject of the assessment less any of the costs that the

parent meets directly through care. The multi-case cap ensures that no more child support is paid than it would cost if all of the children lived in the one house.

In many families there will be a child that is described in the administrative assessment process as a “relevant dependent child” (see s 5 and 46). A parent may have an adopted or a biological child in a new relationship. A parent must have at least “shared care” of the relevant dependent child. If the child is a step-child, there must be an order under s 66M of the FLA.

Income percentage amount

The “income percentage” amount represents the percentage of the particular parent’s income of the total of both parents’ child support income amounts (s 55B). It is a percentage that represents the proportion of the combined income of the parents that is available for the support of the child. This percentage is the method by which the formulas ensure that the parents contribute on a pro rata basis based upon their “adjusted taxable income” amounts (after accounting for self-support and responsibilities for other children).

Level of care factors

Percentage of care

The “percentage of care” represents the actual level of care provided by a parent. The method for determining the proportion of care requires a consideration of the expected number of nights in the care period (s 48 and s 54A, but see Pt 5, Div 4, Subdiv B generally) of the Assessment Act).[14]

Sections 49 to 54HA provide for the registrar to take into account agreements and court orders, and any consensual or non-consensual variations of care arrangements from an order.

Since 6 January 2009, variations in care, whether recorded by a court order, agreement or parenting plan which changes the care percentage for children by less than 7.1% (equivalent to one night a fortnight), can now be adjusted by CSA so that the care percentages reflect this degree of change. Some small changes will not affect child

support payments. If the change of care which is less than 7.1% (equivalent to one night a fortnight) results in the care percentage going above or below the 35% threshold, then this can be processed by CSA. If CSA is informed about a care change within 28 days of it happening, it will be able to adjust an assessment from the date the change in care happened.

Since 1 July 2010 parents have been able to have care determinations or any update of care arrangements made at one agency, either CSA or Centrelink. The other agency simply recognises the level of care or change in circumstances and updates the case details. This applies to all care determinations made on or after 1 July 2010.

The 2018 amendments to the *Child Support Assessment Act 1989* (Cth) brought a variety of new mechanisms that operate within the calculations of “percentage of care” in various circumstances.

Firstly, if under s 49 or 50 a responsible person’s percentage of care is revoked or suspended under the provisions noted in new s 49(1)(b)(i) or 50(1)(b) and the Registrar is satisfied that the responsible person has had, or is likely to have, no pattern of care for the child during the care period (ie such period as the Registrar considers to be appropriate having regard to all of the circumstances). This adopts, for the purposes of s 49 or 50, the new provisions for revocation and suspension of a responsible person’s percentage of care under Subdiv C of Div 4 of Pt 5.

Where action is taken to ensure that the care arrangement is complied with, s 51 requires the Registrar to determine two percentages of care in certain circumstances, or a single percentage of care where the Registrar is satisfied that special circumstances exist.

Section 52 allows for an interim period to apply where a parent is seeking a new care arrangement that would require less care than that provided in the existing arrangement, but greater than the extent of their actual care. It is not appropriate for the care arrangement to be reflected in a situation where both parties are seeking a different level of care. In such situations, it is more appropriate for actual care to be reflected.

The 2018 amendments also have created new terms and how they operate within the Act, which are important to note.

Change of care day

New paragraph (b) in the definition of ***change of care day*** at s 5(1), to clarify that if a determination of the responsible person's percentage of care for the child has been suspended under Subdiv C of Div 4 of Pt 5, the change of care day is the first day that the actual care ceased to correspond with the percentage of care determined for the purposes of s 51(4) under the determination. This change brings the definition into line with the new provisions at items 36 to 38 below. New paragraph (c) of the definition clarifies that the change of care day may be the first day that a care arrangement begins to apply in relation to a child. This change will enable an interim period to apply for parents and carers who were prevented from exercising the extent of care under a care arrangement from the first day that care arrangement took effect.

Maximum interim period

There is a definition under subsection 5(1) for ***maximum interim period*** for the purposes of a determination under s 49 or 50. For a determination of a responsible person's percentage of care for a child under s 49 or 50, the maximum interim period that can apply begins on the change of care day (as defined in subsection 5(1)) and, for a determination relating to a court order, ends on the later of the period of 52 weeks starting on the day the court order first takes effect, or the end of the period of 26 weeks starting on the change of care day. For a determination relating to a written agreement or parenting plan, the maximum interim period ends at the end of the period of 14 weeks starting on the change of care day. There is also signpost definition for the phrase ***takes reasonable action to participate in family dispute resolution***, as well as ***family dispute resolution*** and ***increased care of a child***.

Section 53 incorporates the concept of a "maximum interim period" rather than the 14-week interim period that is currently in s 53. Current s 53(1) provides that s 51 does not apply if certain events in relation to the determination of a responsible person's percentage of care for a

child occur 14 weeks or more after the change of care day. New s 53(1) provides similarly but in relation to those events occurring after the end of the maximum interim period. This recognises that the maximum interim period may be different depending on the time that has elapsed since the change of care day, and the nature of the care arrangement.

New s 53(1) also takes the maximum interim period into account, so that s 51 does not apply in cases where the Registrar has revoked a determination of a responsible person's percentage of care for the child, under s 54F or 54H.

New s 53(2) further provides that s 51 does not apply in relation to a responsible person in relation to whom a determination has been made under s 49 or 50, if an earlier determination determined the responsible person's percentage of care for the purposes of s 51(3) and 51(4), the later determination is made after the end of the maximum interim period for the determination and the later determination relates to the same care arrangement as the earlier determination.

Interim period

New s 53A provides the definition of ***interim period***. Subject to new s 53A(4), for a determination under s 49 or 50 of a responsible person's percentage of care for a child, an interim period begins on the responsible person's change of care day (unless s 53A(2) applies, in which case the interim period begins on the day specified in that subsection).

The interim period ends according to the table at s 53A(1), unless s 53A(1)(b)(ii), (iii) or (iv) applies (ie the person referred to in s 51(1)(d) with reduced care ceases taking reasonable action to ensure that the care arrangement is complied with, or an existing care arrangement ceases or a new care arrangement begins to apply), in which cases the interim period ends according to those subparagraphs.

The table at s 53A(1) sets out six sets of circumstances providing for the interim period to end at different times (ranging from 4 to 52 weeks) depending on whether the care arrangement is a court order,

written agreement or parenting plan, whether and when the person with increased care of the child began taking reasonable action to participate in family dispute resolution (and whether this action was continuous), and whether the Registrar is satisfied that special circumstances exist.

For court-ordered care arrangements, the interim period will be:

- up to 52 weeks, if a disputed care change occurs within the first year of the court order
- up to 26 weeks for older court orders, if the person with increased care does not continuously take reasonable action to participate in family dispute resolution throughout the maximum 26-week interim period, or
- a minimum of 14 weeks for older court orders where the person with increased care continuously takes reasonable action to participate in family dispute resolution.

For care arrangements in a non-enforceable agreement or parenting plan, the maximum interim period will be 14 weeks. This will be reduced to a minimum of four weeks if a disputed care change occurs after the first year of the agreement or plan and the person with increased care continuously takes reasonable action to participate in family dispute resolution.

Where special circumstances exist in relation to the child, the Registrar is to determine the day the interim period ends, being a day before the day the period would otherwise end if the special circumstances did not exist. Special circumstances in relation to a child may also include circumstances that relate to another individual, to the extent that those circumstances also relate to the child; for example where the other individual has care of the child.

Section 53A(2) provides for a further interim period to apply in some instances. Where the interim period for the determination has ended under items 2, 4 or 5 in the table at s 53A(1), the person referred to in s 51(1)(d) with reduced care of the child is taking reasonable action to ensure that the care arrangement is complied with and the person with

increased care (the ***second carer***) ceases to take reasonable action to participate in family dispute resolution before the end of the maximum interim period, then a further interim period for the determination begins on the day the second carer ceases taking such action. In practice, the ability for a further interim period to apply provides an incentive for the person with increased care to take reasonable action to participate in family dispute resolution throughout the maximum interim period (ie even after the interim period had ended and actual care is being used to calculate child support and FTB). This amendment is intended to encourage parents to resolve care disputes promptly.

Section 53A(3) describes what is required for a person to ***take reasonable action to participate in family dispute resolution***, and when the person must take such action for the purposes of determining whether an interim period begins on the change of care day for the person.

New s 53A(4) provides that a determination under s 49 or 50 of a responsible person's percentage of care for a child does not have an interim period if the determination is made before the maximum interim period for another determination under that section of the responsible person's percentage of care for the child. This means that an interim period cannot apply to subsequent care determinations made within the maximum interim period, where those subsequent care determinations have not been revoked. This is addressed further at new s 54FA and 54HA.

For the situations when a person has ***increased care of a child***, see s 53B.

The amended legislation in 2018 also provides additional situations for assessment, which are worth noting here:

1. Section 54B applies where —
    - a determination is made under s 49 or 50, and

      s 51 did not apply
        - the determination was made while an earlier determination was suspended under s 54FA(2) or

54HA(2), and the earlier determination remains suspended or has been revoked under s 54FA(4) or 54HA(4), or

- the determination was a single percentage of care for the child for the purposes of s 51(5).

It is important to note that when circumstances require s 54B to apply, s 54B(1A) provides that the percentage of care applies to each day in a child support period on and from the application day until the determination is revoked, or the earlier determination ceases to be suspended, under Subdiv C of Div 4 of Pt 5.

2. Section 54C applies where —

- a determination is made under s 49 or 50
- two percentages of care were determined for the purposes of s 51(2), and
- the determination is not suspended under s 54FA(2) or 54HA(2).

It is important to note that s 54C(2) provides for the application of the percentage of care referred to in s 51(3) applies to each day in a child support period that occurs in the interim period for the determination, and the percentage of care referred to in s 51(4) applies to each day in a child support period that does not occur in the interim period for the determination, until the determination is revoked or suspended under Subdiv C of Div 4 of Pt 5.

Revocation and suspension of percentage of care determinations

Sections 54F and 54H provide that the determination of a responsible person's percentage of care for a child under s 49 or 50 must be revoked in certain circumstances, and where the Registrar is satisfied that the responsible person's cost percentage would change if the Registrar determined another percentage to be the person's percentage of care for the child under s 49 or 50 and where s 54F(2) and 54H(2) apply in relation to the individual. Sections 54F(2) and 54H(2) apply where:

(a) disregarding s 53(1)(c), s 51 did not apply in relation to the responsible person

(b) s 51 did apply but the maximum interim period for the determination has ended, or

(c) s 51 did apply, and the maximum interim period for an earlier determination of the responsible person's percentage of care for the child has not ended, an interim period does not currently apply in relation to the earlier determination and the determination referred to in s 54F(1) and 54H(1) was made while the earlier determination was suspended under Subdiv C of Div 4 of Pt 5 (where s 54F(1) applies) or s 54HA (where s 54H(1) applies).

A note at s 54F(1) and 54H(1) alerts the reader that the Registrar must make another determination under s 49 or 50 to replace the revoked determination. A note at s 54F(2) and 54H(2) directs the reader to s 53 to explain when s 51 does not apply.

New s 54FA and 54HA provide for the suspension of a responsible person's percentage of care for a child that has been determined under s 49 or 50 for the purposes of s 51(4) (the ***earlier determination***), where an interim period for the earlier determination does not currently apply, the maximum interim period for the earlier determination has not ended, where the Registrar is satisfied that the responsible person's cost percentage would change if the Registrar determined another percentage to be the person's percentage of care for the child under s 49 or 50, s 54F and 54G do not apply (and additionally where s 54FA does not apply when dealing with s 54HA) and where other conditions are met. This section applies where there is a change to the actual care of the child (before the end of the maximum interim period) that is different from the percentage of care determined under s 51(4). This will allow any changes to actual care to be reflected for child support and FTB purposes for any period during the maximum interim period where the interim period does not apply.

Sections 54FA(2) and 54HA(2) require the Registrar to suspend the earlier determination (ie the two percentages of care determined by

the Registrar according to s 51(2)) and also provide for the date of effect of the suspension. The suspension of the earlier determination allows the Registrar to make a new determination of the actual care of the child so that the new care determination can be reflected during the maximum interim period when the interim period does not apply. A note alerts the reader to the fact that the Registrar must make a new determination under s 49 or 50 when the earlier determination is suspended.

Sections 54FA(3) and 54HA(3) require the revocation of the suspension of the earlier determination, and of any determination under s 49 or 50 of the person's percentage of care for the child that was made during the suspension, if a further interim period for the earlier determination begins before the end of the maximum interim period for that determination, because the person with increased care ceases to take reasonable action to participate in family dispute resolution. It also provides for the date of effect of that revocation. If the person with increased care ceases taking reasonable action to participate in family dispute resolution, a later interim period will apply, so revoking the suspension of the earlier determination will allow the appropriate care percentage (i.e. the extent of care under the care arrangement that the responsible person should have) to apply to the later interim period.

Sections 54FA(4) and 54HA(4) require the Registrar to revoke the earlier determination (and any suspension of it), and any later determination that was made during the suspension of the earlier determination, where the Registrar is satisfied that the actual care of the child does not correspond with the later determination, when the maximum interim period for the earlier determination ends. A note alerts the reader that the Registrar must make another determination under s 49 or 50 after revoking a determination under this subsection.

Cost percentage

The "cost percentage" represents the costs of the child that each parent notionally meets by having the child in their care. It is derived from the table set out in s 55C of the Assessment Act, based upon the "care percentage" of the parent concerned.

Below is an expanded version of the child support care and costs table:[15]

Child support care percentage	Equal to no. of nights per year	Equal to no. of nights per fortnight	Care level	Child support costs percentage
0%–13%	0–51 nights	1 night	Below regular care	Nil
14%–34%	52–127 nights	2–4 nights	Regular care	24%
35%–47%	128–175 nights	5–6 nights	Shared care	25% + 2% for every percentage point over 35%
48%–52%	176–189 nights	7 nights	Shared care	50%
53%–65%	190–237 nights	8–9 nights	Shared care	51% + 2% for every percentage point over 53%
66%–86%	238–313 nights	10–12 nights	Primary care	76%
87%–100%	314–365 nights	13–14 nights	Above primary care	100%

Child support percentage

The “child support percentage” is derived by deducting the parents’ “cost percentage” from their “income percentage”. That is, they are to contribute to the costs of the child in the proportion of their income

percentage. However, as the child may be in their care for part of the year, they will be making that contribution directly to the care of the child, and it is deducted to determine the child support percentage. Thus, the child support percentage will represent their pro rata proportions of the costs of the child based upon income and accounting for actual care provided.

Costs of the child

Costs of children are determined in accordance with a table set out in Sch 1 to the Act (s 55G). The table provides for calculations by reference to the total of the parents' "child support income" amount (the "adjusted taxable income" amount less the "self-support" amount, the "relevant dependent child" amount, and any "multi-case allowance" amount).

Below is the costs of children table for 2017:

Costs of the Children Table						
Parents' combined child support income or parent's child support income						
Fraction of MTAWE	0 to 0.5	0.5 to 1	1 to 1.5	1.5 to 2	2 to 2.5	Over 2.5
Child support children						
	Costs of the children					
All children aged 0–12 years						
1 child	17%	15%	12%	10%	7%	-
2 children	24%	23%	20%	18%	10%	-
3 children	27%	26%	25%	24%	18%	-
All children aged 13+ years						
1 child	23%	22%	12%	10%	9%	-
2 children	29%	28%	25%	20%	13%	-

3 children	32%	31%	30%	29%	20%	-
At least one child aged 0–12 years and one child aged 13+ years						
2 children	26.5%	25.5%	22.5%	19%	11.5%	-
3 children	29.5%	28.5%	27.5%	26.5%	19%	-

For ease of reference the tables are published in the Government Gazette each year in an expanded format. For the 2019 year they are:[16]

2019 Costs of the Children Table

	Parents' combined Child Support Income (above the self			
No. of Children	$0 to $37,5572	$37,558 to $75,1143	$75,115 to $112,6714	$112,672 to $150,2285
	Costs of the children (to be apportioned betv			
	Children aged 0 - 12 years			
1 child	17c for each $1	$6,385 plus 15c for each $1 over $37,557	$12,019 plus 12c for each $1 over $75,114	$16,526 plus 10c for each $1 over $112,671
2 children	24c for each $1	$9,014 plus 23c for each $1 over $37,557	$17,652 plus 20c for each $1 over $75,114	$25,163 plus 18c for each $1 over $112,671
3 + children	27c for each $1	$10,140 plus 26c for each $1 over $37,557	$19,905 plus 25c for each $1 over $75,114	$29,294 plus 24c for each $1 over $112,671
	Children aged 13 + years			

1 child	23c for each $1	$8,638 plus 22c for each $1 over $37,557	$16,901 plus 12c for each $1 over $75,114	$21,408 plus 10c for each $1 over $112,671
2 children	29c for each $1	$10,892 plus 28c for each $1 over $37,557	$21,408 plus 25c for each $1 over $75,114	$30,797 plus 20c for each $1 over $112,671
3 + children	32c for each $1	$12,018 plus 31c for each $1 over $37,557	$23,661 plus 30c for each $1 over $75,114	$34,928 plus 29c for each $1 over $112,671
Children of mixed age				
2 children	26.5c for each $1	$9,953 plus 25.5c for each $1 over $37,557	$19,530 plus 22.5c for each $1 over $75,114	$27,980 plus 19c for each $1 over $112,671
3 + children	29.5c for each $1	$11,079 plus 28.5c for each $1 over $37,557	$21,783 plus 27.5c for each $1 over $75,114	$32,111 plus 26.5c for each $1 over $112,671

In *Tan v Tan* (SSAT Appeal) and *Tan* v *Child Support Registrar & Anor* [2013] FCCA 123, the appellant father submitted, inter alia, that SSAT findings regarding costs of the children were inappropriate, as the SSAT relied on incorrect statutory tables in determining the costs and failed to take into account best evidence of the actual costs of the children. Judge Riethmuller rejected this argument on the grounds that the Tribunal had, in fact, given consideration to the actual costs of the children in this particular family.

His Honour noted:

> “While statistical information such as the Costs of Children Tables are important for the basis of sound policy development and implementation by government, when turning to individual families

in specific cases such information remains only a guide. It is the actual expenses and details of this particular family that the tribunal were required to consider when determining a departure application. The best evidence of those expenses is the evidence of the parties as to the amounts they actually spend on the children to the extent that such expenses could be ascertained. To the extent that the specific children's expenses from a family budget are difficult to identify, the tribunal member clearly addressed this and compared the figures ascertained by the fact finding process to the Costs of Children Tables".

Footnotes

12 *Bassingthwaite* v *Leane* (1993) FLC ¶92-410.

13 *SCVG & KLD and Anor* [2017] FAMCAFC 95.

14 Refer to CSA website: www.humanservices.gov.au/customer/dhs/child-support.

15 Source: Department of Human Services: https://www.humanservices.gov.au/individuals/enablers/basic-child-support-formula/30381.

16 Ibid.

¶21-050 Child support formulas

Six formulas have been enacted, with Formula 1 being the most commonly used. The formulas are as follows:

- Formula 1 — basic formula (s 35 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act))
- Formula 2 — for non-parent carers (s 36)

- Formula 3 — for multiple child support cases with no non-parent carers (s 37)

- Formula 4 — for multiple child support cases with non-parent carers (s 38)

- Formula 5 — for non-parent carers, a non-resident parent or special circumstances (s 39), and

- Formula 6 — for non-parent carers and deceased parents (s 40).

The basic formula (described as Formula 1) can be easily manipulated to take into account relevant dependent children. Formulas 2, 5 and 6 take into account non-parent carers with the variations of non-resident parent, special circumstances or deceased parent. Formulas 3 and 4 deal with multiple child support cases with a parent carer and multiple child support cases with a non-parent carer.

All of the variables fit within the basic model, which is to work out a parent's child support income, a parent's self-support income, a parent's percentage of care of a child, a parent's cost percentage of the child, and then the costs of the child using the costs of children tables (see costs of children tables above).

Formula 1 — basic formula

The basic formula (described as Formula 1) applies in cases where the children are in the care of one or both parents. The broad definition of "child support income" ensures that it takes into account relevant dependent children. Once the definitions of the various formula elements are understood, the formula itself is relatively straightforward. It is simply the child support percentage multiplied by the costs of the child. In a more expanded format the steps are contained in the method statement (see s 35).

Step 1.	Work out each parent's child support income for the child for the day (see s 41).
Step 2.	Work out the parents' combined child support income for the child for the day (see s 42).

Step 3. Work out each parent's income percentage for the child for the day (see s 55B).

Step 4. Work out each parent's percentage of care for the child for the day (see Subdiv B of Div 4 of Pt 5 (commencing with s 48)).

Step 5. Work out each parent's cost percentage for the child for the day (see s 55C).

Step 6. Work out each parent's child support percentage for the child for the day (see s 55D).

Step 7. Work out the costs of the child for the day (see s 55G and 55H).

Step 8. If a parent has a positive child support percentage under step 6, the ***annual rate of child support*** payable by the parent for the child for the day is worked out using the formula:

$$\text{Parent's child support percentage for the child for the day} \times \text{Costs of the child for the day}$$

Example

Michael and Mary have four children, Frances, Patrick, Theresa and Margaret.

All of the children are aged under 12 years.

Michael has 47% of the children's care.

Michael earns $80,000 and Mary earns $70,000.

Michael's child support income is calculated by subtracting the self-support amount from his adjusted taxable income. In this case, his adjusted taxable income is simply his taxable income, as none of the additional considerations apply. His child support income is $80,000 less $25,038 (the 2019 self-support amount) which equals $54,962.

Mary's child support income is her taxable income less the self-support amount. In this case, her adjusted taxable income is only her taxable income, as none of the other considerations apply. Her child support income is $70,000 less $25,038 (the 2019 self-support amount) which equals $44,962.

The combined child support income for Michael and Mary will be $54,962 plus $54,962, producing a total of $99,924.

The next step is the income percentage, which is worked out by dividing $54,962 by $99,924 and calculating a percentage. The income percentage is 55% for Michael, and therefore 45% for Mary.

The percentage of care is 47% for Michael and 53% for Mary. The cost percentage is then 49% for Michael (being 25% plus 12 × 2%) and 51% for Mary (see child support care and costs table above).

Michael's child support percentage (based on income) is 55% minus 49% costs percentage (based on levels of care) equaling 6%. Mary's child support percentage is 45% minus 51% which produces a negative child support percentage for her.

The next step is to consider the costs of children by reference to the costs of children table (see costs of children table above). As all of the children are aged under 12 years, the appropriate table to be used is the one for children aged 12 years and under.

In this example the combined child support income (CCSI) is $99,924. That puts this example in the range of $75,115 to $112,671 in the table.

As there are four children, the appropriate column is "3 or more children". The amount is $19,905 plus 25c for each $1 over $75,114 ($99,924 less $75,114 multiplied by 0.25, totaling $6.202.50). Therefore, the amount is $26107.50 ($19,905 plus $6,202.50).

That figure is then divided by four, as there are four children. The cost of each child is $6,526.88. Michael will pay 6% of that figure. His cost for each child is $391.61, so $1,566.45 is payable for four children for the year.

The external reference points beyond the parents' own incomes are the self-support amount, the care percentage, the cost percentage and the reference to the cost of children tables.

Example

The addition of a relevant dependent child would be calculated as follows:

Richard pays child support for his son Christopher who is aged 15 years.

Richard has two relevant dependent children, David, aged six years, and Stephanie, aged four years.

David and Stephanie live with Richard and his partner, Margaret, 100% of the time.

Richard's taxable income is $50,000.

When Richard is assessed for child support for Christopher, the relevant dependent child amount has to be calculated to be deducted from his adjusted taxable income so as to arrive at Richard's child support income. For a relevant dependent child there is an initial calculation to establish the cost of the relevant dependent children, which is then deducted from the child support income, along with the costs of self-support.

Richard's adjusted taxable income is $50,000. The self-support amount of $25,038 is deducted from the adjusted taxable income amount. After deducting the self-support amount from the adjusted taxable income, the amount is $24,962. As David and Stephanie live with Richard full time, his percentage of care is 100%. The costs of the relevant dependent children are calculated using Richard's child support income of $24,962.

As it is a child support period starting in 2019, the appropriate costs of children tables are the 2019 tables (see costs of children tables above). David is aged six years and Stephanie is aged four years, therefore the appropriate table is the table for children aged 12 years and under.

Richard's child support income lies in the cost range of 24 cents for every dollar, totaling $5,990.88.

$5,990.88 is deducted from $24,962 so that Richard's child support income, taking into account the two relevant dependent children, is $18,971.12.

The calculation for Christopher can then be done using the basic formula.

Formulas 2, 4, 5 and 6 — non-parent carers

These formulas provide appropriate variations to take into account non-parent carers with the variations of non-resident parents, multiple cases, special circumstances or deceased parents.

The aim of the formula is to be able to calculate the costs of a child. When a child is cared for by a non-parent carer, child support will be determined according to the combined incomes of the parents. As the non-parent has no legal obligation to financially support the child, their income is disregarded (which would occur if there are two living parents within the child support jurisdiction).

Where there is only one parent against whom a non-parent carer can apply, the parent whose income is available to support the child is doubled and the cost of the children is halved. This ensures that the parent who is liable is not penalised by the fact that the other parent cannot be assessed. Where the other parent is deceased, the income of the living parent is used, as that would be the only income available to support the child if they lived with the parent.

The assessment is still worked out using parental income, costs percentages and child support percentages, as is the case for parents.

Summary

- Since 1 July 2008 there is a wider basis for collection of child support from parents.

- The application of the formula can be more precisely targeted to family situations.

Formulas 3 and 4 — multiple assessment cases

In cases where a parent has children of another relationship, the assessment must account for the multiple cases. This is done by providing for a multi-case allowance and ensuring that the assessment is not greater than the “multi-case cap”.

Example

Fred has two children who live with their mothers. Fred Jr is aged 14 years and Frances is aged eight years. Fred Jr lives with his mother Margaret and Frances lives with her mother Maria.

Fred has no level of care of Fred Jr or Frances and he has no other relevant dependent children. Fred has an adjusted taxable income of $100,000.

From $100,000 the self-support amount of $25,038 (the 2019 self-support amount) is deducted. This gives a child support income of $74,962.

Each case is worked out separately.

Fred Jr: Step one

As Fred has two children, the multi-case cost for Fred Jr is based on the cost of two children aged 14 years using Fred’s child support income of $74,962.

The cost of two 14-year-old children at the child support income of $74,962 is $10,892 plus 28 cents for each $1 over 37,557. In this case, that means $10,892 plus $10,473.40 ($74,962 minus $37,557 multiplied by 0.28), totaling $21,365.40.

$21,365.40 divided by two totals a multi-case cost of $10,682.70 for Fred Jr.

As Fred has no care of Fred Jr, the same care and cost percentages apply.

Frances: Step one

As Fred has two children, the multi-case cost for Frances is based on the cost of two children aged eight years using Fred’s child support income of $74,962.

The cost of two 8-year-old children at the child support income of $74,962 is $9,014 plus 23 cents for each $1 over $37,557. In this case, that means $9,014 plus $8,603.15 ($74,962 minus $37,557 multiplied by 0.23) totaling $17,617.15.

$17,617.15 divided by two totals a multi-case cost of $8,808.58 for Frances. The multi-case allowance is the total of the multi-case costsfor the children in the other cases.

As Fred has no care of Frances, the same care and cost percentages apply.

Fred Jr: Step two

To calculate the child support paid for Fred Jr, the starting point is Fred's child support income of $74,962. Frances' costs of $8,808.58 are deducted and Fred's child support income is $66,153.42, to which the basic formula is applied.

Frances: Step two

To calculate Frances' child support, Fred Jr's cost of $10,682.70 is deducted from Fred's child support income of $74,962. This means that for the calculation of Frances' child support, Fred's child support income is $64,279.30.

Further steps

The normal formula is applied to these child support amounts, taking into account the mothers' incomes. For example, if Margaret's income is $35,000 and Maria's income is $50,000 and Fred has no level of care and no other relevant dependent children, the basic formula is applied.

If Fred had a level of care for either Fred Jr or Frances, then the multi-case cap would also need to be calculated (discussed below). To ascertain Fred's child support income for the purpose of calculating child support payable for Fred Jr, Frances' multi-case cap would be deducted from Fred's child support income and then the basic formula would be applied, and vice versa for Frances.

This formula is important to ensure that appropriate amounts of child support are directed to each household, as there may be an older child in one household and a younger child in another household.

These two additional concepts — first, the multi-case allowance which is deducted like the parent's self-support amount from the adjusted taxable income to calculate a child support income and, second, the multi-case cap which is calculated to ensure that a parent with more than one case would not pay more child support than if all of the children were in one household — are the extra aspects of a multi-case assessment.

The multi-case cap concept is set out in s 55E of the *Child Support (Assessment) Act 1989* (Cth). It is 100% minus the parent's costs percentage multiplied by the multi-case child costs for the particular child.

The parent's cost percentage will always be calculated with reference to the parent's care percentage.

Example

If Fred (scenario above) had a level of care for either child, the multi-case cap would need to be calculated. In this new scenario, Fred has 25% care of Fred Jr and 42% care of Frances.

To calculate the multi-case cap for Fred Jr, deduct the costs percentage for the child (24%) from 100%. This leaves 76%. Fred Jr's multi-case cost $10,682.70 is multiplied by 0.76, being $8,118.85. This is the multi-case cap for Fred Jr.

To calculate the multi-case cap for Frances, deduct the costs percentage for the child (39%) from 100%. This leaves 61%. Frances' multi-case cost $8,808.58 is multiplied by 0.61, being $5,373.23. This is the multi-case cap for Frances.

A multi-case child is calculated as a single child as if all of the children were the same age. The multiple case concepts are readily applied to the non-parent carer whether there are special circumstances, a non-resident parent or a deceased parent.

Checklist

Ensure that:

- all children are considered individually, and
- the maximum cost to the parent is treated as though all the children lived under one roof.

VARYING THE ADMINISTRATIVE ASSESSMENT

¶21-060 Two ways to alter a child support assessment

There are two ways of altering a child support assessment:

- administrative change to a formula element, and

- “departure” from the application of the formula.

Administrative changes to the formula elements include changes to the care arrangements for the children, changes in numbers of children and changes to income levels, including updated tax assessments However, once these changes have been updated on the child support register, the formula will be recalculated to determine the new child support rate.

Child support assessments can also be varied by “departing” from the formula provisions of the legislation. An assessment can only be departed from if there are “special circumstances”, and if the new rate is “just and equitable” and “otherwise proper” (s 117 of the *Child Support (Assessment) Act 1989* (Cth)).

It is important to note that the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2018* amends provisions in the Child Support Assessment Act relating to binding and limited child support agreements. The Act also amends the effect of an agreement (whether binding or limited) where the payee under the agreement ceases to be an eligible carer of the child, whereas before the amendment the paying parent had to apply to the court. The overall effect of the amendment in this section enables the Registrar to take amended tax assessments into account in a broader range of circumstances, having regard to whether the amended assessment results in a lower or higher taxable income, the reasons for the amended tax assessment and the timeliness in seeking an amended tax assessment.

Amended tax assessments

Section 56 of the *Child Support Assessment Act 1989* (Cth) provides that if, after an administrative assessment of child support is made, the assessment of a parent’s taxable income is amended (whether or not the amended tax assessment has come about because of an objection, appeal or review), the Registrar may amend the administrative assessment to take account of the amended tax assessment.

Section 56(2A)(a) provides that if the parent’s adjusted taxable income

(ATI) as worked out using the amended tax assessment result in a higher ATI than the parent's previous ATI, then the amendment to the administrative assessment of a child support must be on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment. This means all amended tax assessments that result in a higher ATI than the previous ATI will apply retrospectively to a child support assessment.

Section 56(2A)(b) provides that if the parent applied for the amendment of the tax assessment on or before the day the parent was required to lodge an income tax return for that year of income, or on or before the end of 28 days after the parent was given the tax assessment (including an amended tax assessment), or on or before the end of 28 days after the parent becomes aware that the tax assessment is not correct (and the parent did not apply for an amendment within the previously mentioned timeframes because of circumstances beyond the knowledge or control of the parent), then the amendment to the administrative assessment of child support must be on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment.

Section 56(2A)(c) provides that if the parent did not apply for an amendment of the tax assessment on or before any of the days listed in s 56(2A)(b), but the Registrar is satisfied that special circumstances exist, then the amendment to the administrative assessment of child support must be on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment.

Section 56(2B) provides that where s 56(2A) does not apply, then the amendment to the administrative assessment of child support for a child support period must be on the basis that for each later day in the period, the parent's ATI for that year of income is the amount worked out as a result of the amended tax assessment.

These provisions support the principle that parents take financial responsibility for the costs of raising their children in line with their financial capacity to do so, and align with existing rules governing the

retrospective application of taxable income.

This will result in a retrospective adjustment to the child support assessment and may lead to an overpayment or underpayment debt being raised against the other party in the child support case. Where the parent with the lower amended taxable income has taken timely action to amend their tax assessment, any debt raised against the other parent will be minimal. This supports the fairer treatment of child support parents who take timely action to correct any errors made in their tax assessment, particularly where another party, such as a tax agent or the ATO, made the error. These provisions also provide fairer outcomes for parents who, due to circumstances beyond their knowledge or control, or in special circumstances such as serious ill health or natural disaster, are unable to amend their tax assessment earlier.

Backdating of a lower amended taxable income is also limited by the timeliness of the lodgement of the person's original tax assessment.

Section 57(7) provides that if, after an administrative assessment of child support is made, the assessment of a parent's taxable income is amended (whether or not the amended tax assessment has come about because of an objection, appeal or review) and the amended taxable income is higher than nil, the Registrar must amend the administrative assessment of child support on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment.

Other tax-related amendments

The 2018 Reforms of the *Child Support Assessment Act 1989* (Cth) inserted additional powers for the Registrar to further amend an administrative assessment of child support, namely, s 58(A)(3A), 58A(3B), 58A(3C), 58A(3D), 58(3E) and 58(3F). It is worth noting these briefly.

Section 58A(3A) provides that if, after an administrative assessment of child support is amended under s 58A(2) or 58A(3) or because of s 58A(1)(b)(i), the assessment of a parent's taxable income is amended (whether or not the amended tax assessment has come about

because of an objection, appeal or review), the Registrar may further amend the administrative assessment to take account of the amended tax assessment.

New s 58A(3B)(a) provides that if the parent's ATI as worked out using the amended tax assessment results in a higher ATI than the amount determined under s 58, then the amendment to the administrative assessment of child support must be on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment.

New s 58A(3B)(b) provides that if the parent lodged their tax return for that year of income on or before the day the parent was required to do so for that year (taking into account any deferral under s 388–55 in Sch 1 to the *Taxation Administration Act 1953*), and:

(i) applied for the amendment of the tax assessment on or before the day the parent was required to lodge an income tax return for that year

(ii) applied for the amendment of the tax assessment before the end of 28 days after the parent was given the tax assessment by the Commissioner of Taxation

(iii) applied for the amendment of the tax assessment before the end of 28 days after the parent becomes aware that the tax assessment is not correct (provided the parent did not apply for the amendment on or before a day referred to in (i) or (ii) due to circumstances beyond the knowledge or control of the parent), or

(iv) the parent did not apply for the amendment on or before any of the days referred to in (i) to (iii) but the Registrar is satisfied that special circumstances exist,

then the amendment to the administrative assessment of child support must be on the basis that the ATI for that year of income is, and always has been, the amount worked out as a result of the amended tax assessment.

New s 58A(3C) provides that where s 58A(3B) does not apply, and the

parent's ATI worked out as a result of the amended tax assessment is either:

(a) higher than the parent's taxable income that was ascertained earlier, or

(b) lower than the amount determined under s 58,

then the amendment to the administrative assessment of child support under s 58A(3A) must be in accordance with s 58A(3E).

New s 58A(3D) provides that an amendment of the administrative assessment under s 58A(3A) must be in accordance with s 58A(3E) if:

(a) s 58A(3B) does not apply

(b) the parent's ATI worked out as a result of the amended tax assessment is lower than both the earlier ascertainment of the parent's taxable income and the amount determined under s 58, and

(c) any of the following applies:

(i) the parent applied for the amendment of the tax assessment before the end of 28 days after the parent was given the tax assessment (including an amended tax assessment) by the Commissioner of Taxation

(ii) the parent applied for the amendment of the tax assessment before the end of 28 days after the parent becomes aware that the tax assessment is not correct if the parent did not apply for the amendment on or before a day referred to in s 58A(3D)(d)(i) because of circumstances beyond the knowledge or control of the parent, or

(iii) the parent did not apply for the amendment of the tax assessment on or before either of the days referred to in s 58A(3D)(d)(i) or (ii), but the Registrar is satisfied that special circumstances exist.

New s 58A(3E) provides that if s 58A(3C) or (3D) applies, then the amendment of the administrative assessment under s 58A(3A) must be on the basis of the later income from the day the earlier ascertainment of the parent's ATI took effect.

New s 58A(3F) provides that if none of s 58A(3B), 58A(3C) or 58A(3D) applies, then the amendment of the administrative assessment under s 58A(3A) for a child support period must be on the basis that for each later day in the period, the parent's ATI for that year of income is the amount worked out as a result of the amended tax assessment.

These provisions support the principle that parents take financial responsibility for the costs of raising their children in line with their financial capacity to do so, and align with existing rules governing the retrospective application of taxable income.

This will result in a retrospective adjustment to the child support assessment and may lead to an overpayment or underpayment debt being raised against the other party in the child support case. Where the parent with the lower amended taxable income has taken timely action to amend their tax assessment, any debt raised against the other parent will be minimal. This supports the fairer treatment of child support parents who take timely action to correct any errors made in their tax assessment, particularly where another party, such as a tax agent or the ATO made the error. These provisions also provide fairer outcomes for parents who, due to circumstances beyond their knowledge or control, or in special circumstances such as serious ill health or natural disaster, are unable to amend their tax assessment earlier.

Backdating of a lower amended taxable income is also limited by the timeliness of the lodgement of the person's original tax assessment.

¶21-070 Ending assessments or changing formula elements

If there are any changes in the care arrangements for the children, it is important to notify the Child Support Agency (CSA) as soon as

possible, as changes in the level of care will only be made prospectively (s 74A of *Child Support (Assessment) Act 1989* (Cth)).

If a “child support terminating event” occurs, the assessment comes to an end.

Note

Child support terminating events are listed as occurring in certain circumstances (s 12), such as when:

- the child dies
- the child turns 18
- the child is adopted
- the child becomes a member of a couple
- the carer dies
- the person ceases to be an eligible carer of the child
- the child no longer has the necessary connection to Australia or a convention country
- the liable parent dies, and
- the carer entitled to child support elects to end administrative assessment.

Note that since the 2018 amendments to the *Child Support (Assessment) Act 1989* (Cth), s 12(6) provides that a reference in a child support agreement to a child support terminating event under the Act is taken not to include a reference to an event under s 12(4)(a)(i). This is to ensure that a child support agreement cannot enable a termination of the agreement via a unilateral election by a payee under s 151 to end the

administrative assessment.

Since 1 July 2008, reconciliation between parents can suspend a liability for child support for up to six months if CSA is informed that the parents have reconciled (s 150E). If parents reconcile for a period of six months or more, that is a child support terminating event (s 12(5)).

Since 1 July 2018, s 150F deals with the suspension of liability to pay child support if there is a delay in notifying when persons have swapped eligible carer roles. Section 150F(1) provides that the Registrar must make a suspension determination that child support is not payable for a child by a liable parent to another person if:

(a) the Secretary or Registrar is notified, or otherwise becomes aware, that

(i) all persons who were eligible carers of the child have ceased to be eligible carers of that child, or

(ii) a parent who was not an eligible carer of the child would have become an eligible carer, but for s 54F(3)(b)(i), and

(b) there is a delay of more than 28 days in the Registrar or Secretary being notified, or otherwise becoming aware, of the relevant change of care day, but before the end of 26 weeks after that day.

Section 150F(2) provides that if the Secretary or Registrar makes a suspension determination, child support for the child is not payable by the liable parent to the other person from that change of care day and until the day before the Registrar is notified, or otherwise becomes aware, of that change of care day.

During this suspension period, a terminating event under s 12(2AA) would not occur, subject to a time limit of 26 weeks between the care

change and notification of the care change. If notification occurs within the 26-week time limit, the assessment would not be in force for the child in the period from the date of event to the day before notification.

Estimating income amounts

Either party may alter their child support income amount by lodging a new estimate of their income with the CSA. However, there are significant limits upon estimates that may be lodged, including:

- the first time an estimate is lodged in a given child support period, it must reduce the child support income amount by at least 15% (s 60), and
- estimates are not retrospective (s 60).[17]

Estimates are reconciled at the end of the child support period (s 64). Generally, only the last estimate is reconciled. If the estimate is an underestimate by more than 10% it will also attract a penalty (s 64AF). The penalty is 10% of the difference between the post-reconciliation assessment and the assessment that would have been made if it had been based entirely on the original estimate/s (s 64AG). Since 1 July 2010 the process for parents who estimate their income for child support purposes has changed. Estimates of income must now be made for financial years, for 12-month periods. The child support period remains at 15 months to ensure that assessments are based on the most recent income information available, but the estimate period has reverted to financial years.

CSA is not required to accept an estimate if the registrar is satisfied that the person's income will be higher than the amount in the estimates (s 63AA). The registrar also has power to alter the assessment after an estimate if the registrar receives information pursuant to a notice under s 160, s 161 or s 162A showing a greater income amount (s 63A and 63B).

Caution

> "There is no time limit imposed by the legislation on the Registrar of Child Support who can reconcile incomes after many years have passed and after a parent's capacity to apply to the change of assessment process has passed": *Quigly* v *Stokes (Estimate Reconciliation)* [2009] SSATACSA 10 (2 April 2009).

The case of *Adams and Barnes* (2008) SSATACSA 6 also dealt with an estimate.

Footnotes

17 *Onans and Onans* (1993) FLC ¶92-336.

¶21-080 Departing from administrative assessment

When the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) was first enacted in 1989, parties had to make application to the courts for departure from the assessment issued by the registrar. In 1992 an administrative departure process was established under Pt 6A of the Assessment Act, and rights of access to the court restricted.

It is now relatively simple to seek a departure from an administrative assessment of child support. The Child Support Agency (CSA) has prescribed forms for making applications to depart from assessments. This is managed through the CSA change of assessment team. The form collects most of the information necessary for the application. The CSA then arranges a conference, in person or by telephone, for a senior case officer (SCO) to hear the parties. The SCO then makes a written decision and provides both parties with a copy of the decision. Decisions can be the subject of objections and reviews to the Administrative Appeals Tribunal (AAT) (see ¶21-200).

Departure applications may also be initiated by the registrar under Pt

6A Div 3 of the Assessment Act. This usually occurs when the registrar forms the view that the income amounts used in an assessment do not reflect the true capacity of a party to provide financial support for a child. However, registrar-initiated applications still represent only a very small proportion of the departure applications.

The power to depart from the assessment is provided for in s 117 of the Assessment Act, which requires a three-step process, as set out by the Full Court:

> "34. The structure of that section is that 117(1)(b) identifies concisely the matters about which the Court must be satisfied and those components are then expanded in sub-sections (2) to (9). Section 117(1)(b) identifies a clear three step process:
>
> 1. Whether one or more grounds of departure in s 117(2) is established.
>
> If so:
>
> 2. Whether it is 'just and equitable' within the meaning of s 117(4) to make a particular order.
>
> 3. Whether it is 'otherwise proper' within the meaning of s 117(5) to make a particular order.
>
> 35. It is clear from the careful way in which s 117 has been structured that the Court must address each of those three separate issues".[18]

Each of the grounds in s 117 requires that a "special circumstance" of the type described in the ground be established. In *Gyselman and Gyselman*, the Full Court said:

> "Section 117(2) sets out the grounds for departure from administrative assessment. Each of those grounds is prefaced by the words, 'in the special circumstances of the case'. Whilst it is not possible to define with precision the meaning of that term, as a generality it is intended to emphasize that the facts of the case must establish something which is special or out of the ordinary.

That is, the intention of the Legislature is that the Court will not interfere with the administrative formula result in the ordinary run of cases. In *Savery's case* [(1990) FLC ¶92-131] (p 77,897), *Kay* J, adopting the view in *Philippe and Philippe* (1978) FLC ¶90-433 at p 77,202 in a different context, said that 'special circumstances' were 'facts peculiar to the particular case which set it apart from other cases'. The approach to the interpretation and application of the particular grounds in s 117(2) must be guided by that qualification.

Section 117(2) sets out three separate categories of grounds of departure, each with a number of sub-categories and with the potential for overlap".[19]

Caution

Time limits

Since 1 January 2007 departures are only able to be backdated up to 18 months, unless the applicant has leave of the court (s 98S(3B)). The rationale set out in the explanatory memorandum to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) is that:

> "In some circumstances, if a parent wishes to avoid paying a large outstanding child support debt, he or she may apply for a change of assessment for a past period, thus making it difficult for the Child Support Agency to enforce that debt".

However, the court may only give leave after considering the factors listed in s 112:

- any responsibility, and reason, for the delay in making the application (or determination)
- the hardship to the applicant (other than the registrar) if leave is not granted
- the hardship to the other party or parties (other than the

registrar) if leave is granted, and

- any other relevant matter.

The maximum period of backdating by leave is seven years from the date of the application to the court (s 112(7)).

Footnotes

18 *Gyselman and Gyselman* (1992) FLC ¶92-279 at [34] and [35].

19 Ibid, at [29] and [40].

¶21-090 Special circumstances

Before making a determination to depart from a child support determination, a “special circumstance” must be established. There are 10 different types of “special circumstances” listed in s 117 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act).

Note

Special circumstances as described on the Child Support Agency (CSA) forms

Reason 1 The costs of spending time with or communicating with the child(ren) are more than 5% of your adjusted taxable income amount.

Reason 2 The child(ren) has special needs.

Reason 3 There are extra costs in caring for, educating or

training the child(ren) in the way both parents intended.

Reason 4 The child(ren) has income, an earning capacity, property and/or financial resources.

Reason 5 You have provided money, goods or property for the benefit of the child(ren).

Reason 6 The costs of child care for child(ren) under 12 years of age are more than 5% of your adjusted taxable income amount.

Reason 7 You have out of the ordinary necessary expenses to support yourself.

Reason 8

A — The assessment does not correctly reflect either parent's income, property and/or financial resources.

B — The assessment does not correctly reflect either parent's capacity to earn an income.

Reason 9 You have a legal duty to support another person.

Reason 10 You have a responsibility to support a resident child.

Reason 1 — costs of spending time with a child

This reason is set out in s 117(2)(a)(iv) and 117(2)(b)(i) of the Assessment Act in different terms to those appearing on the CSA form. The sections say:

> "(a) that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of: …
>
> (iv) high costs involved in enabling a parent to spend time with, or communicate with, any other child or another person that the parent has a duty to maintain; …
>
> (b) that, in the special circumstances of the case, the costs of

maintaining the child are significantly affected:

(i) because of high costs involved in enabling a parent to spend time with, or communicate with, the child".

Section 117(2B) of the Assessment Act limits this ground to cases where the costs involved are greater than 5% of a person's child support income amount.

While formulaic accounting will not always result in a just and equitable adjustment to the rate of child support, it has been adopted by Kay J in *Houlihan and Houlihan* and *Marlow and Marlow*.[20] Kay J increased the payer's exempted income amount by a sum sufficient that after tax it would be equivalent to the costs of contact less 5% of the payer's income.

Example

***Houlihan and Houlihan* (1991) FLC ¶92-248**

The husband was driving around 12,500 km per year to spend time with the children. Kay J found that the costs of this travel reached $2,000 per annum more than 5% of the husband's income amount. Having regard to the husband's marginal tax rate (around 40%) his Honour increased the exempted income amount for the husband by $3,333.

When calculating travel costs, the courts have regularly rejected the use of "rate per kilometre" (such as the federal government travel allowance rates: 68 cents per kilometre for 2018/19 income years) in favour of the actual costs to the party. This is because most people will maintain a vehicle in any event.[21]

The CSA has adopted this method in its online guide.

Reason 2 — special needs of a child

This reason is contained in s 117(2)(a)(ii) and (b)(ia) of the Assessment Act, which provide as follows:

"(a) that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of: …

(ii) special needs of any other child or another person that the parent has a duty to maintain; …

(b) that, in the special circumstances of the case, the costs of maintaining the child are significantly affected: …

(ia) because of special needs of the child".

Examples

***Lightfoot* v *Hampson* (1996) FLC ¶92-663**

The Full Court said that special needs "encompasses a wide range of needs of a child which are seen as 'special' in the sense of necessary or at least desirable of that child's welfare but outside the 'normal' needs of a child which would be catered for within the formula. This would include such things as unusual medical expenditure, facilities for a handicapped child, etc. If necessary it could include 'special needs' in education".

***Blamey* v *Blamey* (1995) FLC ¶92-554**

Kay J found that the section also applied if a child had special abilities and therefore had special needs, such as children who are gifted sports people.

Reason 3 — caring, educating or training the children in a manner expected by the parents

This reason is contained in s 117(2)(b)(ii) of the Assessment Act in the following terms:

"(b) that, in the special circumstances of the case, the costs of maintaining the child are significantly affected: …

(ii) because the child is being cared for, educated or trained in the manner that was expected by his or her parents".

This section is in similar terms to s 66J(2)(a)(ii) of the FLA, and the cases on that section appear to apply here.

In *Paradine and Paradine*,[22] Gunn J said:

"I do not disagree with the proposition that, speaking generally, a party should not be obliged to contribute towards private school fees unless he has consented to do so, or unless he has

> consented to the child attending that school. On the other hand, there may be cases where it would be appropriate for a party to be compelled to contribute towards private school fees even though he or she had not been consulted upon the matter or had not consented to the child attending a private school. For example, as conceded by counsel for the husband, where there is clear evidence that a child would derive a benefit from attending a private school as opposed to attending a public school, it may be appropriate to order a party to contribute towards school fees".[23]

It is not for the decision maker to decide upon reasonable rates of school fees, once the parents have chosen a school, but rather to consider the capacity of the parents to contribute to those fees.[24]

However, different considerations apply once the parties have agreed to one of the children attending a private school and the children's education has proceeded on that basis.[25]

Whether the expectations must have been stated is a moot point in cases involving parties who separate before the children are old enough to contemplate schooling.

In *Reiner* v *Reiner & Anor (SSAT Appeal)* [2013] FCCA 189, a decision by the SSAT that private school fees establish a special circumstance under s 117(2)(b)(ii) was upheld, in circumstances where both parties were seen as having the expectation that these fees would be incurred. The Tribunal determined that the fees should be met by the parties in proportion to their gross income.

Reason 4 — income and earning capacity of the child

It is increasingly uncommon for children to be self-supporting before they attain 18 years. However, some children cease education before they complete Year 12 of high school. In these cases, consideration must be given to the actual earning capacity of the child. The principles are the same as for adults (see Reason 8 below).

Where a child has the capacity to contribute to their own support, it is appropriate that they do so. In *W v W*,[26] Nygh J said:

> "There is no principle that a child should not be expected to

> maintain himself out of funds provided by way of settlement by parents or grandparents … It is therefore proper, if the child has adequate funds at its disposal, that it be expected to contribute to its own maintenance".[27]

It would be rare for a school child who earns a small amount from a part-time job for pocket money to contribute to their self-support. This was identified in *Mee v Ferguson*,[28] where the Full Court (in the context of the FLA) said:

> "45. … Obviously it would not be appropriate for an Australian Boris Becker [a child tennis champion] to look to Mr and Mrs Becker for his support. On the other hand it would in ordinary circumstances be unreasonable to expect that pocket money and other small sources of income derived from paper rounds and casual work after school and the like ought to be taken into account in diminishing the financial responsibility of the parents for the needs of that child".[29]

However, there is clearly no obligation on a parent to build an asset for a child.[30]

Reason 5 — money, goods or property from the payer for the benefit of the children

This reason flows from s 117(2)(c)(ii) of the Assessment Act which provides as follows:

> "(c) that, in the special circumstances of the case, application in relation to the child of the provisions of this Act relating to administrative assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child: …
>
> (ii) because of any payments, and any transfer or settlement of property, made or to be made (whether under this Act, the *Family Law Act 1975* or otherwise) by the liable parent to the child, to the carer entitled to child support or to any other person for the benefit of the child".

This section does not provide a basis for crediting adjustments in property settlement under s 75(2) or s 90SF(3) against the child support assessment. However, where there is a specific property adjustment in lieu of child support, some adjustment may be necessary, as occurred in *Sloan and Sloan*.[31]

An alternative method of accounting for direct payments lies in seeking a credit under the *Child Support (Registration and Collection) Act 1988* (Cth) for a non-agency payment (see below).

Reason 6 — high costs of child care

Section 117(2)(b)(ib) of the Assessment Act provides for a change in an assessment to take account of the high costs of child care as follows:

> "(b) that, in the special circumstances of the case, the costs of maintaining the child are significantly affected: …
>
> (ib) because of high child care costs in relation to the child".

This ground is significantly restricted by the operation of s 117(3A) and (3B):

> "(3A) The ground for departure mentioned in subparagraph (2)(b)(ib) is taken not to exist unless:
>
> (a) the costs are incurred by a parent or a non-parent carer; and
>
> (b) the child is younger than 12 at the start of the child support period.
>
> (3B) Child care costs for a parent can only be high for the purposes of subparagraph (2)(b)(ib) if, during a child support period, they total more than 5% of the amount worked out by:
>
> (a) dividing the parent's adjusted taxable income for the period by 365; and
>
> (b) multiplying the quotient by the number of days in the

period”.

Note

Checklist for high costs of child care

☐ incurred by carer entitled to child support

☐ child is under 12 at the start of the period

☐ no child in substantial, major or shared care

☐ costs of child care exceed 5% of carer’s income.

The CSA suggests that the costs of child care should be accounted for by using a formulaic method akin to that set out in *Houlihan’s* case. However, it appears that such a method will not achieve sufficient alteration in most cases, and fails to ensure that a “just and equitable” outcome is achieved, as it replaces the considerations required under the Act with a mathematical formula that is not in the legislation.

Where costs of child care are relied upon, it would be wise to rely upon Reason 1, given its expanded ambit. How Reason 1 is interpreted in light of Reason 6 remains to be seen.

Reason 7 — necessary expenses in self-support

This reason is provided in s 117(2)(a)(iii) of the Assessment Act as follows:

> “(a) that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of: …
>
> (iii) commitments of the parent necessary to enable the parent to support:
>
> (A) himself or herself; or

(B) any other child or another person that the parent has a duty to maintain; …"

This is a ground commonly relied upon, but which is commonly unsuccessful — probably as a result of a lack of proper supporting material. The ground is in identical terms to s 75(2)(d) or s 90SF(3)(d) of the FLA, which is regularly considered in determining maintenance.

The section has been interpreted as referring to reasonably needed commitments, rather than strictly essential payments.[32]

Caution

Payment of debts will not automatically provide a basis for adjusting child support. It will be important to establish:

- the purpose of the debt
- when the debt arose
- the amount of the debt (with bank statements) at separation or other relevant times
- that reasonable steps have been taken to refinance or otherwise adjust the payments, or why nothing can reasonably be done to reduce the expenses.

Reason 8 — the income, earning capacity, property or financial resources of one or both parents

This ground of departure is provided for in s 117(2)(c)(i) of the Assessment Act as follows:

"(c) that, in the special circumstances of the case, application in relation to the child of the provisions of this Act relating to administrative assessment of child support would result in an

unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child:

(i) because of the income, earning capacity, property and financial resources of the child; …"

This ground is usually seen as covering cases where the income amount used by the CSA in the assessment is inappropriate due to the greater financial resources of the party, or the greater earning capacity of the party. However, a number of cases have pointed to the ground having a more general application.

In *W & W*,[33] it was pointed out at [8]:

> "That s 117(2)(c)(i) is not limited to changes in income amounts in isolation is apparent from the open ended nature of the concept of a 'special circumstance' and the many factors that are relevant when determining what is a 'just and equitable' in each particular case. For example, in *Portillo and Portillo* (1994) FLC ¶92-484 and *S and C* (1997) FLC ¶92-750 lack of notice of a child support liability was a 'special circumstance' in the context of the particular cases even though there was no significant difference in the payer's child support income amounts and actual earnings. Whilst these cases did not specifically identify which sub-section of s 117 was relied upon it appears clear that it was s 117(2)(c)(i)".

To the extent that a change in income amount can be adjusted by lodging an estimate, it will not come within this ground.[34]

In many cases, payers argue that the assessment should be limited to the amount of income shown in their tax returns. This proposition has never been accepted, as taxable income is only *prima facie* evidence of income. The Full Court, in *Bassingthwaite v Leane*,[35] approved the comments of Barry J:

> "The respondent is perfectly entitled to arrange his financial affairs as he wishes. What he cannot do is avoid his responsibilities as a parent by incurring considerable losses in a business venture when he clearly has the capacity to make a

considerable profit. He could sell the farm, invest the proceeds, and receive regular periodic payments in a variety of investments".

In *Nell & Nell* [2010] SSATACSA 10, the SSAT determined that Mr Nell's taxable income did not reflect his "true income, financial resources and benefits available to him". He was self-employed. The Tribunal had regard to *Carey & Carey* [1994] FamCA 74, in which it was noted:

> "The aim of [the *Child Support (Assessment) Act*] is to avoid the necessity of litigation and to make the amount to be paid predictable and readily assessable. The legislation however realises that, whilst the simplest method of calculating child support is to use existing taxation records, the use of taxable income as the sole basis for child support could lead to some inequities and injustices. For a start, the financial position of many members of the community is not accurately reflected in their taxable income; either they manage to evade or avoid their taxation liabilities or they can so structure their affairs so that they are capital rich and income poor …"

The Tribunal increased the husband's adjusted taxable income and decided to set both parents' adjusted income amounts.

Caution

There are three important principles that are generally applicable with respect to income:

- changes in income amount should be the subject of an estimate if an estimate will resolve the issue
- this ground is not limited to changes in income amount
- taxable income is only *prima facie* evidence of a person's income and earning capacity.

Note

The following factors are commonly relevant when considering the extent of financial resources:

- differences between cash flow of a business and the profit and loss statement, for example, the effect of depreciation
- amounts paid in superannuation
- amounts paid to related persons or entities
- amounts retained in companies or trusts
- non-taxable income
- termination payments
- capital gains and capital resources.

In considering income and earning capacity cases, it is important (subject to s 117(7B)) to distinguish between cases where the decision relates to the extent of income or financial resources, and those that relate to earning capacity that is not being exercised. An appropriate framework for considering income earning capacity cases was set out in *W & W*:[36]

> "a) the ability to generate income;
>
> b) the opportunity to generate income; and
>
> c) whether the parent's pursuits are appropriate in the circumstances".

Income and earning capacity cases must be considered in light of the effects of s 117(7B), which provides:

> “(7B) In having regard to the earning capacity of a parent of the child, the court may determine that the parent’s earning capacity is greater than is reflected in his or her income for the purposes of this Act only if the court is satisfied that:
>
> (a) one or more of the following applies:
>
> (i) the parent does not work despite ample opportunity to do so;
>
> (ii) the parent has reduced the number of hours per week of his or her employment or other work below the normal number of hours per week that constitutes full-time work for the occupation or industry in which the parent is employed or otherwise engaged;
>
> (iii) the parent has changed his or her occupation, industry or working pattern; and
>
> (b) the parent’s decision not to work, to reduce the number of hours, or to change his or her occupation, industry or working pattern, is not justified on the basis of:
>
> (i) the parent’s caring responsibilities; or
>
> (ii) the parent’s state of health; and
>
> (c) the parent has not demonstrated that it was not a major purpose of that decision to affect the administrative assessment of child support in relation to the child”.

It appears that the most appropriate approach may be to apply the three steps identified in *W & W*, and then consider each of the requirements of s 117(7A) of the Assessment Act.

The case of *Archer* v *Archer & Anor (SSAT Appeal)* [2013] FCCA 226 concerned a determination as to whether or not an inheritance of $160,000 was a “significant financial resource” that made the minimum assessment amount of $370 per annum being paid by the appellant father an “unjust and inequitable level of financial support”.

The SSAT rejected that the sum was a “modest” amount, citing the disparity between the inheritance amount and child support liability as the s 117 “special circumstance” (*Gyselman* v *Gyselman* [1991] FamCA 93).

The Tribunal considered that the inheritance was a “financial resource” (ie something more than what is covered by the terms income and property), but that when considered under s 117(4) it became a “capital resource” since, if cautiously invested, it could derive an ongoing source of income pursuant to s 117(7A). In making this determination, the Tribunal balanced the financial detriment to the parents and children when considering the hardship that the proposed departure may cause pursuant to s 117(4)(g) and was satisfied the appellant had sufficient capital and financial resources to meet his obligations.

Reason 9 — legal duty to maintain another person or other children

Section 117(2)(a) of the Assessment Act provides for a ground in circumstances where a person has a duty to maintain another as follows:

> “(a) that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of:
>
> (i) the duty of the parent to maintain any other child or another person; or
>
> (ii) special needs of any other child or another person that the parent has a duty to maintain; or
>
> (iii) commitments of the parent necessary to enable the parent to support:
>
> …
>
> (B) any other child or another person that the parent has a duty to maintain; or

(iv) high costs involved in enabling a parent to care for any other child or another person that the parent has a duty to maintain".

In *Vick and Hartcher*,[37] the Full Court concluded that the words refer to a legal duty and not a moral duty. As such it is important to establish the legal basis for the duty to maintain another person before it can be taken into account.

Interestingly, in *Lyon v Wilcox*,[38] the New Zealand Court of Appeal concluded that the comparable provision in New Zealand extended to moral duties. However, the section has been amended a number of times since *Vick and Hartcher* without amending this provision. As a result, the narrow interpretation must be considered to be settled law in Australia.

There is a clear duty to maintain biological children (s 66C of the FLA). That obligation does not cease on the child attaining 18 years, although it becomes more restricted (s 66L of the FLA). In *Bienke v Bienke-Robinson*,[39] Kay J confirmed that the duty to maintain a child continues into adulthood, if the circumstances referred to in s 66L of the FLA apply.

The duty to maintain a step-child only arises when the court declares that the duty ought to be imposed. In *KB & SK*,[40] Sexton FM considered the issue in some detail at [52]–[55], disposing of arguments based upon the social security legislation.

An adoptive parent does have a legal duty to maintain an adopted child, as does the parent of a child conceived by artificial conception, as the children are considered at law to be the children of the parent.[41]

There is a legal duty to maintain a husband or wife, if the factual circumstances require it. There is no need for a court order as a precondition to the creation of the duty to maintain a spouse, as there is with stepchildren. Importantly, separation of the husband and wife is not a precondition to the spousal maintenance duty arising.[42]

The *Family Law Act 1975* (Cth) has been amended in recent years to

increase the rights of members of a de facto couple, including giving the courts the power to make maintenance orders with respect to separated de facto couples (s 90SE). In light of these amendments, and a shift in community expectations in relation to de facto couples, the duty to maintain a de facto partner is also a relevant consideration for Reason 9.

There is a legal duty on a father to maintain the mother of his child during the “childbirth maintenance period” pursuant to s 67B of the FLA. This period starts when the mother ceases paid employment on the advice of a medical practitioner, or two months before the expected date of birth, and ends three months after the birth of the child.

Reason 10 — responsibility to support a resident child significantly reduces capacity to support another child

Either child support parent can apply for a change of assessment in special circumstances if his or her capacity to provide financial support for the child(ren) of the assessment is significantly reduced because of the responsibility of the child support parent to maintain a resident child.

Section 117(2)(aa) provides as follows:

> “that, in the special circumstances of the case, the capacity of either parent to provide financial support for the child is significantly reduced because of the responsibility of the parent to maintain a resident child of the parent”.

Pursuant to s 117(10) a child will be a “resident child” if:

> “(a) the child normally lives with the person, but is not a child of the person; and
>
> (b) the person is, or was, for 2 continuous years, a member of a couple; and
>
> (c) the other member of the couple is, or was, a parent of the child; and

(d) the child is aged under 18; and

(e) the child is not a member of a couple; and

(f) one or more of the following applies in respect of each parent of the child:

(i) the parent has died

(ii) the parent is unable to support the child due to the ill-health of the parent;

(iii) the parent is unable to support the child due to the caring responsibilities of the parent; and

(g) the court is satisfied that the resident child requires financial assistance".

Note

The three threshold requirements are:

1. there are "special circumstances"

2. the child support parent has the responsibility to maintain a "resident child", and

3. the responsibility significantly affects the child support parent's ability to provide financial support for the child of the child support assessment.

The phrase "special circumstances of the case" is not defined in the Assessment Act. The Family Court has held that "it is intended to emphasise that the facts of the case must establish something which is special or out of the ordinary" (*Gyselman and Gyselman* (1992) FLC ¶92-279).

Footnotes

Footnotes

20 *Houlihan and Houlihan* (1991) FLC ¶92-248; *Marlow and Marlow* (1995) FLC ¶92-588.

21 *Houlihan and Houlihan* (1991) FLC ¶92-248.

22 *Paradine and Paradine* (1981) FLC ¶91-056.

23 Ibid, at p 76,457.

24 *Newman & Caldwell (SSAT Appeal)* [2009] FMCAfam 496.

25 *T and T* (1984) FLC ¶91-588.

26 *W* v *W* (1980) FLC ¶90-872.

27 Ibid, at p 75,527.

28 *Mee* v *Ferguson* (1986) FLC ¶91-716.

29 Ibid, at [45].

30 *Koch and Koch* (1977) FLC ¶90-312 and *James* v *James* (1978) FLC ¶90-487.

31 *Sloan and Sloan* (1994) FLC ¶92-507.

32 *Gyselman and Gyselman* (1992) FLC ¶92-279.

33 *W & W* [2005] FMCAfam 295.

34 *Mansfield and Mansfield* (1991) FLC ¶92-206; *Onans and Onans* (1993) FLC ¶92-336.

35 *Bassingthwaite* v *Leane* (1993) FLC ¶92-410 at p 80,192.

36 *W & W* [2005] FMCAfam 295 at [42].

37 *Vick and Hartcher* (1991) FLC ¶92-262.

38 *Lyon* v *Wilcox* [1994] NZFLR 634.

39 *Bienke* v *Bienke-Robinson* (1997) FLC ¶92-786.

40 *KB & SK* [2005] FMCAfam 104.

41 See generally, s 60D, 60F and 60H of the *Family Law Act 1975* (Cth) and s 5 and 29 of the Assessment Act.

42 *Humphries and Humphries* (1993) FLC ¶92-430.

¶21-100 The "just and equitable" requirement

The second step of the departure process provided for in s 117 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) is the requirement that any alteration to the assessment is "just and equitable". In deciding whether a particular change is "just and equitable", s 117 sets out an extensive list of considerations:

> "(4) In determining whether it would be just and equitable as regards the child, the carer entitled to child support and the liable parent to make a particular order under this Division, the court must have regard to:
>
> (a) the nature of the duty of a parent to maintain a child (as stated in section 3); and
>
> (b) the proper needs of the child; and

(c) the income, earning capacity, property and financial resources of the child; and

(d) the income, property and financial resources of each parent who is a party to the proceeding; and

(da) the earning capacity of each parent who is a party to the proceeding; and

(e) the commitments of each parent who is a party to the proceeding that are necessary to enable the parent to support:

(i) himself or herself; or

(ii) any other child or another person that the person has a duty to maintain; and

(f) the direct and indirect costs incurred by the carer entitled to child support in providing care for the child; and

(g) any hardship that would be caused:

(i) to:

(A) the child; or

(B) the carer entitled to child support;

by the making of, or the refusal to make, the order; and

(ii) to:

(A) the liable parent; or

(B) any other child or another person that the liable parent has a duty to support;

by the making of, or the refusal to make, the order".

While it is not necessary to slavishly identify and specifically consider

every factor in every case,[43] it is nonetheless necessary to identify and consider the significant factors.[44] Importantly, the task required by s 117(4) must be undertaken with respect to each relevant period and not on a global basis.[45] However, it is likely to be sufficient if each period where there is a different assessment or different circumstances is considered.

When adjusting the assessment it is possible in some cases to merely adjust a formula element to account for the particular special circumstance.[46] However, in many cases the circumstances will be too complex for simple adjustments to formula elements to be "just and equitable".[47]

This issue has been the basis of a number of successful appeals from the Social Security Appeals Tribunal. As Slack FM said in *Eades & Cadell (SSAT Appeal)* [2009] FMCAfam 275:

> "35. The SSAT can have regard to the operation of the formula as a convenient starting point but is not entitled to simply do so without further and proper regard to the actual capacity of a parent to contribute to the support of the children …."

Footnotes

43 *Ross* v *McDermott* (1998) FLC ¶98-003.

44 *Hides* v *Hatton* (1997) FLC ¶92-759; *Hallinan* v *Witynski* (1999) FLC ¶98-009.

45 *Hides* v *Hatton* (1997) FLC ¶92-759.

46 See, for example, *Savery's* case (1990) FLC ¶92-131; *Houlihan and Houlihan* (1991) FLC ¶92-248; *Burke and Elliott* (1990) FLC ¶92-161.

47 *Vick and Hartcher* (1991) FLC ¶92-262.

¶21-110 The “otherwise proper” requirement

In determining whether a particular change to an assessment is “otherwise proper”, the decision maker must have regard to the matters set out in s 117(5) of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act):

> “(5) In determining whether it would be otherwise proper to make a particular order under this Division, the court must have regard to:
>
> (a) the nature of the duty of a parent to maintain a child (as stated in section 3) and, in particular, the fact that it is the parents of a child themselves who have the primary duty to maintain the child; and
>
> (b) the effect that the making of the order would have on:
>
> (i) any entitlement of the child, or the carer entitled to child support, to an income tested pension, allowance or benefit; or
>
> (ii) the rate of any income tested pension, allowance or benefit payable to the child or the carer entitled to child support”.

In *Hall and Rushton*,[48] Kay J considered the impact of this section when the parties sought to enter into consent orders for nil child support, saying:

> “… It seems to me I cannot accede to the request for a consent assessment at nil. If the wife is able to withdraw herself from the child support scheme then the parties are free to make such arrangements as they like.
>
> She is dependent on social services, she is in the child support scheme, she is bound by the operation of the Act which is there to protect not only the parties but also the taxpayers of Australia, and to make sure that people who are on social services do not get more than they would otherwise be entitled to if their spouses

were paying appropriate maintenance and they are in a position to do so".

However, the test does not require that there be no impact upon the public purse. There is no requirement to act as the "protector of the Revenue", merely to have regard to the effect orders may have.[49]

A failure to consider whether a particular change is "otherwise proper" will result in a failure to properly exercise the discretion.[50]

Footnotes

48 *Hall and Rushton* (1991) FLC ¶92-249 at p 78,680.

49 *Burke and Elliott* (1990) FLC ¶92-161.

50 *Hallinan* v *Witynski* (1999) FLC ¶98-009.

CHILD SUPPORT AGREEMENTS

¶21-120 General

Part 6 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) provides for child support agreements. Agreements are a method of entering into consent arrangements between parties to provide for child support, rather than relying upon the formula assessment method.

It is important to note that the law relating to agreements changed on 1 July 2008. Agreements entered into before that date may not continue to have effect thereafter.

Since the 2018 amendments, in relation to a child support agreement that has been accepted by the Registrar, if the agreement includes provisions of a kind listed in s 95(2), then the provisions have effect for the purposes of s 142 (as well as Pt 5, which is already referenced in

s 95(2)), as if they were an order made by consent by a court under Div 4 of Pt 7.

The amendments give effect to the policy that certain provisions in child support agreements would cease to have effect when a child support terminating event occurs due to s 142, for example, where a child leaves their parents' care to live independently or becomes a member of a couple. This clarifies the current policy in light of differing opinions put forward by Murphy and Aldridge JJ in the decision of the Full Court of the Family Court of Australia *Masters and Cheyne* (2016) FLC ¶98-072.

Section 131(5) enables a court to vary or revoke an order made under s 131 if that order was made because another order ceased to be in force under s 142, and then subsequently revives because of new s 142(1B) and (1C).

It is important to note s 85, providing that an agreement is not a child support agreement in relation to a child if, disregarding s 67A (which provides for offsetting of child support liabilities), the agreement provides for a party to pay or provide child support to another party for any period during which the party is not an eligible carer of the child.

This amendment seeks to ensure that provisions in child support agreements are consistent with the objects of the child support legislation, by not requiring child support payments to be made to a person during periods when that person is not an eligible carer for a child.

Binding child support agreements

For a binding child support agreement, a person must have had independent legal advice. The agreement must contain a statement to the effect that the party to whom the statement relates has been provided with independent legal advice from a legal practitioner as to the effect of the agreement on the rights of the party and the advantages and disadvantages, at the time the advice is given, of signing the agreement. The advice must be given before the agreement is signed. The practitioner must also sign a certificate which forms part of the agreement.

The agreement must meet formal requirements similar to those of a binding financial agreement pursuant to s 90G or s 90UJ of the *Family Law Act 1975* (Cth) (FLA).

Binding child support agreements must also comply with the same formal requirements as a limited child support agreement. Section 84 of the Assessment Act sets out the types of provisions that may be found in a child support agreement.

A binding child support agreement may provide for a lower rate of child support than would be payable under the formula as binding agreements do not have to comply with s 80E of the Assessment Act. A decision by a party to an agreement to accept less than the amount of child support assessed by the formula previously had implications for Family Tax Benefit Part A. Since 1 July 2008 the family tax benefit entitlement of a parent receiving child support is assessed as though the agreement had not been made. In other words, the notional assessment that could have been made will determine the level of family tax benefit to be paid.

It is important to note that these agreements can remain in effect despite a change in the care arrangements for the children. A party may be liable for obligations under a binding child support agreement despite a change in care that would otherwise reduce their child support obligation.[51]

Section 80C of the Assessment Act explains that a binding child support agreement can include lump sum payments, including a transfer of property which is then able to be credited to a child support liability instead of periodic payments. It must comply with other legislation to ensure beneficial stamp duty and other roll-over relief are preserved.

An agreement to pay a lump sum amount can be made without having to actually agree on the amount of child support being paid as the Child Support Agency (CSA) can make assessments as usual. For these types of agreements, there is to be provision for a payment that is more than the annual child support rate under the assessment in force at the time of the agreement.

When the agreed lump sum payment is greater than the assessed annual child support rate, the difference is used as a credit for future child support payments. The method by which this crediting occurs is set out under s 69A of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act). The lump sum amount must be agreed upon and must exceed the annual rate of child support payable under the administrative assessment.

An agreement can nominate a percentage of the future child support payments that are to be met using the credit created by the lump sum payment. The lump sum payment will be reduced at the end of each financial year according to the amount of child support liability for that year. Any remaining amount is indexed annually.

Section 81(2) requires that the agreement must comply with s 82, 83, 84 and 85.

Limited child support agreements

A limited child support agreement has no requirement for independent legal advice. It must be in writing and it must be signed by both parties.

It applies to a child for whom an administrative assessment could have been sought and it can be made between an eligible carer and a person who is a parent of the child and resident in Australia on the day the agreement is entered into (for the meaning of “resident of Australia” see *Peters & Peters & Ors* (2012) FLC ¶93-511).

A limited child support agreement must be accepted by the Registrar of Child Support and it must ensure that at least the amount of child support that would have been otherwise payable under the formula is paid. A limited child support agreement can operate for a maximum of three years, after which time either party can terminate the agreement.

Section 80E deals with limited child support agreements. When a limited child support agreement is described, it is described as needing to comply with s 81(2). Section 81(2) requires that the agreement must comply with s 82, 83, 84 and 85. A limited child support agreement must be accepted by a registrar and must meet the requirements of s 80E(2), (3) and (4).

Agreements entered into before 1 July 2008

Agreements entered into before 1 July 2008 were all reviewed by the CSA before 30 June 2008. Agreements that were not acceptable were terminated on 30 June 2008.

An agreement may cover periods prior to 1 July 2008, as well as periods from 1 July 2008. When this occurs, the CSA will consider the agreement in two parts and as two separate child support agreements: one with effect for the period before 1 July 2008 and one with effect from 1 July 2008.

The legislation in place at the time of lodging the agreement will be applied in determining whether to accept the "first" child support agreement with effect to 30 June 2008. The legislation in place from 1 July 2008 is applied in determining whether to accept the second child support agreement. Only one part may be acceptable. This is particularly relevant when the parent in receipt of child support is also in receipt of Centrelink payments, as Centrelink must accept the agreement as satisfying the activity test.

Since the 2018 amendments to the *Child Support (Assessment) Act 1989* (Cth), s 136(2A) provides that, if a party has applied under s 136(1) for a court to set aside the agreement, the court may also set aside the agreement in accordance with the application if the court is satisfied in relation to the criteria set out in s 136(2A). These are that the agreement was made before 1 July 2008, the agreement was made without at least one of the parties to the agreement receiving independent legal advice (before entering the agreement) from a legal practitioner as to the matters referred to in s 80C(2)(c) and it would be unjust and inequitable if the court does not set the agreement aside.

Footnotes

51 *Masters & Cheyne* (2016) FLC ¶98-072.

¶21-130 Termination and suspension of child support

agreements

Termination

Limited child support agreements and *binding* child support assessments are terminated under the *Child Support (Assessment) Act 1989* (Cth) under s 80G and 80D respectively.

Section 80G of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) provides the manner by which *limited* child support agreements can be terminated as follows:

(a) by entering into a fresh agreement

(b) by agreement in writing signed by the parties

(c) a court order

(d) a new notional assessment that varies the previous notional assessment by more than 15% in circumstances not contemplated by the previous agreement

(e) simply if the agreement is three or more years old, and

(f) the agreement being terminated by subsection (1B).

Section 80G(1B) provides for termination of a limited child support agreement in relation to a child when the former eligible carer who was a party to the agreement ceases to be an eligible carer for the child. The agreement is terminated in relation to the child if the circumstances listed at s 80G(1B) are met. A note alerts the reader that the agreement may continue in relation to other children to whom the agreement relates, if the person does not cease to be an eligible carer of those children.

Section 80G(1B) provides for the same outcome in relation to limited child support agreements as provided under new s 80D(2A) for binding child support agreements.

Note s 80G(2)(e), which provides the date of effect for the termination where s 80G(1)(f) applies, is the day the former carer ceases to be an

eligible carer of the child.

It is not possible to vary a child support agreement. It must be set aside or terminated.

Section 80D of the Child Support (Assessment) Act sets out how a *binding* child support agreement can be terminated. Terminating a binding child support agreement is by means of a new binding child support agreement, a termination agreement, through a court order or where an agreement is terminated by s 80D (2A) (see below). Binding child support agreements require legal certification and so do termination agreements.

Section 80D(2A) provides for termination of a binding child support agreement in relation to a child when the former eligible carer who was a party to the agreement ceases to be an eligible carer for the child. The agreement is terminated in relation to the child if the conditions listed at s 80D(2A) are met. A note alerts the reader that the agreement may continue in relation to other children to whom the agreement relates, if the person does not cease to be an eligible carer of those children.

If a binding child support agreement is terminated under s 80D(2A) and the agreement had resulted in an assessment under s 34B(1) of the Child Support Assessment Act, the effect of the termination is that the assessment under s 34B(1) no longer has effect, and the liability for the child would, in relation to future child support periods, be assessed under child support formula provisions.

Note s 80D(3)(d), which provides the date of effect for the termination where s 80D(1)(d) applies, is the day the former carer ceases to be an eligible carer of the child.

Section 135 of the Assessment Act provides that courts may set aside a child support agreement or a termination agreement if:

(a) the agreement of one of the parties was obtained by fraud, undue influence or unconscionable conduct, or

(b) there has been a significant change in circumstances, or

(c) the annual rate of child support payable under the agreement is not proper or adequate, and

(d) exceptional circumstances arise after the agreement is made.

Section 136 of the Assessment Act sets out the power of a court to set aside child support agreements or termination agreements.

Checklist

- Does the agreement comply with the formal drafting requirements?
- For a binding financial agreement, is a certificate of independent legal advice provided?

For agreements terminated under s 80D or 80G before 1 July 2018, see s 74 for specific time limitations and details.

Suspension

The 2018 amendments to the*Child Support (Assessment) Act 1989* (Cth) inserted new Subdiv 2A into Pt 6 of the Act, dealing with situations involving the suspension a child support agreement where the person ceases to be the eligible carer for the child.

New s 86 provides for the suspension of a child support agreement in relation to a child on a day if the party entitled to be paid or provided child support is not an eligible carer of the child on that day, the period during which the person has not been an eligible carer of the child is 28 days or less (or 26 weeks or less in certain circumstances as per s 86(2)), and a child support terminating event does not occur under s 12(2AA), and the former carer would otherwise continue to be paid or provided child support for the child despite ceasing to be an eligible carer.

New s 86 allows for the suspension of agreements during temporary care changes. If a child support agreement is suspended under s 86 and the agreement had resulted in an assessment under s 34B(1) of the Child Support Assessment Act, the effect of the suspension is that the assessment under s 34B(1) no longer has effect, and the liability for the child would, in relation to the period of the suspension, be assessed under child support formula provisions.

Section 86A applies where an agreement is made in the same document in relation to two or more children, and the agreement does not explicitly provide, and it is not possible to work out, the amount payable under the agreement in relation to each of the children to whom the agreement relates. The agreement is taken to provide that the total amount payable under the agreement in relation to each of the children to whom the agreement relates is worked out using the formula at s 86A(2). The formula provides that the total amount payable under the agreement is to be divided among the number of children to whom the agreement relates. S 86A(3) provides that, to avoid doubt, the amount worked out under s 86A(2) continues to apply in relation to each of the remaining children to whom the agreement relates.

Effects of suspension

Section 93(1A) provides that despite s 93(1)(g) and (h), child support is not payable for a child under the agreement for a day if the agreement is suspended in relation to the child under s 86 on that day.

If a child support agreement is suspended under s 86 and the agreement had resulted in an assessment under s 93(2) of the Child Support Assessment Act, the effect of the suspension on the child support assessment is that the liability for the child would be nil during the suspension period, as there was no prior assessment of child support before acceptance of the agreement. However, new s 151(1A) seeks to provide an option to parties in such cases.

Section 151(1A) provides that if child support is not payable to a person for a child under a child support agreement for a day under s 93(1A), any party to the agreement may, by notice given to the Registrar on that day, elect that the liability of a liable parent who is a

party to the agreement to pay or provide child support for the child to the person is to end from a specified day. The operation is such that where —

- a person is a party to a child support agreement that has resulted in an assessment under s 93(2) of the Act, and
- that agreement has been suspended under s 106,

the person may elect, under s 151(1A), to end the assessment that has been made under s 93(2). This would provide an option for a person (who could be the payer under the agreement, but is now an eligible carer for the child) to end the s 93(2) assessment and request a new assessment under s 34B(1). The new eligible carer could therefore be assessed and potentially receive child support payments under child support formula provisions during an agreement suspension period.

NON-PERIODIC CHILD SUPPORT (LUMP SUMS)

¶21-140 Primary purpose of child support

The primary purpose of child support (and child maintenance) has always been to ensure that children receive regular periodic support to meet their day-to-day needs. This principle has always underpinned the law. In *Luckie & Luckie*,[52] the Full Court said that the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) makes it clear that the preferable order for the payment of maintenance is for periodic payments, and the court is not to consider other methods of payment unless it has first considered the capacity of a party to make periodic payments:

> "A number of cases decided under the superseded child maintenance legislation were to the effect that save in exceptional circumstances the most appropriate order for child maintenance was a periodic order rather than a lump sum order anticipating the

long term future. These decisions include *Spano* v *Spano* (1979) FLC ¶90-707, *V and G* (1982) FLC ¶91-207, *Racine and Hemmett* (1982) FLC ¶91-277 and *Vartikian and Vartikian (No 2)* (1984) FLC ¶91-587".

Similarly, in *Bendeich & Bendeich*,[53] Mushin J explained that:

> "The rationale underlying the general approach of the court was that the longer a lump sum order operates the greater the chance of change in circumstances necessitating a variation of that order, thereby making the order unjust. Those changed circumstances might be in relation to the liable parent, custodial parent or the children. Incomes may increase or decrease and children may change their living arrangements from one parent to another".

While the Assessment Act makes no specific reference to the preference for periodic support in the objects (s 3 and 4), the scheme of the Assessment Act makes periodic support an underlying presumption of the legislation.

- The Act provides for periodic assessment as the automatic first assessment of support.
- Periodic support is provided for by way of administrative assessment, whereas lump sum support is only available by agreement or court order (s 123).
- A court can only make an order for non-periodic payments if there is already an assessment for a periodic amount and the matters set out in s 124 have been satisfied.

In many circumstances, consideration should be given to orders for securing the future payment of child support, rather than lump sum payments.

Footnotes

52 *Luckie & Luckie* (1989) FLC ¶92-036 at p 77,464.

53 *Bendeich & Bendeich* (1993) FLC ¶92-355 at p 79,754.

¶21-150 Legislative basis for lump sums

The legislative scheme contained in Pt 7 Div 5 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) provides for the court to order lump sums or other forms of support *in substitution* of periodic payments to the eligible carer.

On 1 July 2008 the law relating to lump sums changed. A lump sum payment to the payee now results in a credit balance and is notionally used to meet ongoing liabilities under the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act) rather than reducing the liabilities under the Assessment Act as the s 123 orders previously did. The distinction is that a lump sum order was made in substitution for a periodic order and altered the administrative assessment. Now, a lump sum order that does not alter the assessment can be made and the process of crediting the lump sum against the assessed liability allows for the assessment to remain unaltered.

When a court makes an order for child support to be used as a credit to meet ongoing liabilities, it must specify the percentage of these liabilities to be met by drawing on the lump sum. A s 123 order must state whether or not the order will reduce the annual rate of child support payable. If the order is silent about a reduction, the payment is treated as an additional obligation to the assessed rate. If a s 123 order reduces the annual rate, the order itself must make the reduction clear by way of percentage of dollar value that is intended as provided in s 125.

The distinction must now be made between non-periodic lump sum orders and lump sum payment. Lump sum payments operate on the credit balance process, whereas s 123 orders and substitution orders can reduce the actual assessed liability.

As was stated by Kay J in *Borg and Borg*:[54]

> "The purpose of Div 5 is to enable the Court … to provide for child support other than by way of periodic payment, eg by indirect payment such as school fees and the like or by the provision of property or lump sum payments".

The scheme of the legislative provisions is to deal with all orders relating to non-periodic child support in the same manner: that is, lump sum support and other forms of substituted support are dealt with in the same terms by the legislation. However, it is convenient to maintain the distinction between these two categories of non-periodic support orders:

- lump sum orders, and
- other substitution orders.

Part 7 Div 5 should be seen as a remedial provision providing for alternative methods of giving child support only if the circumstances of the case are such that a periodic assessment fails to meet the objectives of the Act.

Is the power independent of substitution?

The nature of the Pt 7 Div 5 provisions has been the subject of conflicting judicial opinion. Some judges accepted the view that Div 5 is concerned only with the form of child support orders rather than with the amount.[55] Other judges have held that Div 5 was an independent source of power to make child support orders.[56]

The Full Court has considered the issue in two decisions: Lightfoot v Hampson[57] and *Ivanovic* v *Ivanovic*.[58] Since *Ivanovic* there have been Full Court cases involving lump sums, but they have not expressly considered this issue.

In *Lightfoot v Hampson*, Fogarty J (with whom Purvis J agreed) held that Div 5 is essentially a substitution provision and not an independent source of power to make child support orders, unless there are "special circumstances" justifying an order that did not provide for substitution (Kay J dissenting).

Thus, on the ratio in *Lightfoot* v *Hampson*, where the existing liability is

nil, there is nothing to substitute and no source of credits. Hence an application under Div 5 will often fail.

A differently constituted Full Court (Nicholson CJ, Baker and Rowlands JJ) in *Ivanovic v Ivanovic*, expressed reservations about the correctness of the majority decision in Lightfoot v Hampson. However, the court said that it was not sufficiently persuaded that the decision was wrong, considering that it should not express a contrary conclusion. In *Ivanovic's* case the husband appealed from orders under s 124 requiring him to pay a lump sum to be used for the private school education of the children, in addition to an administrative assessment for periodic payments where the order made no provision for the school fees to be credited against the existing assessment under s 125(3). The court found that *Ivanovic* fell within the meaning of a special circumstance as outlined in *Lightfoot*.

In *Johnson* v *Johnson*,[59] the Full Court (Nicholson CJ, Finn and Moore JJ) proceeded to consider the case before them on the basis that the lump sum should be in substitution for the periodic child support (and to that end the periodic rate was first increased under s 117). Examples of two areas where a special circumstance (within the meaning of s 125) may arise appear to be:

- where there is a lump sum substitution order for specific needs of the children, and there is an additional sum incurred by the carer (such as interest on borrowings to meet the needs of the children in the interim). The interest may not form a basis for a retrospective increase in the assessment under s 117. It may then be appropriate for the lump sum to represent the arrears of child support and the interest, with only the arrears, not the interest, to be credited against the assessment (this is the school fees example given by Fogarty J in *Lightfoot v Hampson*), and

- where the liable parent has a resource that is of potential benefit to the child, but the resource cannot be converted to, or generate, a liquid financial resource. In this situation, an increase under s 117 may not be available due to the poor financial position of the payer. For example, where the payer has property that cannot be sold for a useful sum, but can be provided to the carer for the

benefit of the child (such as an older car), or where the payer has the ability to add the child to their medical insurance at no extra cost.

Thus, in almost all cases, an application under s 117 to increase the administrative assessment will be required, to ensure that the periodic rate is great enough for it to be substituted by a lump sum. It is clear that any form of substitution will normally be limited to the capitalised value of the periodic rate (except in the case of the s 125(2) exception). Compliance with s 125 is mandatory and a failure to undertake the steps required by s 125 will result in orders being set aside.[60]

Summary

- Prior to 1 July 2008, lump sums were in substitution for periodic payments.
- Post 1 July 2008, lump sum orders can be credited towards an assessed liability.
- Lump sum orders do not need to alter the assessment.
- Lump sum orders permit parents to reach an agreement for one parent to retain a particular asset, such as the former family home.

Footnotes

54 *Borg and Borg* (1991) FLC ¶92-215 at p 78,451.

55 For example *Ryan and Ryan* (1995) FLC ¶92-594, per Gee J.

56 *Hartnett* v *Baker* (1995) FLC ¶92-620, per Mullane J.

57 *Lightfoot* v *Hampson* (1996) FLC ¶92-663.

58 *Ivanovic* v *Ivanovic* (1996) FLC ¶92-689.

59 *Johnson* v *Johnson* (1999) FLC ¶98-004.

60 *Rankin & Rankin* (2017) FLC ¶93-766.

¶21-160 Necessary elements of lump sum applications

There is an administrative assessment in force (s 123(2))

Provided there is an administrative assessment in force, either the carer entitled to support or the liable parent can apply for an order that child support be provided in a form other than periodic payment to the carer (s 123(2) of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act)).

Any application for a departure from the administrative assessment (under Pt 7 Div 4) has been heard and determined

Before determining the application for a substitution order (whether it be by way of lump sum or other form of support), the court must first determine any application under Div 4 (ie departure applications) (s 123(3)). This requirement has been interpreted strictly (in the absence of the consent of the parties) and must be complied with.

The purpose of this section is described in *Hartnett v Baker*[61] where Mullane J said:

> "Clearly the intention of the legislature was for the court to have the benefit of such an assessment having been already made before any determination by the court in relation to a lump sum application. Such a liability under an administrative assessment or a nil assessment should be taken into account by the court on the hearing of the lump sum application. Similarly, subsec 123(3) requires the court to first hear any sec 117 application to depart from an administrative assessment of liability to pay child support by periodic amounts. Again, presumably, this was considered

desirable by the Parliament so that the court would know the extent of any such periodic liability in determining under sec 124 what orders should be made and under sec 125 what part of the lump sum, if any, should be credited to any periodic liability under assessments issued administratively or pursuant to a hearing under sec 117".

The order would be just and equitable

Section 124(1)(b)(i) provides that any order must be "just and equitable", and s 124(2) lists a number of further specific considerations as follows:

> "(2) In determining the application, the court must have regard to:
>
> (a) the administrative assessment in force in relation to the child, the carer entitled to child support and the liable parent; and
>
> (aa) any determination in force under Part 6A (departure determinations) in relation to the child, the carer entitled to child support and the liable parent; and
>
> (b) any order in force under Division 4 (Orders for departure from administrative assessment in special circumstances) in relation to the child, the carer entitled to child support and the liable parent; and
>
> (c) whether the carer entitled to child support is in receipt of an income tested pension, allowance or benefit or, if the carer entitled to child support is not in receipt of such a pension, allowance or benefit, whether the circumstances of the carer are such that, taking into account the effect of the order proposed to be made by the court, the carer would be unable to support himself or herself without an income tested pension, allowance or benefit".

Identifying an asset or resource to fund the order

As the order must have some effectiveness, it is also necessary to

identify an asset or financial resource from which the order may be affected. This is a practical requirement, without which it is hard to see that an order could be just and equitable.

Establishing a need for a lump sum or substitution order

The provision of child support by way of a lump sum payment is clearly not the preferred method of maintaining children. The Full Court in *Prpic and Prpic*[62] stated that:

> "Capitalisation orders may well be appropriate where there are difficulties in enforcement or where it is proper to sever the financial link between the parties. However, as a general rule, given that payments of child support depend upon circumstances prevailing from time to time which circumstances cannot be predicted with any significant degree of certainty, it seems to us that the provision of child support by way of lump sum should not be considered to be a readily available alternative but one that is only exercised when there are circumstances that make it appropriate so to do".

Lump sum orders are usually considered in two situations:

- where there are difficulties in enforcement, and
- where liable parents are asset rich and income poor.

However, the situations or circumstances where a lump sum substitution order may be appropriate are not closed or even limited.

The cases involving difficulties in enforcement are characterised by findings such as:

- "the husband is likely to manipulate his affairs to get a nil assessment"[63]
- "the father will do everything he can to avoid paying proper child support",[64] and
- the evidence establishes that the father will not voluntarily provide any child support for the children.[65]

The fact that the payer may be moving out of the jurisdiction is not, of itself, sufficient to justify a lump sum order (at least where there are reciprocal rights).[66] Similarly the acceptance of a redundancy package is not sufficient evidence, of itself, to show an intention to avoid child support.[67]

Cases where parents are asset rich and income poor

In cases involving sums received by liable parents as compensation for future economic loss, different results have followed. In *Hartnett v Baker*,[68] a lump sum order was made against a father who had ceased work due to a back injury. Mullane J concluded that the father had no intention of voluntarily providing any child support and had little prospect of providing support from his earnings in the future.

In *Harris v Harris*,[69] the liable parent (a father) received around $215,000 from the settlement of a personal injuries claim. Kay J declined to alter the periodic assessment on an application by the father for a reduction. His Honour noted that if the father set aside a lump sum representing around 20% of the damages settlement, it would cover future child support assessments (which calculated out to around $40 per week per child). However, the mother made no application for a lump sum order. Significantly, Kay J stated:

> "The compensation package received by the husband was made up essentially of money to compensate for future economic loss. The nature of the compensation paid in this case is unknown because it was done by way of settlement. Whether it was based on actual economic loss or based on a table arrangement in accordance with the provisions of the *Workers' Compensation Act 1958* (Vic) is not clear. But essentially a workers' compensation payment is an economic loss payment, and without that economic loss these children could clearly have been expected to share in the bounty of their father as he earned his income on a weekly basis, and to have their child support paid.
>
> Rather than earning his income on a weekly basis the father has had it paid up front by way of compensation. He has utilised that money to acquire an equity in the farm property. The issues as I

perceive them are whether, in those circumstances, the application of the capital was a commitment necessary to enable him to support himself, and whether, having applied the money in that manner, an assessment based on an artificially created income which takes into account not only actual income but also deemed income for which he has already been compensated has resulted in an unjust and inequitable determination of the level of financial support".[70]

While a consideration of whether the nature of the payment is capitalised income, or simply an asset, may be helpful in some cases, it does not adequately deal with the difficulties facing the court. For example, consider the following three potential situations:

- a liable parent unable to find employment due to a lack of any real skills, and unlikely to ever obtain employment in the future, but who owns a home that is likely to realise around $110,000 (net of sale expenses) if sold. The home was received in a bequest after separation

- a liable parent unable to work in the future due to a back injury, for which compensation of $110,000 is received. The compensation money is to be applied to the purchase of a home, and

- a liable parent unlikely to work in the future (for legitimate reasons) who wins $110,000 in the lottery.

The better view may be that:

- if the liable parent is dissipating an asset through application to day-to-day expenses, as a matter of principle the children should be entitled to share in the standard of living of the parent (s 4(2)(d) of the Assessment Act), and

- if a liable parent is not dissipating an asset, but applying it to long-term use, such as the provision of a home, then the circumstances of both parties must be carefully considered. In this scenario, the future needs of the parties and the children, together with the assets and likely future income of the parties,

will be particularly relevant. This is the approach adopted in *Hallinan* v *Witynski*.[71]

Footnotes

61 *Hartnett* v *Baker* (1995) FLC ¶92-620 at pp 82,236–82,237.

62 *Prpic and Prpic* (1995) FLC ¶92-574 at p 81,688.

63 *Bolton and Bolton* (1992) FLC ¶92-309 per Cohen J at p 79,323.

64 *Dwyer and McGuire* (1993) FLC ¶92-420 per Lindenmayer J at p 80,328.

65 *Hartnett* v *Baker* (1995) FLC ¶92-620 per Mullane J at p 82,240.

66 *Reitsema* v *Reitsema* (1991) 15 FamLR 706.

67 *Bendeich and Bendeich* (1993) FLC ¶92-355.

68 *Hartnett* v *Baker* (1995) FLC ¶92-620.

69 *Harris* v *Harris* (1999) FLC ¶98-010.

70 Ibid, at p 95,330.

71 *Hallinan* v *Witynski* (1999) FLC ¶98-009.

¶21-170 Security as an alternative to lump sum orders

In some cases, the benefits of both periodic support payments and the security of a lump sum, may be achieved by orders requiring that a sum be deposited by the liable parent and held on trust for the purpose of meeting future child support liabilities as they accrue. This has become a relatively common practice in the Family Court and Federal Circuit Court.

Example

***R and R (No 1)* [2002] FMCAfam 153**

A good example of the common form of order is found in *R & R (No 1)*, where Bryant CFM included the following order:

> "That the Father forthwith pay to the Mother's solicitors, M H A the sum of $50,000.00 to be held on trust by them in the names of the Mother and Father as trustees upon trust to:
>
> (a) Firstly, to pay to the Child Support Agency on a monthly basis the amount due pursuant to Child Support Assessments created by the Child Support Agency in accordance with these Orders;
>
> (b) Unless otherwise ordered by a Court exercising jurisdiction under *Child Support (Assessment) Act 1989* as at 1 July 2007 disburse any monies then remaining:
>
> (i) firstly in payment of any outstanding fees to the Child Support Agency; and
>
> (ii) any balance then remaining to the Father".

Similar orders were made by Ryan FM in *C and G* [2002] FMCAfam 361.

The precise source of power for such orders remains unclear. However, s 141 provides for a number of general powers of the court, the relevant parts of which are to:

- order payment of a lump sum, whether in one amount or by instalments
- order that payment of an amount ordered to be paid be wholly or partly secured as the court specifies
- make an order imposing terms and conditions, and

- make any other order (whether or not of the same kind as those referred to in s 141(1)(a) to (m) (inclusive)) that the court considers appropriate.

¶21-180 Substitution orders (other than lump sum orders)

In *Szepietowski & Szepietowski*,[72] Kay J ordered that $2,400 per year of the child support assessment be substituted by the payment of education expenses, uniforms, books and travel by the husband. The wife did not appear at the hearing, and no analysis of the nature of the discretion was set out.

In *Hall & Rushton*,[73] a substitution order was made for children's clothing and the like, where the wife had agreed to a nil assessment but was in receipt of social security payments. Again, the court did not discuss the nature of the discretion.

Footnotes

72 *Szepietowski & Szepietowski* (1991) FLC ¶92-247.

73 *Hall & Rushton* (1991) FLC ¶92-249.

OBJECTIONS AND APPEALS

¶21-190 Objection rights

Most decisions made by the Child Support Agency (CSA) can be challenged in the objection process under Pt VII of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act).

Note

Objections may be lodged to the following types of decisions (s 80(1)):

- to register a registrable maintenance liability
- as to particulars entered in the child support register in relation to a registrable maintenance liability
- as to particulars varied in the child support register in relation to a registrable maintenance liability
- to delete an entry from the child support register in relation to a registrable maintenance liability
- to credit, under s 71, 71A or s 71C of the Registration and Collection Act, an amount received by the payee of a registrable maintenance liability, or a third party, against the liability of the payer of the liability to the Commonwealth
- to make an appealable refusal decision in relation to a registrable maintenance liability
- to make an appealable collection refusal decision in relation to a registrable maintenance liability and carer liability (as of 1 July 2018).
- in relation to the remission of a penalty under s 54(1) or s (2), or s 68 of the Registration and Collection Act
- to accept an application for administrative assessment under s 30(1) of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act)
- to refuse to accept an application for administrative assessment under s 30(2) of the Assessment Act
- as to the particulars of an administrative assessment

- to refuse under s 63AS(1) of the Assessment Act to accept an election made by a parent under s 63AC(1) of that Act
- to make a determination in relation to a parent under s 63AE(1) of the Assessment Act
- in relation to the remission of a penalty under s 64AH of the Assessment Act
- to terminate a child support agreement under s 80G(1)(d) or (e) of the Assessment Act
- to accept or to refuse to accept an agreement in relation to a child under s 92 or s 98U of the Assessment Act
- as to the particulars of a notional assessment, and
- to make or to refuse to make a determination under Pt 6A of the Assessment Act.

Section 80A of the Registration and Collection Act allows a carer entitled to child support or the liable parent to lodge an objection against a care percentage decision with the Registrar or Secretary.

When an objection is lodged, the objections officer must consider the decision afresh. The other person affected by the objection must be given a copy and an opportunity to respond. The objection should be decided within 60 days. In *Garnaut v DCSR*,[74] Spender J recorded:

> "49. … At the directions hearing on 6 December 2002, the Registrar conceded that an error of law had occurred in connection with the 24 October 2002 decision, namely, that the Pt 6B review had been conducted by way of an appeal and not by way of merit review…. The order of the Federal Court on 6 December 2002 was to set aside the decision of 24 October 2002 and to remit the matter to the Registrar to make a decision

according to law".

Caution

An objection must:

- be in writing (s 80(1) of the Registration and Collection Act), and
- "state or give fully and in detail the grounds relied on" (s 84, Registration and Collection Act).

In *Kness v Kness*,[75] Kay J found that a letter from a mother to the Child Support Agency (CSA) merely expressed her dissatisfaction with the outcome of the decision, but it was not possible to glean from the letter why she was dissatisfied.

Time limits on objections

The time limit for lodging an objection is 28 days from the time of service of the notice of decision on the person (s 81, Registration and Collection Act). Service may be effected by post (s 28A(1) of the *Acts Interpretation Act 1901* (Cth)). When service is effected by post, it is deemed to have been effected at the time the letter would ordinarily be delivered, unless the contrary is proved (s 29(1) of the *Acts Interpretation Act 1901*). Unless the contrary is proved, postal delivery within Australia is presumed to occur in four working days (s 160 of the *Evidence Act 1995* (Cth)).

If the objection is out of time, the objector may request an extension of time (s 82, Registration and Collection Act). If the extension of time is refused by the CSA, that extension decision may be reviewed by the Social Security Appeals Tribunal (see ¶21-200) (s 89(1), Registration and Collection Act).

Summary

- Objections have time limits.
- An objection application must set out the reasons for the objection.
- There is a level of formality in the objection process.

Footnotes

74 *Garnaut* v *DCSR* [2004] FCA 1100, Spender J at [49].

75 *Kness* v *Kness* (2000) FLC ¶98-013.

¶21-200 AAT reviews

Since 1 July 2015, child support decisions are reviewed by the Social Support and Child Support Division of the Administrative Appeals Tribunal (AAT).

From 1 January 2007 to 30 June 2015, child support decisions were reviewed by the Social Security Appeals Tribunal (SSAT).

In relation to reviews not made by the SSAT before 1 July 2015, applications will be dealt with by the AAT.

Child support care percentage decisions still undergo a two-stage review process. Previously an applicant would appeal to the SSAT for a review of a child support care percentage decision and then, if they were still dissatisfied, they would have appealed to the AAT.

Now applicants will apply for a first review by the AAT's Social Service & Child Support Division and, if they are dissatisfied with the outcome, they can apply for a second review in the AAT's General Division.

The relevant provisions pertaining to reviews to the AAT are contained in Pt 7A of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act).

Section 89 provides who may appeal. In substance, anyone who was entitled to be served with the objection decision or entitled to participate in the objection process is entitled to make application to the AAT to review the objection decision (an “AAT first review”). This section must be read with s 80 to properly determine who may apply.

Caution

The time limit for appeals to the AAT is 28 days (s 90(1)). Time can be extended under s 91(1). Appeals about extensions of time lie with the AAT: s 92.

The procedures of the AAT in processing a review application are set out in Div 3.

The Registrar must take reasonable steps to lodge with the AAT documents requested and referred to within the specified period provided by s 37(1) of the AAT Act (s 95C). The AAT may request the Registrar to provide information relevant to the AAT first review and the Registrar must comply with the request within 14 days (s 95G).

The AAT may request information from a person relevant to an AAT first review and the person must produce any such information or documents or answer questions (s 95H(1)). If the person fails to comply with the notice they have committed an offence (s 95H(2)).

The hearing of an AAT first review must be in private (s 95K).

Within 14 days after making a decision, the AAT must give written notice to the parties setting out the decision and either give reasons orally or give written reasons (s 95P).

An application may be made to the AAT for a second review in relation

to the following decisions by the AAT:

(a) a decision under s 92 to refuse an extension application

(b) a decision under s 43(1) of a care percentage decision

(c) a decision under s 95N(2) to make, or not make, a determination (s 96A).

If an application for a second review is made in relation to a decision under s 92 to refuse an extension application then the AAT must give written notice of receipt of the application to:

(a) the applicant

(b) the person who made the decision (the Registrar within the meaning of the *Child Support (Registration and Collection) Act 1988)*, and

(c) Any other person who is made a party to the review by the enactment that authorised the application (s 29AC of the *AAT Act 1975* and s 96B of the *Child Support (Registration and Collection) Act 1988*.

Appeals from the AAT with respect to most decisions lie to a court exercising jurisdiction under the Act, but only on a question of law (s 108).

Tip

The AAT produces a weekly Bulletin containing a list of recently published AAT decisions. Anyone interested in the decisions is able to subscribe to an email notification service at https://www.aat.gov.au/aat-alerts-archive/

¶21-210 Court appeals and applications

Court applications

There are a wide variety of court appeals and applications that can be made with respect to child support assessments and decisions. Applications may be made directly to the court with respect to the following issues:

- applications seeking urgent maintenance while waiting for an administrative assessment of child support (s 139 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act))

- applications with respect to paternity (s 106A and 107) and applications for recovery of child support paid as a result of mistaken paternity (s 143)

- applications for leave to seek a backdated departure for a period over 18 months up to seven years ago (s 112)

- departure applications from administrative assessments (under s 118) where
  - the Child Support Registrar has refused to determine the departure application because the issues are too complex (s 98E and 98R)
  - there is another application pending before the court and special circumstances exist to enable the court to determine both applications (s 116(1)(a)), and
  - the payer seeks to reduce a minimum administrative assessment (s 116(1)(c)), or

- applications to vary or discharge a child support agreement (s 95, 98 or s 136)

- applications with respect to lump sum and non-periodic child support (s 123 to 129)

- applications for an order staying (suspending) the operation of the Act, until the finalisation of objections, reviews or court proceedings (s 140 of the Assessment Act and s 111C of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act))

- applications under s 131(5) enabling a court to vary or revoke an order made under s 131 if that order was made because another order ceased to be in force under s 142, and then subsequently revives because of new s 142(1B) and (1C), and

- applications under s 142 which provides that an order can be made under the Child Support Assessment Act ceases to be in force in certain circumstances. Note s 142(1B) provides s 142(1) ceases to apply where a child support terminating event happens under s 12(4)(a)(i) because a person makes an election under s 151, and the liability to pay child support is under a child support agreement whose provisions are covered by s 95(2) or 95(3), and the person who makes the election under s 151 applies for an administrative assessment of child support before the liability under the agreement ends. Section 142(1C) confirms that the order is taken to revive at the time the person applies for an administrative assessment of child support.

Departure applications to the court

Access to the courts for departure applications is now limited by s 116 to cases that fall within the three exceptions:

- where the Child Support Agency (CSA) has determined that the issues in the application are too complex to be dealt with administratively, pursuant to s 98E or s 98R

- where there are existing proceedings before the court and it is appropriate for the child support issues to be litigated in the court, for example in conjunction with property proceedings, and

- where the payer seeks to pay less than the minimum rate of child support. This category is unlikely to be used as the court

application would represent many years' support at the minimum rate.

Most applications must be made administratively and reviewed by the Administrative Appeals Tribunal (AAT). Access to the courts is largely limited to appeals from decisions of the AAT (see below).

Caution

Generally court applications should not be instituted if there is an administrative alternative available. If court applications are instituted when there is an administrative alternative, it is likely that the court will dismiss the application and order the applicant to pay the respondent's costs.

The road to the courtroom will now be long for the average payer. It commences with a CSA assessment, followed by the Pt 6A departure application. After the "review" or "change of assessment" decision there are objection rights. If the objection does not resolve the issues, there will be an appeal to the AAT for a rehearing on a "non-adversarial" basis. Finally, a payer may apply to the court, but it will be an appeal on a question of law alone. The more ingenious will look for wormholes that lead to the court. The obvious options are:

- apply for a lump sum under s 124 of the Assessment Act — the court must first consider whether a departure is required (s 123 of the Assessment Act, and Hartnett v Baker).[76]

  "Argue that it is 'in the interest of the liable parent and the carer entitled to child support for the court to consider' making an order when there is another application pending before the court (s 116(1)(b), Assessment Act). This section no longer requires the applications to be heard at the same time, in deference to concerns of members of the FMC as to cases where the other proceedings settle, or where it is efficient to

be able to maintain a discrete child support list".

This section is unlikely to become a "free pass" straight to court. The common situations will include:

– applications for extension of the 18-month backdating limitation period

– pending property or spousal maintenance applications

– applications to vary or set aside agreements

– enforcement proceedings.

Time limits

As the legislation now limits the period that a change of assessment application can backdate a change to 18 months, the court has the authority to change an assessment for a period that is more than 18 months ago, as provided in s 111 and 112.

Proceedings pending before the CSA or the court do not operate to effect a stay on an order. A particular application must be made under s 111C of the Registration and Collection Act. Before a court will extend a period to backdated administrative assessments for more than 18 months, it must consider the matters set out in s 112(4) and it may review the matters under s 112(5). The court then makes an order specifying a period for which the court or CSA may change the assessment. The order does not require the CSA or the court to actually make a change for the specified period, it simply makes an enquiry into the period possible. The CSA has the same rights as parents to seek an administrative assessment for a period that is more than 18 months in the past.

Stays

The stay power is found in the Registration and Collection Act (s 111C), which gives a broad power to stay collection of child support when applications are pending before the registrar, AAT or a court. The registrar is able to make a "suspension determination" suspending payment to the payee in cases involving paternity

disputes and disputes as to whether the payee is a resident of Australia (s 79A to 79C of the Registration and Collection Act, see also *Peters & Peters & Ors* (2012) FLC ¶93-511 for the meaning of "resident of Australia").

Appeals from the AAT and departure prohibition orders

Appeals from the AAT lie to the Federal Circuit Court and the Family Court. Appeals from decisions of the registrar to make departure prohibition orders lie to the Federal Circuit Court and the Federal Court.

Since December 2008 Departure Prohibition Orders became easier to implement as the CSA began to use data matching technology provided by the Department of Immigration.

The power of the courts on appeals is set out in Pt VIII of the Registration and Collection Act.

The jurisdiction of courts is set out in s 104 of the Registration and Collection Act and includes the Family Court, Federal Circuit Court and state and territory courts of summary jurisdiction. All of the courts with jurisdiction under the Act have jurisdiction to hear appeals from the AAT.

LDME v *JMA* [2007] FMCAfam 712 is the first reported appeal from the SSAT in relation to child support.

The mother had been assessed to pay child support by the CSA and lodged an objection. The mother's objection was unsuccessful and she applied to the SSAT for a review of the CSA's decision. The SSAT decided that, pursuant to s 98S(3B) of the Assessment Act, it did not have jurisdiction to hear the matter as the appeal related to a child support period which was more than 18 months earlier. The mother appealed to the Federal Magistrates Court. On appeal, it was considered whether s 98S(3B) applied to the mother's review application and whether the SSAT had jurisdiction to hear and determine the review application. The Federal Magistrate found that, as the mother's change of assessment application and objection were made before 1 January 2007, s 98S(3B) did not apply. It was concluded that the SSAT had the jurisdiction and power to hear and

determine the review application. Accordingly, the matter was remitted back to the SSAT.

Importantly, the AAT has obligations to comply with the general principles of procedural fairness, which may form a proper basis for appeal.[77]

Summary

- The role of the court continues to be significant.
- Paternity issues are determined by courts.
- Substitution or lump sum orders are determined by courts.
- Urgent applications are determined by courts.
- Stay orders must be made by courts.

Footnotes

76 *Hartnett* v *Baker* (1995) FLC ¶92-620.

77 *PJ and Child Support Registrar (SSAT Appeal)* [2007] FMCAfam 829.

COURT-ORDERED MAINTENANCE

¶21-220 Children born before 1 October 1989

Maintenance for children born before 1 October 1989 (and any other children outside the ambit of the child support scheme) is covered by

Pt VII Div 7 of the *Family Law Act 1975* (Cth) (FLA). These provisions have no current application as given all persons born pre-1989 would have attained 18 years by 2007.

¶21-230 Children over 18

The power to make child maintenance orders continues even though a child has attained 18 years of age. Section 66L of the *Family Law Act 1975* (Cth) (FLA) provides:

> "66L(1) A court must not make a child maintenance order in relation to a child who is 18 or over unless the court is satisfied that the provision of the maintenance is necessary:
>
> (a) to enable the child to complete his or her education; or
>
> (b) because of a mental or physical disability of the child.
>
> The court may make such a child maintenance order, in relation to a child who is 17, to take effect when or after the child turns 18.
>
> (2) A court must not make a child maintenance order in relation to a child that extends beyond the day on which the child will turn 18 unless the court is satisfied that the provision of the maintenance beyond that day is necessary:
>
> (a) to enable the child to complete his or her education; or
>
> (b) because of a mental or physical disability of the child.
>
> (3) A child maintenance order in relation to a child stops being in force when the child turns 18 unless the order is expressed to continue in force after then".[78]

In *AR & AL*,[79] Walters FM considered whether HECS/HELP fees were "necessary" in the context of the legislation:

> "155. I accept that it may have been financially advantageous to the girls for their HECS fees to have been paid, and I accept that it would be a relief for them not to have a large liability when they complete their course. But the question is whether it is necessary

that their HECS fees be paid. Clearly, it is not".

However, "necessary" should be read as "reasonably necessary", as too stringent an interpretation would be inappropriate.

The need for adult child maintenance does not have to be present when the child attains 18 years, but can arise later.[80] However, the power to award adult child maintenance remains discretionary.[81] While the relationship of the child to the parent may be relevant, a warm filial relationship is not required.[82]

Note

An adult child maintenance order will cease to be in force if the circumstances that gave rise to the order cease, for example, the child ceases university (s 66VA of the FLA).

Footnotes

78 See *Paul & Paul* (2012) FLC ¶93-505 for a discussion of s 66L(1)(a) by the Full Court.

79 *AR & AL* [2004] FMCAfam 597 per Walters FM at [154]–[155].

80 *Re AM (Adult Child Maintenance)* [2006] FamCA 351.

81 *Tynan and Tynan* (1993) FLC ¶92-385.

82 *Cosgrove and Cosgrove* (1996) FLC ¶92-700.

¶21-240 Step-children

A parent can claim a step-child as a relevant dependent child. Section 5 of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act) provides that a relevant dependent child means a child or step-child of the parent if:

> "(a) the parent has at least shared care of the child or step-child during the relevant care period; and
>
> (b) either:
>
> (i) the child or step-child is under 18; or
>
> (ii) if the child or step-child is not under 18 — a child support terminating event has not happened under subsection 151D(1) in relation to the child; and
>
> (c) the child or step-child is not a member of a couple; and
>
> (d) in the case of a step-child:
>
> (i) an order is in force under section 66M of the *Family Law Act 1975* in relation to the parent and the step-child; or
>
> (ii) the parent has the duty, under section 124 of the *Family Court Act 1997* of Western Australia, of maintaining the step-child; and
>
> (e) in the case of a child — the parent is not assessed in respect of the costs of the child (except for the purposes of step 4 of the method statement in section 46)".

The power to impose the obligation is set out in s 66D of the *Family Law Act 1975* (Cth) (FLA), but without guidance as to when it should be imposed:

> "66D(1) The step-parent of a child has, subject to this Division, the duty of maintaining a child if, and only if, a court, by order under section 66M, determines that it is proper for the step-parent to have that duty.
>
> (2) Any duty of a step-parent to maintain a step-child:

(a) is a secondary duty subject to the primary duty of the parents of the child to maintain the child; and

(b) does not derogate from the primary duty of the parents to maintain the child".

In *DRP & AJL* [2004] FMCAfam 440, it was said that "the scheme of the step-parent provisions of the Family Law Act is to value relationships and continuity of support for children, even if the traditional biological connection is absent".

Caution

Where a step-parent has a child support obligation to biological children, the carer of the children must be joined in proceedings for step-child maintenance orders.[83]

Once the duty is imposed, a little more guidance is provided to assessing the extent of the duty. Section 66N of the FLA provides:

"66N In determining the financial contribution towards the financial support necessary for the maintenance of the child that should be made by a party to the proceedings who is a step-parent of the child, the court must take into account:

(a) the matters referred to in sections 60F, 66B, 66C, 66D and 66K; and

(b) the extent to which the primary duty of the parents to maintain the child is being, and can be fulfilled".

Footnotes

83 *Mulvena & Mulvena & Butler & Edwards* [1999] FamCA 280.

¶21-250 Overseas orders

There are special provisions for overseas orders in the *Child Support (Registration and Collection) Act 1988* and in Pt III, IIIB, IIIC and IV of the Family Law Regulations 1984 (Cth).

COLLECTION AND ENFORCEMENT

¶21-260 Collection by CSA or private collection

The provisions for child maintenance and child support obligations to be registered, and thereby become a debt to the Commonwealth (s 30, *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act)) were the first stage of Australia's child support scheme. These provisions were instituted in 1988, at a time when less than 30% of child maintenance was paid. The objects of the Registration and Collection Act are:

> "3(1) The principal objects of this Act are to ensure:
>
> (a) that children receive from their parents the financial support that the parents are liable to provide; and
>
> (b) that periodic amounts payable by parents towards the maintenance of their children are paid on a regular and timely basis; and
>
> (c) that Australia is in a position to give effect to its obligations under international agreements or arrangements relating to maintenance obligations arising from family relationship, parentage or marriage.
>
> (2) It is the intention of the Parliament that this Act shall be construed and administered, to the greatest extent consistent with the attainment of its objects, to limit interferences with the privacy

of persons".

There is no doubt that the Registration and Collection Act was a serious move by parliament to overcome the problem of non-payment of child maintenance and child support. Since its introduction payment rates have more than doubled.

The Child Support Agency (CSA) is obliged to collect debts owing to it except where the debt is not legally enforceable or it is uneconomic to pursue (s 103(c) of the *Public Governance, Performance and Accountability Act 2013* (Cth) and s 11 of the Public Governance, Performance and Accountability Rule (Recovery of Debts)(Cth)). The CSA maintains a register of debts that it has chosen not to pursue.

Since 1 January 2007 the payee parent with a registered maintenance liability has been able to bring court proceedings to recover debts owed by the payer to the CSA even while continuing to have ongoing liabilities collected by the CSA. Prior to 1 January 2007 this was not possible. If the CSA was responsible for collecting ongoing liabilities then debts were accrued to the Commonwealth and could not be enforced by individual parents.

A parent can seek a certificate under s 116 of the Registration and Collection Act to form evidence of the amount of arrears. Legal action can be taken under s 113(1) of the Registration and Collection Act.

The 2018 amendments to the *Child Support (Registration and Collection) Act 1988* (Cth) inserted various new definitions:

- ***Carer debt*** means an amount that is a debt due to the Commonwealth under s 69B.

- ***Carer liability*** means a liability to pay a debt that is due to the Commonwealth under s 69B.

- ***Child-support-related debt*** means the amount of penalty (if any) imposed under s 67 in respect of a child support debt or under s 64AF of the Child Support Assessment Act; or any costs ordered by a court to be paid to the Commonwealth in respect of an offence committed by a person against this Act or the Child Support Assessment Act; or any amount ordered by a court, upon

the conviction of a person for an offence against this Act or the Child Support Assessment Act, to be paid by the person to the Registrar.

- ***Deductible liability*** has the meaning given by s 43 (see the section on Administrative collection methods at ¶21-290 below).

- ***Payee*** in s 4(1) is expanded by inserting new subparagraph (iii) at the end of paragraph (a) so that in relation to a carer liability, payee means the person who is entitled to receive payment under the carer liability (see s 69B(3)). That is, if a payer of a registered maintenance liability has paid too much child support, they then become a payee of a carer liability and are entitled to receive repayment of the overpaid amounts.

- ***Payer***, in relation to a registrable maintenance liability, means the person who is liable to make payments under the liability. In relation to a deductible liability, the payer is the person who is liable to pay the liability.

- ***Relevant debt*** means a child support debt or a child-support-related debt or a carer debt.

- ***Relevant debtor*** means a person who is liable to pay a relevant debt.

- ***Weekly deduction rate*** means:

  (a) for an enforceable maintenance liability — the weekly rate of payment specified in the particulars of the entry in the Child Support Register in relation to the liability, or

  (b) for any other deductible liability — the weekly rate of payment specified in the notice given in relation to the liability under s 45.

¶21-270 Registration for collection

Sections 17 to 19 of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act) identify all of the maintenance liabilities that are registrable under the Act. Child support, and child and spousal maintenance obligations can be registered for collection.

Section 25 provides for applications to be made for the registration of a registrable maintenance liability. The details must be entered on the child support register (s 26). The liability first becomes enforceable on the day specified under s 28. However, arrears of up to three months (extending to nine months in exceptional circumstances) may be sought under s 28A.

The 2018 amendments to the Act expand circumstances when a liability will be a registrable maintenance liability. There will also be a registrable maintenance liability where the court has made an order under s 143(1)(a) of the Act (which overturns on appeal a declaration under s 106A of that Act), or in response to a declaration of s 107 of that Act that the payee should not be assessed in respect of the costs of the child because the payee is not a parent of the child. New s 17A(1)(c) provides that there will be a registrable maintenance liability where the court has made an order under s 143(1)(b).

Proceedings under s 143 of the CSA Act may be commenced by a child support payer (eg a payer of a liability to pay child support under s 17). Where the court has made an order under s 143 that amounts paid by the payer under the first liability should be recovered from the payee under the first liability (eg due to parentage findings), the court order to repay the overpaid amount could be registered under this section and collected by the Registrar. The payer under the first liability, therefore, becomes the payee under the second liability.

Pursuant to s 38, a payee may elect to end enforcement by the Child Support Agency (CSA). If the payer has a good payment history (which the CSA defines as six months), the CSA may elect to end enforcement under s 38B. If the payer does not make payments on time, the payee can again elect to have the debt enforced by the CSA under s 39 and 39A.

Child support is due and payable on the seventh day of the following

month (s 66). The payment periods can be adjusted to reflect the payer's pay cycle, if the payments are being deducted from salary or wages of a payer.

Where payments are not made on time, penalties are imposed. The CSA has power to remit penalties in limited circumstances. Penalties are retained by the CSA, and not paid to the payee.

Where debts are owing to more than one payee, the payees receive rateable proportions of the payment based on the amount each payee is owed (s 70).

Note the 2018 amendments repealed and replaced s 70(1)(a) and (b) for the purposes of apportioning the amount of a debt repayment between different payees in proportion to the amount of the debt owing in relation to each payee. New s 70(1)(a) and (b) provide for a person who owes two or more child support debts that relate to two or more enforceable maintenance liabilities with different payees, or two or more carer debts that relate to two or more carer liabilities with different payees.

¶21-280 Non-agency payments

Payments direct to payees may be offset against the liability if both the payee and payer intended the payment to be child support (s 71(1) of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act)). It is important to note the 2018 amendment of s 71(1), which provides subject to s 71D, if:

(a) Either:

(iv) the payee of an enforceable maintenance liability received from the payer an amount intended by both the payer and the payee to be paid in complete or partial satisfaction of an amount payable under the liability in relation to the child support enforcement period, or

(v) the payee of a carer liability receives from the payer an amount intended by both the payer and the payee to be paid in complete or partial satisfaction of an amount payable

under the liability, and

(b) the payer or the payee applies to the Registrar to have the amount received by the payee treated as having been paid to the Registrar,

the Registrar must, despite s 30 and 69B, credit the amount received by the payee against the amount payable under the liability.

Payments to third parties may also be credited if intended by both the payer and the payee to be child support (s 71A). Section 71A(1) provides for when a payer of an enforceable maintenance liability or carer liability pays a third party an amount intended as a debt repayment amount for the payee (rather than the Registrar collecting a debt repayment amount and passing this onto the payee). New s 71A(1) provides that subject to s 71D, if:

(a) the payer of an enforceable maintenance liability or carer liability pays a third party an amount that partially or completely satisfies a debt owed by the payee of the enforceable maintenance liability or carer liability, or the payer, or both the payee and payer

(b) the payer or the payee applies to the Registrar, in the manner specified by the Registrar, to have the amount, or part of the amount, received by the third party treated as having been paid to the Registrar, and

(c) the amount paid, or a part of the amount paid, was intended by both the payer and the payee to be paid in complete or partial satisfaction of an amount payable under the enforceable maintenance liability in relation to the child support enforcement period or the carer liability,

the Registrar must, despite s 30 and 69B, and in accordance with s 71A(2) and (3), credit the amount, or part of the amount, received by the third party against the amount payable under the enforceable maintenance liability or carer liability.

The note at the end of s 71A(1) signposts that s 16A provides for the

Registrar to specify the manner in which an application may be made.

Similarly, the Child Support Agency (CSA) may offset registered liabilities between the payer and payee (s 71AA). Section 71AA(1) provides for the Registrar to offset debts if:

(a) two persons each have a child support debt arising from a liability referred to in s 17 or 17A or a carer debt

(b) the Commonwealth would (apart from this section) be required for each debt, under s 69B(3) or s 76 to pay the amount paid by one of the persons to the other person, and

(c) for a debt that arose from a liability referred to in s 17 or for a carer debt, the liability provided for, or related to, child support for a child of the two persons.

For clarity, s 71AA(1)(a) covers any combination of child support debts and carer debts. For example, where a person would be entitled to receive child support payments under s 76 due to a child support debt but that person also owes a carer debt, those child support payments can be reduced for carer debt repayment purposes.

The 2018 amendments to the Act inserted new s 71AB, which provides for the reduction of child support or carer debts owed by one person in a child support case where that person would otherwise be entitled to be paid debt repayment amounts that were owed to them under a separate case. Section 71AB(1) provides that the section applies if:

(a) a person (the ***first person***) owes either a child support debt or a carer debt (the ***first debt***)

(b) the Registrar receives an amount (the ***repayment amount***) from another person that is owed by the other person and is intended by that person to be in partial or complete satisfaction of a child support debt or carer debt, and

(c) the Registrar would, apart from this section, be required under s 69B(3) or s 76 to pay the repayment amount to the first person.

Section 71AB(2) provides that the Registrar may, despite those provisions:

(a) credit the repayment amount against the amount payable under the first debt, and

(b) if, after the amount has been credited, the first debt has been paid in full, pay any excess to the first person.

In addition, s 72AB operates such that if a person has an unpaid carer debt in relation to a child, but is also receiving family tax benefit in relation to the child, deductions can be made from the person's family tax benefit to repay the unpaid carer debt.

Deductions can also be made from a person's veterans' pension or allowance (see s 72AC) or parental leave pay instalments (see s 72AD).

Pursuant to s 71C, payments of up to 30% of the liability may be made indirectly, even without the consent of the payee, if the payments are of the types set out in the Regulations. Regulation 5D of the Child Support (Registration and Collection) Regulations 1988 currently provides:

> "5D For paragraph 71C(2)(a) of the Act, specified payments are payments of the following kinds:
>
> (a) child care costs for the child who is the subject of the enforceable maintenance liability;
>
> (b) fees charged by a school or pre-school for that child;
>
> (ba) amounts payable for uniforms and books prescribed by a school or pre-school for that child;
>
> (c) fees for essential medical and dental services for that child;
>
> (d) the payee's share of amounts payable for rent or a security bond for the payee's home;
>
> (e) the payee's share of amounts payable for utilities, rates or

body corporate charges for the payee's home;

(f) the payee's share of repayments on a loan that financed the payee's home;

(g) costs to the payee of obtaining and running a motor vehicle, including repairs and standing costs".

An important limitation on non-agency payments is found at s 71C(3) of the Registration and Collection Act. This section prevents the registrar from crediting non-agency payments unless the payee has paid the balance of the child support when it becomes due and payable.

¶21-290 Administrative collection methods

Auto-withholding (administrative garnishees)

Under Pt IV of the *Child Support (Registration and Collection) Act 1988* (Registration and Collection Act), the registrar may require an employer to deduct the payments from the payer's wages or salary.

Where the payer of an enforceable maintenance liability is an employee, the registrar shall, as far as practicable, collect amounts due to the Commonwealth under or in relation to the liability by deduction from the salary or wages of the payer (s 43).

The 2018 amendments to the Act have substantially changed the scope of s 43.

New s 43 provides a general rule for the collection by automatic withholdings in the case of employees. Section 43(1) provides that s 43 applies (subject to s 43(3)) if the payer of an enforceable maintenance liability is an employee and any of the deductible liabilities set out in s 43(1) are due by the payer to the Commonwealth. These deductible liabilities are the payer's enforceable maintenance liability, a liability to pay a child-support-related debt or a carer liability. Therefore, employer withholdings would not apply to an employee who only has a carer liability or liability to pay back a child-support-related debt (and no ongoing child

support liability).

Section 43(2) provides that the Registrar must, as far as practicable, collect amounts due to the Commonwealth under or in relation to the deductible liability by deducting the amount from the salary or wages of the payer under this Part.

Section 43(3) provides that s 43(1) does not apply in relation to a payer's enforceable maintenance liability, or any other deductible liability if, under s 44, the particulars of the entry in the Child Support Register in relation to the payer's enforceable maintenance liability contain a statement that the employer withholding does not apply in relation to the enforceable maintenance liability. If the Register is silent and does not contain a statement that employer withholding does not apply in relation to the enforceable maintenance liability, employer withholding is to apply.

The provisions provide for protected earnings (s 46). It is an offence for an employer to discriminate against an employee because of child support (s 57).

Cases where employer withholding not applicable

Under s 44(1), if the payer of an enforceable maintenance liability elects that employer withholding is not to apply in relation to the liability and the Registrar is satisfied that the payer is likely to make timely payments to the Registrar under the liability, the Registrar must, within 28 days after receiving the election, vary the particulars of the entry in the Child Support Register in relation to the liability so that they contain a statement that employer withholding does not apply in relation to the liability. Sections 44(2) to (4) deal with similar situations.

It is worth noting that s 44(5) and (7) provide that the Registrar must vary the particulars of the entry in the Child Support Register in relation to the payer's enforceable maintenance liability so that they contain a statement that employer withholding applies in relation to the enforceable maintenance liability if:

(a) because of s 44(1) or (2) and 44(6), the particulars of the entry in the Child Support Register in relation to the payer's enforceable maintenance liability contain a statement that employer

withholding does not apply in relation to that liability, and

(b) the payer does not make timely payments to the Registrar under that liability or any of the payer's other deductible liabilities.

Therefore, if a payer elects not to have automatic withholdings apply but then fails to make timely payments in relation to either the child support liability or one of their other liability types, automatic withholdings may be applied at that point.

Attachment of debts

An effective method of debt collection for the Child Support Agency (CSA) is attachment of the payer's tax refund. This is available pursuant to s 72 of the Registration and Collection Act.

The CSA may also attach other debts or other money owing to the payer by issuing a notice to the debtor pursuant to s 72A of the Registration and Collection Act. The operation of the section is not limited to "debts" but extends to anyone (s 72A(1)):

> "(a) by whom money is due or accruing, or may become due, to a relevant debtor; or
>
> (b) who holds, or may subsequently hold, money for or on account of a relevant debtor; or
>
> (c) who holds, or may subsequently hold money on account of some other person for payment to a relevant debtor; or
>
> (d) who has authority from some other person to pay money to a relevant debtor".

Further provisions in s 72AA to 72B allow for collection from other sources, such as social security and veterans' pensions.

Departure prohibition orders

The registrar also has power to issue a "departure prohibition order" under s 72D of the Registration and Collection Act. This prevents a person from leaving the country. Payers who are the subject of a

departure prohibition order may appeal the decision of the registrar to issue the order to the Federal Circuit Court (s 72Q). There do not appear to have been any successful appeals from these orders. Presumably this is because the registrar has generally complied with the requirements of the section and taken all of the relevant considerations into account.

¶21-295 Overpayments

Backdated reductions

The 2018 amendments to the *Child Support (Registration and Collection) Act 1988* (Cth) repealed s 79 and replaced it with the new s 69B, which deals with repayments of overpayments to the payee.

Section 69B provides that backdated reductions to a child support assessment or other registered maintenance liability:

- that result in an overpayment, and
- for periods where the liability was collected by the Registrar,

are repayable by the payee to the Registrar and are a debt due by the payee to the Commonwealth (subject to certain exceptions under s 69B(2)).

Section 69B(1) provides that if the payee of a registered maintenance liability is paid an amount under s 76 or taken to have been paid an amount under s 76 because of s 71AA or 71AB and the payee was not entitled to be paid the amount, the amount is (subject to s 69B(2)) a debt due to the Commonwealth and repayable by the payee to the Registrar. The amount that the payee is not entitled to may have occurred due to a subsequent variation to the particulars of the entry in the Child Support Register in relation to the registered maintenance liability.

Section 69B(2) provides that an amount is not repayable by the payee, or a debt due, under s 69B(1) if:

(a) the payee was not entitled to be paid the amount because of a subsequent variation to particulars of the entry in the Child

Support Register in relation to the registered maintenance liability, and

(b) the variation was the result of a decision that the registered maintenance liability should never have existed (s 69B(2)(i)) or the payer of that liability ceasing to be a resident of Australia or a reciprocating jurisdiction (s 69B(2)(ii)).

Although these amounts are not a debt to the Commonwealth and would therefore not be recovered by the Registrar, the note at the end of s 69B(2) clarifies that an amount covered by s 69B(2)(i) may be recovered if a court makes an order under s 143 of the Child Support Assessment Act.

Section 69B(3) provides that the Registrar must pay any amount that is paid to the Registrar under s 69B(1) to the payer of the registered maintenance liability.

The note at the end of s 69B(3) clarifies that the payee referred to in this section becomes a payer of a carer debt (see the definitions of ***carer debt*** and ***payer*** in s 4(1)).

Section 69B(4) provides that a payee of a liability under s 69B(1) is limited to recovering a debt due in relation to the liability through court proceedings under s 113A.

The note at the end of s 69B(4) clarifies that the liability under s 69B(1) is a carer liability (as defined in s 4(1)).

¶21-300 Court enforcement

As the child support liability becomes a debt to the Commonwealth upon registration for collection, the Child Support Agency (CSA) may enforce the debt (and any penalties) in the courts utilising the usual court enforcement processes.

Payee enforcement

Payees have had concurrent enforcement powers since 1 January 2007. This overcomes the problems of payees being unable to enforce while the debt is registered for collection. The payee may now

enforce regardless of whether the debt is registered for collection by the CSA.

The scheme for concurrent enforcement is set out in s 113A of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act) which provides for payment direct to the payee or through the CSA. The section sets out the obligations as follows:

> "**113A Recovery of debts by payees**
>
> *Payee to notify Registrar of intention to institute a proceeding to recover debt*
>
> (1) A payee of a registered maintenance liability may sue for and recover a debt due in relation to the liability if the payee notifies the Registrar in writing of his or her intention to institute a proceeding to recover the debt:
>
> (a) at least 14 days before instituting the proceeding; or
>
> (b) in exceptional circumstances — within such shorter period as the court allows.

Note

For provisions relating to proceedings instituted under this section, see s 111F and 111G.

> *Payee to notify Registrar of orders made and payments received*
>
> (2) A payee of a registered maintenance liability who has instituted a proceeding in a court to recover a debt under subsection (1) must give notice to the Registrar, in the manner specified by the Registrar, of:
>
> (a) any orders (including orders as to costs) made by the court in relation to the payee and the debt due in relation

to the liability; and

(b) any payments received by the payee from the payer under any such order;

within 14 days of the order being made or the payment being received.

> **Note**
>
> Section 16A provides for the Registrar to specify the manner in which a notice may be given".

It is an offence to fail to comply with the obligations of s 113 (s 113A(3)).

These provisions are likely to result in an increase in the number of payee enforcement applications. The provisions do not appear to create any real difficulties. In specific cases, consideration may need to be given to the practical impact of orders, such as deciding whether the payment should be made through the CSA.

Setting aside transactions

Section 72C contains a specific power to set aside transactions entered into to defeat child support debts.[84]

It provides that the court may set aside the instrument or disposition, or restrain the making of the proposed instrument or disposition, if the court is satisfied that the instrument or disposition has been made, or is proposed to be made, to reduce or defeat the payer's ability:

(a) to pay child support, or

(b) to pay any debt under, or to meet, the enforceable maintenance liability or carer liability.

Caution

It is clearly essential that the other person involved in a transaction that may be set aside is served with the proceedings: see, for example, *M and T* [2005] FMCAfam 193.

Court enforcement

As the CSA uses the Federal Circuit Court for enforcement procedures, the Federal Circuit Court Rules are referred to in this section.

On enforcement proceedings, the court does not have power to reduce a child support liability, nor remit any penalties accrued. As Coker FM noted in *Child Support Agency and Von Borstel*:[85]

> "These proceedings are purely and simply an enforcement summons, that is, an inquiry into the father's financial circumstances and then an assessment of the ability he has to meet the arrears of child support in the manner in which the Child Support Agency proposes".

Rule 25B.05 of the Federal Circuit Court Rules 2001 (as applied in the Federal Circuit Court) provides that the division applies to family law and child support proceedings and notes that the division is a modified form of Ch 20 of the Family Law Rules.

The specific procedures for enforcement of a child support liability are set out in r 25B.09 of the Federal Circuit Court Rules:

(1) This rule applies to a person seeking to enforce payment of a child support liability that is not an order and is not taken to be an order.

(2) Before an enforcement order is made, the person must first obtain an order for payment of the amount owed by filing:

(a) an application in a case and an affidavit setting out the facts

relied on in support of the application, and

(b) if the payee is the Child Support Agency or is seeking to recover a liability under s 113A of the Registration Act — a certificate under s 116 of the Registration Act.

(3) A payee who seeks to recover a child support liability in his/her own name under s 113A of the Registration Act must attach to the affidavit filed with the application a copy of the copy notice, given to the Child Support Agency, of his/her intention to institute proceedings to recover the debt due.

Note 1

After the court has ordered payment of the amount owed, it may immediately make an enforcement order (see r 25B.11).

Note 2

A payee who is enforcing a child support liability must notify the Registrar in writing of his/her intention to institute proceedings to recover the debt due (see s 113A(1) of the Registration Act).

Once the debt is proved, the court has a wide variety of powers to enforce the payment. Rule 25B.11 provides for:

(a) an order for seizure and sale of real or personal property, including under an Enforcement Warrant (see Subdiv 25B.2.3)

(b) an order for the attachment of earnings and debts, including under a Third Party Debt Notice (see Subdiv 25B.2.4)

(c) an order for sequestration of property (see Subdiv 25B.2.5), and

(d) an order appointing a receiver (or a receiver and manager) (see Subdiv 25B.2.6).

> **Note**
>
> The court may imprison a person for failure to comply with an order (see s 112AD of the Family Law Act). Div 25B.1 sets out the relevant procedure.

A type of order commonly sought, although not specifically listed, is a charge over property (usually real property), which can be registered or support a caveat. If the payment is not made within a reasonable period the creditor can then move to have the property sold.

The discretion to enforce

There is a general discretion as to whether or not to enforce a judgment or decree when enforcement is pursuant to the *Family Law Act 1975* (Cth) (FLA) (s 105 and *Ramsey and Ramsey*).[86]

The nature of the discretion was considered in *Watson and Watson*[87] where Riethmuller FM said:

> "31. I am not convinced that the discretion to enforce is limited to protecting subsequent equitable rights or interests. I see no reason that the broad discretion in s 105 should be limited by equity's doctrines. If it were, *Thwaite's case* is difficult to rationalise. Rather the discretion would be exercised after consideration of the relevant facts and circumstances in the context of the legislative scheme.
>
> 32. I am satisfied that the discretion needs to be founded on conduct or events that occurred after the orders were made (for conduct prior to the order the appropriate course is to apply under

s 79A). As a result, delay may be the basis for the exercise of the discretion, analogous to laches being a basis for not exercising the discretion to grant equitable relief. However, delay, of itself, would rarely be sufficient, particularly if the delay is less than the limitation period for enforcement of judgments generally in the jurisdiction. Whilst there is no Commonwealth limitation period, the *Limitations of Actions Act 1958* (Vic) provides for a 15 year period on enforcement of judgments in the state courts: see s 5(4).

33. Significant weight must be given to the importance of litigants being able to enforce orders: *prima facie* orders should be enforced. If the discretion is to be exercised against enforcement, it appears to me that it would be important to clearly identify the facts or circumstances relied on".

In *Mathieson and Hamilton*,[88] Walters FM concluded that the so-called "12 months rule" no longer applies (if it ever did), and closely examined the applicable principles.

Penalties

Penalties arise if an incorrect estimate is lodged or if payment is late. Penalties are debts due to the Commonwealth and application to discharge arrears of penalties can be made to the Administrative Appeals Tribunal.

Footnotes

84 *DCSR and B* [2000] FMCAfam 32.

85 *Child Support Agency and Von Borstel* [2004] FMCAfam 265 (at [34]).

86 *Ramsey and Ramsey* (1983) FLC ¶91-301.

87 *Watson and Watson* [2006] FMCAfam 293 per Riethmuller FM at [31]–[33].

88 *Mathieson and Hamilton* [2007] FMCAfam 238 at [230].

WESTERN AUSTRALIA

¶21-310 Overview

When the child support scheme was first introduced it was applicable to most Australian children but was not able to be applied to those children residing in Western Australia who were classified as ex-nuptial children and the children with at least one parent residing in a non-reciprocating jurisdiction. This was because when the Commonwealth made laws relating to children it could only apply to ex-nuptial children if the states referred their powers in respect of children to the Commonwealth. Western Australia did not. The Western Australian Parliament retained its own powers to make laws about Western Australian children whose parents had never been married and this included the right to make child support laws.

¶21-320 Ex-nuptial cases

The Western Australian Parliament has adopted the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act). The *Child Support (Adoption of Laws) Amendment Act 2007* (WA) amended the *Child Support (Adoption of Laws) Act 1990* (WA) to adopt amendments made to the Registration and Collection Act by the *Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006* and the *Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reforms Consolidation and Other Measures) Act 2007*.

The amendments to the Registration and Collection Act made by the *Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act* have applied to all

cases involving Western Australian ex-nuptial children since 1 November 2007.

Certain further amendments have applied since 1 January 2007 as follows:

(a) the role of the Administrative Appeals Tribunal (AAT)

(b) the right of a payee to pursue court enforcement of a debt while still registered for collection by child support

(c) a court exercising the jurisdiction to hear an enforcement application made by a payee has the same powers as the CSA to obtain information in order to collect child support

(d) a court has powers to make orders staying a child support assessment or collection pending the determination of an objection application for review or appeal to a court, and

(e) an amount repayable by a payee to a payer under a parentage over payment order can be registered for collection.

Amendments to the Registration and Collection Act made by the *Families, Community Services and Indigenous Affairs Legislation Amendment (Child Support Reform Consolidation and Other Measures) Act 2007* apply to cases in Western Australia involving ex-nuptial children from 1 January 2007. Other amendments have applied to all cases from 22 June 2007 and they are:

(a) the allocation of stay order provisions within the Registration and Collection Act

(b) the provision for objections and accompanying documents to be sent to the other party, and

(c) the provision that any payment made in private payee enforcement proceedings must be made to the CSA.

In addition, employers meeting their obligations to hold money from a payer’s salary now includes payments made to independent

contractors, and there have been some changes to the secrecy provisions.

All other changes which came into effect on 1 January 2008 and 1 July 2008 have come into effect for cases involving ex-nuptial children.

Summary

- The status of a child is based on its residence.
- If a child changes residence from Western Australia, the child falls under the usual scheme.
- There is an increasing adoption of the CSA scheme.

INTERNATIONAL ASPECTS

¶21-330 Overview

Until July 2007 the Child Support (Assessment) (Overseas Related Maintenance Obligations) Regulations 2000 and the Child Support (Regulation and Collection) (Overseas Related Maintenance Obligations) Regulations 2000 had been in effect, but in July 2007 these Regulations were repealed. The aim was to have the necessary legislative provisions within the main child support legislation.

The history of Australia's management of overseas child and spouse maintenance really begins from 1 July 2000. Amendments were then made and Australia entered into three international maintenance agreements which addressed the increased internationality of child support collection and allowed for the Child Support Agency (CSA) to be responsible for the majority of international child support cases. The effect of repealing the regulations in July 2007 was to shift the

responsibility from the court process to the administrative process.

The CSA became Australia's central authority and if a paying parent resides in an overseas country with a reciprocating jurisdiction with Australia, the assessments issued override any pre-existing Australian order or any overseas assessment or order. It also simplifies matters in that if a paying parent leaves Australia and commences residing permanently in an overseas reciprocating jurisdiction, the assessment simply continues. There are some reciprocating jurisdictions that cannot accept administrative assessments and these have been specifically excluded for the purposes of the *Child Support (Assessment) Act 1989* (Cth) (Assessment Act). Section 30A of the Assessment Act deals with these jurisdictions.

It is established law that a court exercising family law jurisdiction cannot make child maintenance orders where the parents are eligible for an administrative assessment, except in cases involving an excluded or non-reciprocal jurisdiction. There are 80 reciprocating jurisdictions in place under a range of international arrangements. Where the paying parent resides in Australia, it is a matter for a judicial or administrative authority in the appropriate reciprocating jurisdiction to send the liability to the CSA for registration and enforcement and there is no involvement with an Australian court. These obligations, once registered, are treated by the CSA as if they were purely domestic obligations.

¶21-340 Australian paying parent in a reciprocating jurisdiction

The 80 reciprocating jurisdictions are set out in Sch 2 to the Child Support (Registration and Collection) Regulations 1988 (Cth) (Registration and Collection Regulations).

There are a number of different agreements and arrangements that have been entered into. There are 50 separate states in the United States, and while the United States may be a reciprocating jurisdiction, the actual number of government authorities that have to be dealt with is significantly greater than the 80.

¶21-350 Overseas parent living in Australia

The method of creating a liability in other jurisdictions may differ from the Australian administrative process. There may be international court orders as well as administrative processes to be considered. There may also be agreements producing a child support liability.

Before Australia accepts a liability it must confirm that the paying parent resides in Australia. An Application for Registration of an Overseas Liability by a paying parent can be made directly to the Child Support Agency (CSA) or through an overseas authority.

There are two types of liabilities that the CSA can register. One is for a child and the other is for a spouse. Both types can be a registrable maintenance liability under s 18A of the *Child Support (Registration and Collection) Act 1988* (Cth) (Registration and Collection Act). There can be periodic payments for child support, periodic payments for spouse support, a requirement to reimburse an overseas agency and the collection of arrears.

Once these liabilities become enforceable, the debt is due to the Commonwealth by a paying parent. If a paying parent applies to an Australian court to vary an overseas maintenance order or liability, the law to be applied is Australian law (see reg 36(4) of the Family Law Regulations 1984).

The CSA can also take into account overseas maintenance liabilities that are not those set out in s 18A of the Registration and Collection Act. These may be lump sums or non-periodic amounts (see s 28A of the Registration and Collection Act). These maintenance liabilities are not enforceable by the CSA, but they must be registered with the CSA prior to the receiving parent being able to proceed to seek access to Australian court enforcement.

Once the overseas liability is registered, the ordinary powers under the Registration and Collection Act for enforcement action can be taken administratively or through the courts. The administrative enforcement actions are:

- as a result of a negotiation and arrangement for payment, the

payer elects to pay child support directly

- the collection of child support from salary or wages
- the collection from social security pensions or benefits, or family tax benefit
- tax refund intercepts, or
- collections from third parties.

The CSA can litigate in reliance on the enforcement powers contained in s 113 of the Registration and Collection Act. A paying parent may seek a variation through the court process and if, after registration of a liability, the paying parent brings an application to the Family Court in Australia they do so under reg 36 of the Family Law Regulations. If the relevant jurisdiction is one mentioned in reg 38(1) of the Family Law Regulations, then the court's order is provisional.

It is not unusual for parents to argue that their salaries and circumstances in a different jurisdiction are very different from those that gave rise to the original liability. It is also not unusual for significant arrears to have accrued prior to a parent being located, so that an application might be made to discharge arrears or liability that has been in abeyance for many years.

The CSA disburses funds for overseas parents or agencies once a month, as it does with Australian parents. The United States does not normally recognise Australian courts' variations to liabilities originating in the United States. The practical impact of this is that the CSA can recognise and register the Australian order variation, but the United States will maintain the original liability and continue to seek enforcement of the original liability.

Currency fluctuations clearly have significance, as overseas liabilities are expressed in the currency of origin. The liability will be registered using the exchange rate on the day the Application for Registration was registered. The longer a case is registered in Australia, the greater the problems created by fluctuation of currency from the

country of origin can become.

¶21-360 Paying parent overseas

The reverse process applies when a paying parent leaves Australia. The Child Support International Team is located in Hobart. Subsequently, the Administrative Appeals Tribunal (AAT) Tasmanian Office hears most overseas applications for review. Applications for review of child support decisions lodged by overseas applicants can be heard by any of the AAT offices.

The Application for Registration would be made in the same way as for a domestic application. There is greater scrutiny on the eligibility of the parents and it may take some time before an effective collection process is put in place. With the exception of New Zealand, most reciprocating jurisdictions rely on court processes to recognise and enforce Australian liabilities. This creates a liability for the paying parent in the overseas jurisdiction and allows for collection and enforcement under their law.

Payments collected overseas are forwarded to the CSA for disbursement in Australia. Australian court liabilities can be varied by an Australian court or an overseas court. Australian assessments are subject to the normal processes under the Assessment Act. It is often difficult to locate an individual paying parent and establish his/her income. While the processes exist and are effective they are certainly much more complex. Again, currency fluctuations are of significance.

Part F — De facto relationships

DE FACTO RELATIONSHIPS

Editorial information

The commentary on de facto relationships was adapted from the detailed chapter in Wolters Kluwer *Australian Family Law and Practice*, written by Chris Othen.

OVERVIEW

¶22-000 Introduction

In November 2008, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* was given Royal Assent. A number of its provisions passed into law immediately, and the most significant changes, those legislating for de facto property rights under the *Family Law Act 1975*, came into force on 1 March 2009. De facto relationships between heterosexual and same sex couples are now covered by federal law, with the exception of Western Australia where the relevant powers have not been referred to the Commonwealth.

¶22-010 Summary of legal developments

Between 2003 and 2006, New South Wales, Queensland, Tasmania, Victoria and the territories referred their powers to make laws in relation to the property of de facto couples and their maintenance to the Commonwealth. Since 1 March 2009, these states and territories have been "participating jurisdictions" in the *Family Law Act 1975* (Cth) (FLA). South Australia referred its powers to the Commonwealth at a later date and has been a participating jurisdiction since 1 July 2010.

Western Australia is a "non-referring state", as it has not yet referred its powers to the Commonwealth. Western Australia had already legislated to bring de facto couples, including same sex couples, within its own Act (*Family Court Act 1997* (WA)).

The primary objective of the amendments to the FLA was to extend the financial settlement regime to parties in de facto relationships, whether they are in heterosexual or same sex relationships. This was achieved by conferring jurisdiction on certain courts, inserting a new Pt VIIIAB and amending Pt VIIIAA and VIIIB. Parties to a de facto relationship can seek declaratory relief in relation to their relationship and property. They can seek maintenance orders and property adjustment orders. The thresholds for maintenance are similar, and the property adjustment provision (s 90SM(3)) include contributions and "future needs" and other matters set out in s 79(4) for married couples. Superannuation splitting and financial agreements are now also available to de facto couples in all states and territories, except Western Australia.

MAKING A CLAIM

¶22-020 Date of separation

Under s 86(1) of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, de facto relationships which broke down on a final basis prior to 1 March 2009 (1 July 2010 in

relation to South Australia) are excluded from the federal system. Such relationships are dealt with under state and territory laws.

However, there is an exception to this. Pursuant to item 86A, parties are able to opt in to the federal legislation even if their date of separation was prior to 1 March 2009. The choice must be unconditional and must satisfy the following conditions:

- There must be no current order about property or maintenance.
- There must be no agreement between the parties enforceable under state law in existence.
- The parties must consent in writing.
- The parties must have received independent legal advice as to the advantages and disadvantages of making the choice.
- The parties must have received a signed statement confirming the advice from their lawyer.

The court can set aside the choice if it is satisfied that not to do so would be unjust or inequitable having regard to the circumstances in which the choice was made (item 86A(7)).

Item 86A also applies to financial agreements. Parties can choose to enter into a Pt VIIIAB financial agreement even if their date of separation was prior to 1 March 2009.

¶22-030 Limitation dates

Section 44 of the *Family Law Act 1975* (Cth), which previously dealt with limitations on the institution of matrimonial causes alone, now has subsections putting a bar on instituting certain de facto financial causes more than two years after separation.

Section 44(5) defines the standard application period as the two years following the end of a de facto relationship and provides that proceedings may only be instituted within that period in relation to applications for maintenance, property adjustment and declaration

orders. If a financial agreement between the parties to the de facto relationship is set aside or found to be invalid, then a time limit of 12 months after the financial agreement was set aside or found to be invalid applies to commence proceedings. If both parties consent, then the time limit does not apply. However, pursuant to s 44(5A), a power exists to dismiss the proceedings, despite consent, if satisfied that, because the consent was obtained by fraud, duress or unconscionable conduct, allowing the proceedings to continue would amount to a miscarriage of justice.

In *Madin & Palis* (2015) FLC ¶93-647, the appellant filed an application for a declaration under s 90RD of the *Family Law Act 1975* that a de facto relationship existed between the parties, commencing in March 2002 and ending on 9 January 2011. The trial judge dismissed the application on the basis it was filed outside the statutory time limit in s 44(5). The trial judge concluded that the statutory time limit expired on 8 January 2013. The appellant filed the initiating application on 9 January 2013. In allowing the appeal, the Full Court referred to *Susiatin* v *Minister for Immigration and Muticultural Affairs* (1998) 83 FCR 574 at [19]:

> "We are therefore prepared to conclude at least by analogy with Beaumont J's decision in Susiatin that in the present case the two year limitation period provided in s 44(5) of the Family Law Act commenced on 10 January 2011 and ended at midnight on 9 January 2013. The appellant's initiating application, having been filed on 9 January 2013, was therefore filed within time, and the primary judge was in error in holding that it was not."

Section 44(6) makes applications for leave to institute proceedings out of time possible if the court is satisfied that hardship would be caused to a child or to the party if that leave were not granted. It is anticipated that the court will follow existing authority on the question of determining if there is hardship and the exercise of discretion.

A further exception applies to applications for maintenance. If, at the end of the standard application period, a party is or was unable to support themselves without a means tested benefit, then leave may be granted to bring the maintenance proceedings out of time. For

detailed discussion by Murphy J on this section, see the case of *Montano & Kinross* (2014) FLC ¶93-623 where the de facto wife successfully appealed a trial judge's decision dismissing her application to bring an application under s 44(6).

¶22-040 Meaning of de facto relationship

Section 4(1) of the *Family Law Act 1975* (Cth) defines "de facto relationship" as having the meaning set out in s 4AA(1). A de facto relationship is defined in s 4AA(1) as:

> "A person is in a ***de facto relationship*** with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family (see subsection (6)); and
>
> (c) having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis."

Paragraph (b) is explained by s 4AA(6). Paragraph (c) has effect subject to s 4AA(5).

The circumstances considered under s 4AA(1)(c) may include any or all of the factors referred to in s 4AA(2):

> "(a) the duration of the relationship;
>
> (b) the nature and extent of their common residence;
>
> (c) whether a sexual relationship exists;
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
>
> (e) the ownership, use and acquisition of their property;
>
> (f) the degree of mutual commitment to a shared life;

(g) whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;

(h) the care and support of children;

(i) the reputation and public aspects of the relationship."

No particular finding of any circumstance is necessary in deciding the existence of a de facto relationship (s 4AA(3)). In determining whether a de facto relationship exists, a court is entitled to have regard to, and attach weight to, any matters that seem appropriate to the court in the circumstances of the case (s 4AA(4)). Under s 4AA(2)(g), the registration of a relationship under a state or territory relationship register is not definitive. The relationship must be within the definition of a de facto relationship for Commonwealth purposes and this definition may be narrower than state or territory requirements.

A de facto relationship can exist between two persons of different sexes or between two persons of the same sex, and can exist even if one person is legally married to someone else or in a concurrent de facto relationship (s 4AA(5)).

Section 4AA(1)(b) excludes persons who are related by family from the definition of a de facto relationship. Persons are related by family if one is the child of the other (including an adopted child), one is the descendant of the other or they have a common parent (s 4AA(6)).

The concept of what a de facto relationship is has been considered by the state courts in the context of state property adjustment legislation.

In *D v McA*,[1] Powell J indicated that the following factors should be assessed when determining whether a de facto relationship exists:

1. the duration of the relationship

2. the nature and extent of the common residence

3. whether or not a sexual relationship existed

4. the degree of financial interdependence, and any arrangements

for support between the parties

5. the ownership, use and acquisition of property
6. the procreation of children
7. the care and support of children
8. the performance of household duties
9. the degree of mutual commitment and mutual support, and
10. reputation and “public” aspects of the relationship.

Powell J’s approach was supported by Kearney J in *Simonis v Perpetual Trustee Co Limited*[2] and in *Davies v Sparkes*.[3] Support for the approach can be also found at s 4AA(2)–(4), where the legislation not only sets out a list of circumstances for the court to consider in determining whether a de facto relationship exists, but also confers a wide discretion on the court to give such weight as it may choose to whichever circumstances it thinks most relevant in the determination. It also directs that no particular circumstance is a necessary element to what makes a de facto relationship exist.

In *Moby & Schulter* (2010) FLC ¶93-447, the Family Court of Australia declared, after a detailed consideration of the evidence, that a de facto relationship existed between the parties for the purposes of bringing an application for property in the Family Court.

Subsequently, in *Jonah & White* (2012) FLC ¶93-522, the Full Court considered an appeal against the refusal of the trial judge to declare that the appellant had lived in a de facto relationship with the respondent pursuant to the provisions of s 90RD of the Act. An appeal against the trial judge’s refusal to declare that a de facto relationship existed was dismissed. The trial judge found that the parties had a long-standing relationship in which they had a consistent sexual relationship which was (with the exception of the respondent’s casual associations and his marriage) exclusive and such circumstances, taken with the respondent’s financial support of the appellant, “pointed

to the conclusion" that the relationship was a de facto one. However, the matters which pointed "to the opposite conclusion" included:

- Each of the parties kept and maintained a household distinct from the other.
- The evidence did not reveal any relationship, or any intended relationship, between the applicant and the respondent's children.
- The relationship was clandestine.
- Despite the regular monthly payments and the payment of $24,000 the parties maintained no joint bank account; engaged in no joint investments together; and acquired, or maintained, property in their own individual names.
- The parties rarely mixed with each other's friends.
- It was put to the respondent that the parties were in a long-term relationship to which the respondent replied "we were in a relationship; we were having an affair".
- There was very little time spent by the applicant and the respondent with the applicant's family.
- The parties did not have a "reputation" as a couple.

The existence of a child of the relationship does not mean of itself that a de facto relationship will be found to have existed (see *Ricci & Jones* [2011] FamCAFC 222). In *Clarence & Crisp* (2016) FLC ¶93-728, the primary issue was whether a de facto relationship existed between the parties at the time the child was conceived. The trial judge made parenting orders after finding the parties were in a de facto relationship at the time the child was conceived and that the respondent was a parent in accordance with s 60CC. The appellant was the child's birth mother and the respondent had supplied the egg. The Full Court dismissed the appeal after finding that the trial judge did not err in concluding that the parties were in a de facto relationship at the time the child was conceived.

In *Sinclair & Whittaker* (2013) FLC ¶93-551, the Full Court considered the approach on appeal to be taken on de facto cases and the standard of proof required. The Full Court stated that the decision about whether or not a de facto relationship existed was a matter for the court, and this meant that the perception of the parties about it at the time, while relevant, was not determinative.

In *Regan & Walsh* (2014) FLC ¶93-614, it was found that a de facto relationship never existed between the parties. The applicant had sought orders in relation to a de facto property settlement. The respondent claimed there was no de facto relationship between the parties. The parties acknowledged that they knew each other from 2005 and shared a residence on various occasions. However, the applicant purported that the parties were in a genuine domestic relationship whereas the respondent had the perspective that it was a "situation of friends with benefits", a situation of friends having a sexual relationship at different times rather than a relationship of a genuine domestic character. In dismissing the application, the Hon Coker J found that there were no arrangements or agreements between the parties for financial support, no joint ownership or acquisition of property between the parties, and little evidence to support a conclusion that there was a mutual commitment to a shared life. On the balance of probabilities, his Honour was not persuaded that the circumstances of the relationship were such as to lead to a finding that the parties were a couple living together on a genuine domestic basis.

In *Cadman & Hallett* (2014) FLC ¶93-603, the issue before the trial judge was when the relationship between the parties ended. The appellant contended that the relationship ended in January 2000. The respondent argued that the relationship ended in October 2010. The trial judge found that the appellant formed an intention to end the relationship in mid-2010 when he changed his will. In dismissing the appeal, the Full Court considered and applied the interpretation of the statute, and the relevant principles emerging from leading authorities, which determine a "de facto relationship" as a matter of law.

Footnotes

1 *D* v *McA* (1986) DFC ¶95-030.

2 *Simonis* v *Perpetual Trustee Co Limited* (1987) DFC ¶95-052.

3 *Davies* v *Sparkes* (1990) DFC ¶95-080.

¶22-050 Gateway requirements — Length of relationship, etc

Section 90SB of the *Family Law Act 1975* (Cth) (FLA) provides that a court may only make an order under s 90SE (maintenance), 90SG (urgent maintenance) or s 90SM (property), or a declaration under s 90SL (declaration of interests — property) in relation to a de facto relationship if the court is satisfied:

"(a) that the period, or the total of the periods, of the de facto relationship is at least 2 years; or

(b) that there is a child of the de facto relationship; or

(c) that:

(i) the party to the de facto relationship who applies for the order or declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c); and

(ii) a failure to make the order or declaration would result in serious injustice to the applicant; or

(d) that the relationship is or was registered under a prescribed law of a State or Territory."

The provision envisages the possibility of separation and the resumption of cohabitation in a de facto relationship. The notion of an aggregate of periods being sufficient is not new to the FLA. Section 50

of the FLA permits periods of cohabitation individually lasting no more than three months to be disregarded, and the periods of separation before and after cohabitation to be aggregated to make up the 12-month period of separation needed to prove the ground for divorce. Section 90SB has no restriction or guidance as to how long a period of separation needs to be before the periods of the de facto relationship either side of the separation are no longer to be treated as part of the same relationship. In *Dahl & Hamblin* (2011) FLC ¶93-480 the trial judge determined that two agreed periods could be aggregated to establish the two-year period required to make orders for alteration of property interests under Pt VIIIAB. The two periods in which it was agreed that the parties had been in a de facto relationship were between 1994 and 1998, and between April 2008 and October 2009. The two agreed periods were, thus, almost 10 years apart. On appeal, the Full Court considered whether the use of the word “periods” in s 90RD(2) and 90SB(a) meant that where there had been a breakdown in a relationship, the periods could be aggregated so that there was only one relationship between the parties and whether a period of the relationship which ended prior to the commencement of Pt VIIIAB could be included in the aggregation of the periods for the purpose of establishing the two-year period.

Section 205Z(2) requires the court, when deciding whether there has been a de facto relationship of two years’ duration, to consider whether there has been any break in the relationship, the length of the break and the extent of the breakdown of the relationship.

¶22-060 Geographical conditions

Certain geographical conditions must be met for a declaration to be made, for applications to be brought in relation to property and/or maintenance, and for parties to enter into financial agreements.

At the time a declaration of the existence of a de facto relationship is made, the court must be satisfied that one or both of the parties were ordinarily resident in a participating jurisdiction when the primary proceedings were commenced (s 90RG).

A declaration as to property rights or an order as to the alteration of

property interests requires the geographical requirements of s 90SK(1) to be met. A maintenance order can only be made if the court is satisfied that the geographical requirements of s 90SD (repetitive of s 90SK) are met (s 90SD(1)). The requirements are:

(a) one or both parties to a de facto relationship were ordinarily resident in a participating jurisdiction when the declaration or order was made, and

(b) that either:

(i) both parties were ordinarily resident in participating jurisdictions during at least a third of the relationship, or

(ii) the applicant made substantial contributions in participating jurisdictions in relation to the de facto relationship under s 90SM(4)(a) to (c).

The geographic pre-requisites for a de facto couple or prospective de facto couple to make a Pt VIIIAB financial agreement are less stringent. They can do so as long as the parties are ordinarily resident in a participating jurisdiction when they make the agreement (s 90UA). However, if the agreement is set aside, property or maintenance orders cannot be made unless the jurisdictional hurdles are met for those provisions.

Note

When advising a party who is a past or current resident of Western Australia, who has lived outside that state at any time during their relationship, or owns property outside that state, careful consideration of which jurisdiction to use is required.

Case study

In *Harriott & Arena* (2016) FLC ¶93-702, the Full Court found that the geographical requirement was satisfied as substantial contributions were made in New South Wales by the appellant. The appellant appealed against an order dismissing her application for property settlement orders arising out of a de facto marriage relationship. The trial judge dismissed the application because the appellant had not established that she made substantial contributions in relation to the de facto relationship in New South Wales. The parties met in 1999 when the appellant, who was living in Sydney, visited Vanuatu, where the respondent lived. The trial judge found the parties lived in a de facto relationship in Vanuatu from 2000 to 2011. Prior to moving to Vanuatu, the appellant sold her home in New South Wales and received $80,000 net. The respondent also had a property in New South Wales, which he still owned. The parties acquired a business in Vanuatu, and the appellant paid $30,000 from the proceeds of her home for her half share. The parties purchased a home in Vanuatu for $120,000 and the appellant contributed $30,000 from the proceeds of her home. The balance was funded by a joint mortgage. The appellant claimed the remaining $20,000 diminished during her time away. The appellant contended the relationship commenced in August 1999 and that the trial judge should have arrived at different finding. The appellant submitted the trial judge failed to appreciate the contributions made at the commencement of the relationship were made in New South Wales. The appellant further submitted that the trial judge erred in concluding that anything occurring prior to the start of the relationship could not be considered in determining whether the appellant made substantial contributions in relation to the relationship. The Full Court found that a contribution of the requisite kind was made in New South Wales and that it was substantial and satisfied the geographical requirement.

¶22-065 Section 90RD declarations

In many cases, all of the above hurdles are conceded by the other party to have been cleared. In such cases, the court can proceed to determine claims in property adjustment and maintenance in the usual way without the need for the court to make any preliminary declarations about those matters. Findings will be sufficient in those cases. The wording of s 90RD(1) makes this clear:

> "If:
>
> (a) An application is made for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL; and
>
> (b) A claim is made, in support of the application, that a de facto relationship existed between the applicant and another person;
>
> The Court may, for the purposes of those proceedings (the **primary proceedings**) declare that a de facto relationship existed, or never existed, between those 2 persons."

In cases where the existence of a de facto relationship is the subject of dispute, therefore, the court can make a declaration that it did or did not exist. Such arguments are regularly heard as preliminary questions by the court.

Where any of the preliminary requirements are asserted not to have been met to permit a claim to proceed (see ¶22-050–¶22-060), a party can seek various declarations in aid of it as part of the declaration that a de facto relationship did or did not exist. In other words, in such cases, even if the fact of a de facto relationship having existed is conceded, one must still seek that declaration in order for the court to be able to make declarations about related matters.

Specifically, the court can make the following supplementary declarations (s 90RD(2)):

1. the period, or periods, of the relationship for the purposes of determining whether the relationship lasted not less than two years

2. whether there is a child of the de facto relationship

3. whether one of the parties to the de facto relationship made substantial contributions of a kind mentioned in paragraph 90SM(4)(a), (b) or (c)

4. when the de facto relationship ended, and

5. where each of the parties of the de facto relationship was ordinarily resident during the de facto relationship.

His Honour Justice Watts, in *Lee & Hutton* [2013] FamCA 745, considered s 90RD in some depth, where the applicant sought declarations that the de facto relationship (the existence of which was conceded) lasted more than two years, that there is a child of the de facto relationship (albeit both were foetuses which had miscarried and been aborted respectively during the course of the relationship), and that she had made substantial contributions.

His Honour found the relationship lasted less than two years.

His Honour determined that for an applicant to qualify for relief because there is a child of the relationship, the child had to be alive at the time of application and hearing, and found that unborn children were not children for the purposes of s 90SB.

His Honour accepted that substantial contributions had been made by the applicant in her attempts to have a family with the respondent (the two foetuses mentioned above). While this decision was appealed, the appeal was subsequently withdrawn as the parties resolved their differences privately. No doubt the question of whether attempting to have children is a contribution to the welfare of the family made up of the parties, if it arises again, will be hotly contested. His Honour did not find that such a contribution generally speaking would be considered substantial, but was satisfied that it was on the facts of the case.

The final conclusion of importance of the trial judge was that while the court did not appear to have the power to make a declaration that a failure to permit an applicant to proceed with a case where substantial contributions were made amounted to a serious injustice, the court could make a finding that this was so (and in this case, he did).

In *Delamarre & Asprey* (2014) FLC ¶93-606, the Full Court considered, where the trial judge's conclusion that the de facto relationship had commenced on a certain date was found to be an error, whether it was necessary in all cases for a s 90RD declaration to state the precise period of the relationship. While in some cases it would be required to establish jurisdiction (if the length of the relationship was said to be less than two years by one party and there were no children of the de facto relationship, for example) it was held that it was not required in all cases.

All s 90RD declarations have the effect of a judgment of the court (s 90RE). In addition to the usual rights of appeal, s 90RH permits the declaration to be varied or set aside if the court is satisfied that:

1. a fact or circumstance has arisen that has not previously been disclosed to the court, and

2. the affected person did not know about it at the time the application for a declaration was made.

While the setting aside of the declaration does not affect the validity of anything done while the declaration was in force (s 90RH(2)), the court has the power (at s 90RH(3)) to make such orders as it considers just and equitable, including the transfer of property, "for the purpose of placing as far as practicable any person affected by the setting aside of the declaration in the same position as that person would have been in if the declaration had not been made".

Perhaps unsurprisingly, there are no reported decisions on s 90RH as yet.

PROPERTY SETTLEMENT

¶22-070 Overview

The powers of the Family Court to make orders by way of property settlement have applied from 1 March 2009 to all de facto couples who separate on or after that date and who meet the various

jurisdictional and qualifying conditions set out above, with the exception of de facto couples in South Australia where the powers have applied from 1 July 2010. The result is near uniform law across Australia (the *Family Court Act 1997* (WA) is for all intents and purposes identical to the *Family Law Act 1975* (Cth)).

As the property settlement provisions in Pt VIIIAB are primarily identical to their equivalents in Pt VIII, existing principles in family law are applied. The main differences are:

1. The requirement to satisfy jurisdictional hurdles including geographic jurisdiction and a gateway requirement such as a relationship of two years.

2. The parties must be separated to apply for property or spousal maintenance, unlike married couples, eg *Stanford & Stanford* (2012) FLC ¶93-518.

A declaration as to the existing rights of each party to a de facto relationship after the breakdown of the relationship can be made under s 90SL, which is similar to s 78(1) for legally married couples. Property interests can be altered under s 90SM, which is slightly differently worded to s 79. Section 90SM(4)(a), like s 79(4)(a), requires the court to take into account financial contributions, but is worded more clearly.

Under s 90SM(10), creditors are entitled to become parties to the proceedings if the creditor may not be able to recover their debt if the order were made (similar to s 79(10)).

The rights of the trustee of a bankrupt spouse and a bankrupt's de facto spouse are similar to those in relation to a legally married bankrupt (s 90SQ, 90SR, 90SS(6)–(11)).

Property orders may be set aside in similar ways to those under s 79A. Section 79A(1) is reproduced in s 90SN(1).

The duty to end financial relationships in s 81 is reproduced in s 90ST, save that proceedings under s 78 or proceedings with respect to maintenance payable during the subsistence of a marriage (which are irrelevant to de facto financial causes) are not excluded.

Below is a summary of the operative property settlement sections in both Pt VIII and VIIIAB. As well as the text of the various sections being virtually identical, they are in the same order, with the exception of the proceeds of crime provisions, which have been given their own separate division in Pt VIIIAB, Div 5.

Part VIII	**Description**	**Part VIIIAB**
s 75(2)	Maintenance factors or third step of property adjustment	s 90SF(3)
s 78	Declarations of interests in property	s 90SL
s 79	Alteration of property interests	s 90SM
s 79A	Setting aside property adjustment orders	s 90SN
s 79B–79E	Proceeds of crime provisions	s 90VA–90VD
s 79F	Notifying third parties	s 90SO
s 79G	Notifying bankruptcy trustee	s 90SP
s 79H	Notifying court about bankruptcy	s 90SQ
s 79J	Notifying non-bankrupt spouse of bankruptcy	s 90SR
s 80	General powers of court	s 90SS
s 81	Duty to end financial relations	s 90ST

Case study

In *Chancellor & McCoy* (2016) FLC ¶93-752, the trial judge referred to the facts of *Fielding & Nichol* (2014) FLC ¶93-617, and also the analysis of the case law since *Stanford & Stanford* (2012) FLC ¶93-518 and *Bevan & Bevan* (2013) FLC ¶93-545

which Thackray CJ undertook. In this case, the Full Court dismissed an appeal by the appellant against orders dismissing the appellant's application for alteration of property interests after the trial judge concluded that it was not "just and equitable" to make any order for property settlement. The appellant and the respondent lived in a same-sex de facto marriage for 27 years and kept their financial affairs almost entirely separate. By the time they separated, the respondent's assets and superannuation were worth more than double those of the appellant.

Note

For detailed commentary on property settlement, see Chapter 13.

MAINTENANCE

¶22-160 Overview

De facto couples who separate on or after 1 March 2009 (or 1 July 2010 in relation to couples in South Australia), and who meet the various jurisdictional and qualifying conditions set out above, have the same rights to maintenance as married couples under the *Family Law Act 1975* (Cth). The provisions in Pt VIIIAB, which relate to de facto couples, are very similar to those in Pt VIII, which deal with parties to a marriage.

Section 90SE is similarly worded to s 74 with respect to the ability of the court to make maintenance orders. Section 72, which deals with the right of a spouse to maintenance in a legally married relationship, is not reproduced exactly in s 90SF. The s 75(2) factors are largely reproduced in s 90SF(3), save that the letters are continuous. The extra provisions of s 75(2)(naa) and (q) are replicated in s 90SF(3)(o)

and (s).

An order for lump sum maintenance must specify that the purpose or one of the purposes of the payment is to make provision for maintenance, express the order to be one to which s 90SH applies and specify the portion which is attributable to maintenance.

Maintenance orders can be varied under s 90SI in a similar manner as for legally married couples under s 83.

Below is a summary of the operative maintenance sections in both Pt VIII and VIIIAB.

Part VIII	**Description**	**Part VIIIAB**
s 72	Right to maintenance	s 90SF(1)
s 74	Power to order maintenance	s 90SE
s 75(2)	Factors to be taken into account	s 90SF(3)
s 77	Urgent maintenance	s 90SG
s 77A	Specification in orders	s 90SH
s 82	Cessation of orders	s 90SJ
s 83	Modification of orders	s 90SI

Section 90SF(3), which relates to maintenance applications, repeats the s 75(2) factors. A comparison of s 75(2) and 90SF(3) is in the table below.

Issue	**s 75(2)**	**s 90SF(3)**
Age and state of health	(a)	(a)
Income, property, earning capacity, etc	(b)	(b)
Care of child of relationship under 18	(c)	(c)
Commitment to support self and those the party has duty to maintain	(d)	(d)

Responsibility to support others	(e)	(e)
Eligibility for pension, allowance, superannuation, etc	(f)	(f)
Standard of living	(g)	(g)
Education or training	(h)	(h)
Effect on creditor	(ha)	(i)
Contribution to financial position of the other	(j)	(j)
Duration of relationship and effect on earning capacity	(k)	(k)
Need to protect parent role	(l)	(l)
Financial circumstances of cohabitation with another	(m)	(m)
Terms of order proposed or made	(n), s 79	(n), s 90SM
Child support	(na)	(q)
Terms of order or declaration made or proposed under Pt VIIIAB	(naa)	(o)
Any other fact or circumstance which justice requires to be taken into account	(o)	(r)
Terms of any Pt VIIIA financial agreement	(p)	(t)
Terms of order or declaration made or proposed to be made under Pt VIII	–	(p)
Terms of Pt VIIIAB financial agreement	(q)	(s)

Note

For detailed commentary on maintenance, see Chapter 14.

FINANCIAL AGREEMENTS

¶22-240 Overview

Since 1 March 2009 (1 July 2010 in relation to South Australia), parties have no longer been able to enter into binding pre-separation agreements under state legislation anywhere in Australia, apart from Western Australia.

Part VIIIA, which deals with financial agreements for legally married couples, is largely reproduced in Div 4 of Pt VIIIB of the *Family Law Act 1975* (Cth) (FLA), which deals with financial agreements for de facto couples.

Sections 90UB, 90UC and 90UD are similar to s 90B, 90C and 90D respectively. These sections provide that people contemplating a de facto relationship or parties or former parties to a de facto relationship may make a Pt VIIIAB financial agreement with one or more other people. The main differences are:

1. The matters which can be dealt with under the agreement are different. Part VIIIAB agreements cannot deal with property or financial resources acquired after the separation or with “other matters”.

2. The effect in the event of a bankruptcy appears to be different (s 90SA). There is no comparable provision in Pt VIIIA.

3. The consequences if the agreement is set aside. See ¶20-240.

A financial agreement made after the breakdown of the relationship may terminate a written agreement made previously under Pt VIIIAB only if all of the parties to the previous agreement are parties to the new agreement (s 90UD(4)). If not, a termination agreement must be

made by the parties to the previous agreement and a separate agreement as to what occurs after the breakdown of the relationship must be made between the other parties.

As with s 90B and 90C Pt VIIIA financial agreements, a separation declaration is needed for certain provisions of a financial agreement to take effect (s 90UF).

Section 90UJ(1) reproduces s 90G(1) which sets out when financial agreements under Pt VIIIA are binding. A significant difference is that a Pt VIIIAB financial agreement ceases to be binding if, after making the agreement, the parties to the agreement marry each other (s 90UJ(3)).

Section 90UK reproduces s 90H. An agreement continues to be binding on the personal representative of a party who is deceased.

Grounds for setting aside a financial agreement under Pt VIIIAB are similar to those under Pt VIIIA and are reproduced in s 90UM.

If the parties enter into a state and/or territory agreement under the law of a non-referring state (Western Australia), s 90UE allows it to be treated as a financial agreement and operates to transfer jurisdiction over matters arising from the agreement to the Family Court in the event the parties can establish a geographical connection to a referring state.

A comparison of Pt VIIIA and VIIIAB is in the table below.

Part VIII	**Description**	**Part VIIIAB**
s 90A	Definitions	None
None	Geographical requirement	s 90UA
s 90B	Pre-relationship agreement	s 90UB
s 90C	During relationship but prior to separation	s 90UC
s 90C	During marriage but after separation	None
None	After separation of de facto relationship	s 90UD

s 90D	After divorce	None
None	How state agreements become financial agreements	s 90UE
s 90DA	Separation declarations	s 90UF
s 90DB	When certain clauses come into effect	s 90UG
s 90E	Requirements for maintenance provision	s 90UH
s 90F	Income tested benefit exception	s 90UI
s 90G(1)	What makes agreements binding	s 90UJ(1)
s 90H	Effect of death	s 90UK
s 90J	Termination of agreements	s 90UL
s 90K	Setting aside agreements	s 90UM
s 90KA	Validity and enforceability	s 90UN

Items 87 and 88 of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* deem existing referring state and territory agreements to be Pt VIIIAB financial agreements from 1 March 2009 (1 July 2010 in the case of South Australia), if:

- the agreement deals with how the property and/or financial resources of the parties are to be divided in the event the relationship breaks down, or the maintenance of either of them
- the agreement is in writing, and made under a “preserved law”
- as a result of entering into the agreement, the state court would have been unable to make orders about the matters contained in the agreement, and
- the agreement was in force and the parties had not separated or married as at 1 March 2009.

Provided the state agreement has been drafted in accordance with

state law sufficient to make it binding in the state court, then it will be converted.

The result of the conversion is that the state agreement is treated as a Pt VIIIAB financial agreement, and any application about it needs to be made under the FLA and not under the state legislation.

There is an additional ground for setting aside converted state financial agreements only. Section 90UM(1)(k) of the FLA permits such agreements to be set aside if the court is satisfied as to the matters in s 90UM(5). That section provides that if at least one spouse party to the agreement did not receive independent legal advice about the effect of the agreement on their rights, or as to the advantages and disadvantages of them entering into it, or there is no signed statement by a lawyer for at least one of the parties attached to the agreement confirming the advice was given, and it would be unjust or inequitable not to set the agreement aside, then the court may set it aside.

This does not affect:

- termination agreements entered into before 1 March 2009 (1 July 2010 in South Australia), and
- termination agreements entered into after 1 March 2009, but where the parties separated prior to 1 March 2009 (1 July 2010 in South Australia).

In those cases, the state laws will continue to apply, including any applications to set aside the agreement.

Note

For detailed commentary on financial agreements, see Chapter 20.

SUPERANNUATION

¶22-330 Overview

Part VIIIB extends to de facto couples and superannuation splitting is available to the court when making orders under s 90SM of the *Family Law Act 1975* as much as under s 79.

Rather than enact a whole new Part dealing with de facto superannuation splitting, amendments were made to Pt VIIIB to include de facto relationships. Section 90MA, which describes the objects of Pt VIIIB, has been amended to extend its scope to include the allocation of property interests of parties to a de facto relationship as well as to a marriage. Section 90MC has been extended so that the meaning of “property” in the relevant de facto financial cause, as well as the relevant matrimonial cause, includes the superannuation entitlements of a party. Section 90MD has been amended so that “spouse” means a party to a de facto relationship as well as to a marriage. Section 90MHA is similarly worded to s 90MH and allows de facto financial agreements to include superannuation provisions.

The separation declaration provisions in relation to superannuation are more complex than for legally married couples. Section 90MP(10) sets out what will occur if one of the parties dies.

The parties can be separated if they were previously in a de facto relationship even if:

(a) their cohabitation was brought to an end by the action or conduct of only one of them

(b) they have continued to reside in the same residence, or

(c) either of them has rendered household services to the other (s 90MP(11)).

De facto couples can resume cohabitation for a period of up to three months (s 90MP(12)).

Interestingly, s 90MA and 90RC(1)(c) use the word “allocated” rather

than the terminology of Pt VIIIB which is to “split” or “flag” a superannuation interest.

> **Note**
>
> For detailed commentary on superannuation, see Chapter 19.

Part G — Court process, evidence and costs

EVIDENCE

Editorial information

Written by Genevieve Dee

¶23-000 Introduction

Evidence in the Family Court of Australia (FCA) is governed primarily by Pt 11 of the *Family Law Act 1975* (Cth) (FLA) and Ch 15 of the Family Law Rules 2004 (Cth). Evidence in the Federal Circuit Court of

Australia (FCC) is governed primarily by the provisions of the FLA and Pt 15 of the Federal Circuit Court Rules 2001. Evidence in the FCA and FCC is also subject to the terms of the *Evidence Act 1995* (Cth) (EA) where the provisions of the EA do not conflict with the provisions of the FLA. The challenge for practitioners when preparing their matters is to ensure they are aware of all the relevant provisions which apply to evidence which is to be presented in either the FCA or the FCC, and the way in which the applicable Rules of Court interact with the provisions of both the FLA and the EA.

It is also imperative that practitioners are aware of any new Practice Directions issued by the court which governs how evidence is to be presented. For example, Practice Direction No 2 issued by the Federal Circuit Court and which commenced on 1 January 2018, and is discussed in greater detail later in this chapter, governs how evidence is to be presented in interim proceedings, in that court.

¶23-010 Admissibility

Both the Family Law Rules 2004 (Cth) (FLR) and the Federal Circuit Court Rules 2001 (Cth) (FCCR) require evidence presented to the court to be relevant to the matters in dispute in the proceedings. Section 56 of the *Evidence Act 1995* (Cth) (EA) provides that except as otherwise provided for in that Act, evidence which is relevant to an issue in dispute is admissible in the proceeding. Generally, evidence that is not relevant to the proceeding is not admissible (s 56(2), EA).

The term “relevant evidence” is defined in s 55(1) of the EA as evidence that, if it were accepted, could rationally affect, either directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding. Section 55(2) goes on to provide that evidence will not be considered irrelevant only because it relates only to:

- the credibility of a witness
- the admissibility of other evidence, or
- a failure to adduce evidence.

¶23-020 Client legal privilege

Generally, evidence will not be adduced if, after an objection by a client, the court finds adducing the evidence would result in disclosure of:

- a confidential communication made between the client and a lawyer
- a confidential communication made between two or more lawyers acting for the client, or
- the contents of a confidential document prepared by the client, lawyer or another person

for the dominant purpose of the lawyer (or one or more of the lawyers) providing legal advice to the client (s 118, EA).

Further, s 119 of the EA provides evidence will not be adduced if the court finds the evidence would disclose a confidential communication between the client and another person, or between a lawyer acting for the client and another person, or the contents of a confidential document prepared for the proceedings. These restrictions also apply for self-represented parties and confidential communications between the party and other persons, or confidential documents prepared for the proceedings (s 120, EA).

Rule 13.12 of the FLR provides that, subject to r 15.55 in relation to the mandatory disclosure of an expert's report, a party must disclose if requested, but need not produce, a document for which there is a claim for privilege from disclosure; or a copy of a document already disclosed if it has not been subsequently amended.

If a party to a proceeding claims privilege in respect of a document or claims they are unable to produce a document and the claim is challenged by another party, then within seven days of receiving notice of the challenge, the party claiming privilege must file an affidavit particularising the details of their claim (r 13.13, FLR). Any dispute about disclosure can then be determined by way of an application filed pursuant to r 13.18 and 13.22, FLR (r 13.13, FLR).

Non-compliance with r 13.12 as to disclosure may result in the party being guilty of contempt, ordered to pay costs, or the court staying or dismissing all or part of the party's case (r 13.14, FLR). In addition, r 13.14(a)(i) provides where the rules as to disclosure have not been complied with, a party must not offer the document, or evidence of its contents, without the other party's consent or leave of the court. In the FCC, if an objection is made to a claim of privilege from inspection or production, the court will inspect the document to assess the claim's validity (r 14.05(1)–(2), FCCR).

¶23-030 Loss of client legal privilege

No express provision in the EA, FLR or FCCR prevents a party from adducing evidence, (with the consent of a party or client) which would otherwise be subject to a claim of legal privilege. Further, s 122(2) provides that where a client has acted in a way that is inconsistent with maintaining legal privilege under s 118, 119 and 120 of the EA, that evidence may be adduced, subject to the terms of s 122(5) discussed below.

A client or party to a proceedings is taken to have acted in a way which is inconsistent with maintaining legal privilege where they:

- knowingly and voluntarily disclose the substance of the evidence to another person, or

- the substance of the evidence has been disclosed with the express or implied consent of the client or the party (s 122(3)(a) and (b), EA).

Section 122(5) of the EA details the circumstances where a disclosure by a client or party is not inconsistent with maintaining legal privilege. Those circumstances include where the disclosure was made:

> "(a)(i) in the course of making a confidential communication or preparing a confidential document; or
>
> (a)(ii) as a result of duress or deception; or

(a)(iii) under compulsion of law; or

(b) by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person;

(c) to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court".

Further, s 122(6) provides that nothing in Div 1 of Pt 3.10 of the EA prevents the adducing of evidence of a document a witness has used to try and revive their memory about a fact or opinion or has been used in accordance with s 32 or s 33 of the EA.[1]

Client legal privilege can be waived expressly with:

- the consent of the party or client entitled to claim the privilege, and
- the knowing or voluntary publication of privileged material.

Client legal privilege can also be impliedly waived by the conduct of a party, client or legal representative for a party or client, which is inconsistent with the maintenance of the confidential nature of the communication or document.

The implied waiver of client legal privilege was considered by the High Court in the decision of *Mann v Carnell*.[2] The majority (constituted by Gleeson CJ, and Gaudron, Gummow and Callinan JJ) noted at [19] that the circumstances in which legal professional privilege may apply are not limited to the adducing of evidence in the course of a hearing in a court. Their Honours continued that the privilege may be invoked, and its application may be of importance, in pre-trial proceedings such as the discovery and inspection of documents. The court referred to the earlier decision of the High Court in *Baker v Campbell*[3] in which the court held the application of legal professional privilege was not confined to judicial or quasi-judicial proceedings. Justice Deane said

in *Baker v Campbell*:

> "Once one recognizes that the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications and that the privilege is not confined to such communications as are made in the course of or in anticipation of litigation but extends generally to confidential communications of a professional nature between a person and his lawyer made for the purpose of obtaining or giving legal advice, common sense points to a conclusion that the principle should not be seen as restricted to compulsory disclosure in the course of such proceedings".[4]

The waiver of legal privilege can be express or implied. The majority held at [28] that "it is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege". An intentional act which is inconsistent with the maintenance of the confidential nature of a communication or document may result in the implied waiver of client legal privilege. The majority noted at [29] that "what brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality, not some overriding principal of fairness operating at large".

Practitioners should also note s 125 of the EA which relates to the loss of legal privilege on account of misconduct.

Section 125 of the EA provides that Div 1 of Pt 3.10 of that Act dealing with legal privilege does not prevent the adducing of evidence as to:

> "(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
>
> (b) a communication or the contents of a document that the

client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power".

Footnotes

1 Section 32 of the *Evidence Act 1995* relates to attempts to revive memory in court, and s 33 relates to evidence given by police officers.

2 *Mann* v *Carnell* (2000) Aust Torts Reports ¶81-539; [1999] HCA 66.

3 *Baker* v *Campbell* (1983) 153 CLR 52.

4 Ibid, at pp 116–117.

¶23-040 Loss of client legal privilege — related communications and documents

If, due to the application of s 121–125 of the *Evidence Act 1995* (Cth) (EA) evidence is adduced of a communication or the contents of a document, s 121–125 do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document adduced (s 126).

Example

(Section 126, *Evidence Act 1995*)

A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability "as set out in my previous letter to you dated 11 August 1994". In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

¶23-050 Privilege in respect of self-incrimination in other proceedings

The court will not require a witness to give evidence if the witness has objected to giving the evidence on the basis it may tend to prove the witness:

> "(a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
>
> (b) is liable to a civil penalty".[5]

The court must determine if there are reasonable grounds for the objection (s 128(2) of the EA).

If the court requires the witness to give evidence after consideration of the matters detailed in s 128(4) of the EA (discussed below), the court will give the witness a certificate under s 128 of the Act in respect of the evidence.

The court is also to give a witness a certificate if an objection to the giving of the evidence has been overruled, and after the evidence was given, the court found that there were reasonable grounds for the objection (s 128(6), EA).

The court may require the witness to give the evidence if it is satisfied:

> "(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
>
> (b) the interests of justice require that the witness give the evidence" (s 128(4), EA).

If the court has given a witness a certificate under s 128 of the EA, evidence given by the person in respect of the certificate, and evidence of any information, document or thing obtained as a direct or indirect consequence of the person giving the evidence, cannot be used against the person other than in respect of proceedings relating to the falsity of the evidence (s 128(7), EA).

In the Full Court decision of *Ferrall and McTaggart (trustees of the Sapphire Trust) & Ors v Blyton*,[6] it was held that it would be unrealistic to limit the availability of a certificate under s 128 of the EA to a situation where a witness is asked a particular question in cross-examination. The court held that the availability of a certificate also applied to the giving of evidence in chief.

The certificate had been granted at first instance where the husband had refused to file his affidavit unless a certificate under s 128 was given. The granting of a certificate to the husband was not opposed by the wife. Third parties to the application sought leave to appeal the orders of Ryan J at first instance. Leave to appeal was not granted.

The decision of *Ferrall and McTaggart (trustees of the Sapphire Trust) & Ors v Blyton* was applied in the decision of *Old and Old & Ors*. It was held in *Old and Old & Ors*[7] that s 128 of the EA applies if a witness objects to giving particular evidence on the ground that such evidence may tend to prove that the witness has committed an offence against or arising under Australian law. The court must then be satisfied that the requirements of s 128(5) of the EA have been met, and that the "need of the evidence concerned to tend to prove that an offence has been committed and that the interests of justice require the evidence to be given".[8] Justice Young also noted that s 128 is designed to provide protection both against direct use and derivative use of information which would ordinarily be subject to a privilege against self-incrimination but where the disclosure is compelled or volunteered under the section.[9]

The court held, after considering the requirements of s 140 and 142 of the EA and all other relevant matters, including:

(a) the importance of the evidence in the proceedings (s 142(2)(a), EA)

(b) the likelihood that the evidence may be unreliable even if a certificate is given

(c) the nature of the relevant offence, cause of action, or defence and the nature of the subject matter of the evidence

(d) the nature of the offence or penalty in respect of which the witness may incriminate himself or herself

(e) the gravity of the matters alleged in relation to the question (s 142(2)(b), EA), and

(f) the likelihood of any other proceeding being taken in relation to the offence in respect of which the witness may incriminate himself or herself, including penalty proceedings,[10] that the husband could establish on the balance of probabilities he held reasonable grounds for his objection to give evidence without first having been granted a certificate pursuant to s 128 of the EA.

In *Jarvis & Pike* (2013) FLC ¶93-565, the Full Court expressed the view that the test for what constitutes "reasonable grounds for an objection to give evidence" was broad and the trial judge ought to have given the father "significant latitude" in determining whether he had reasonable grounds for objecting. The court concluded that the trial judge erred by taking into consideration the fact that the father had made "no relevant admissions" and determining there would have to be "far more evidence" that the father was "either at a real risk of incriminating himself in some way, or likely to be at such a risk".

Footnotes

5 *Evidence Act 1995*, s 128(1).

6 *Ferrall and McTaggart (trustees of the Sapphire Trust) & Ors* v *Blyton* (2000) FLC ¶93-054; [2000] FamCA 1442.

7 *Old and Old & Ors* (2006) FLC ¶93-280; [2006] FamCA 729.

8 Ibid, at p 80,789.

9 Ibid, at p 80,790.

10 Ibid, at p 80,792.

RULES OF COURT

¶23-060 Family Court of Australia

The Family Law Rules 2004 (Cth) (FLR) apply in all cases in the Family Court. The general rules are set out in Ch 1 of the FLR. Where a rule under any other chapter or part of the FLR conflicts with a rule in Ch 1, the rule in Ch 1 will apply.[11] Before commencing any action in the Family Court, a prospective party to a case must ensure they comply with the pre-action procedures set out in Sch 1 of the FLR (r 1.05(1), FLR). Compliance with the pre-action procedures is not necessary if one of the following matters applies:

- if a matter involves allegations of child abuse or family violence or a risk of child abuse or family violence (r 1.05(2)(a) and (b), FLR)
- urgency (r 1.05(2)(c), FLR)
- the applicant would be unduly prejudiced by requiring compliance with the procedures (r 1.05(2)(d), FLR)
- there has been a previous application in the same matter in the 12 months immediately preceding the filing of the application (r 1.05(2)(e), FLR)
- the application is for a divorce (r 1.05(f), FLR)
- the application is a child support application or appeal (r 1.05(g), FLR), and
- the application involves the court's jurisdiction in bankruptcy under s 35 or s 35B of the *Bankruptcy Act (1959)* (Cth) (r 1.05(h), FLR).

Legal practitioners should ensure they are familiar with the terms of the pre-action procedures and comply with them, unless otherwise excused by r 1.05(2)(a)–(h). This is important to note as the court may take into account a party's failure to comply with the pre-action procedures when considering any orders the court may make, including an order as to costs (r 1.05, FLR).

The main purpose of the FLR is to "ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case".[12] When applying the FLR to promote the main purpose set out in r 1.04, the court actively manages each case with reference to the requirements of subrules 1.06(a)–(j), including:

> "(a) encouraging and helping parties to consider and use a dispute resolution method rather than having the case resolved by trial;
>
> (b) having regard to unresolved risks or other concerns about the welfare of a child involved;
>
> (c) identifying the issues in dispute early in the case and separating and disposing of any issues that do not need full investigation and trial;
>
> (e) setting realistic timetables, and monitoring and controlling the progress of each case;
>
> (h) dealing with as many aspects of the case as possible on the same occasion".

To achieve the main purpose of the FLR, the court applies the FLR in a way that:

(a) deals with each case fairly, justly and in a timely manner

(b) encourages parties to negotiate a settlement, if appropriate

(c) is proportionate to the issues in a case and their complexity, and the likely costs of the case

(d) promotes the saving of costs

(e) gives an appropriate share of the court's resources to a case, taking into account the needs of other cases, and

(f) promotes family relationships after resolution of the dispute, where possible (r 1.07, FLR).

Legal practitioners should be aware that in accordance with s 123 of the *Family Law Act 1975* (Cth) (FLA), any rules of court with respect to the practice and procedure of the Family Court or any court exercising jurisdiction under the FLA, cannot be inconsistent with the provisions of the FLA. This means that the provisions of the FLA will override the provisions of the FLR in the event of any inconsistency — this includes the main purpose set out in r 1.04.

Footnotes

11 Family Law Rules 2004, r 1.03(1) and 1.03(2).

12 Ibid, r 1.04.

¶23-070 Evidence of children

Section 100B of the *Family Law Act 1975* (Cth) (FLA) provides that a "child",[13] other than a child seeking to become a party to proceedings, must not swear an affidavit, unless the court makes an order allowing the child to do so". Further, s 100B(2) provides that a child must not be called as a witness in proceedings or be present in the court during proceedings under the FLA, unless the court makes an order allowing the child to be called as a witness or to be present in the court. Rule 15.02 of the Family Law Rules 2004 (Cth) (FLR) provides that in the event a party seeks to adduce evidence of a child pursuant to s 100B of the FLA, the party must file an affidavit that:

(a) sets out the facts relied on in support of the application

(b) includes the name of a support person, and

(c) attaches a summary of the evidence to be adduced from the child.

The affidavit should be filed together with an Application in a Case in accordance with Ch 5 of the FLR. If the court makes an order permitting a child to give evidence in the proceedings, the court may further order that the child's evidence may be given by way of:

- affidavit
- video conference
- closed circuit television, or
- other electronic communication.[14]

The court may order the support person named in the affidavit filed by the party in accordance with r 15.02, be present with the child when the child gives the evidence in the proceedings (r 15.02(2)(b), FLR).

Where a child is examined without leave of the court, the evidence resulting from the examination of the child which relates to the abuse of, or risk of abuse of the child, is not admissible in proceedings under the FLA (s 102A(1), FLA). However, the restriction on the use of evidence in s 102A(1) does not apply where a person causes the child to be examined for the purpose of deciding whether to bring proceedings under the FLA involving an allegation, or making of an allegation, that a child has been abused or is at risk of being abused (s 102A(2), FLA). When determining whether to give leave permitting the examination of a child, the court must have regard to the following matters:

(a) whether the proposed examination is likely to provide relevant information that is unlikely to be obtained otherwise (s 102A(3)(a), FLA)

(b) the qualifications of the person who proposes to conduct the examination (s 102A(3)(b), FLA)

(c) whether any distress likely to be caused to the child by the examination will be outweighed by the value of the information that might be obtained from the examination (s 102A(3)(c), FLA)

(d) any distress already caused to the child by any previous examination associated with the proceedings or with related proceedings (s 102A(3)(d), FLA), and

(e) any other matter that the court thinks is relevant (s 102A(3), FLA).

The term “examined” is defined at s 102A(5) and means being “subjected to a medical procedure” or an examination or assessment by a “psychiatrist or psychologist (other than by a family counsellor or family consultant)”. The notation contained at the foot of s 102A(5) refers legal practitioners to s 69ZV of the FLA which applies where the admissibility of evidence of a representation of a child would otherwise be affected by the law against hearsay. Section 69ZV applies if a court applies the law against hearsay in accordance with s 69ZT(2) to child-related proceedings.[15] Section 69ZV(2) of the FLA provides that “evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay”. A representation is defined in s 69ZV(5) and includes an “express or implied representation, whether oral or in writing, and a representation inferred from conduct”.

Section 69ZT(1) of the FLA provides that the following provisions of the *Evidence Act 1995* (Cth) (EA) do not apply in child-related proceedings conducted under the FLA:

- Div 3, 4 and 5 of Pt 2.1, with the exceptions of s 26, 30, 36 and 41.[16]

- Pt 2.2 and 2.3.[17]

- Pt 3.2–3.8.[18]

The court may give such weight as it thinks fit to evidence admitted as a consequence of the provisions of the EA not applying (s 69ZT(2), FLA). However, the court may decide to apply one or more of the provisions of the EA to an issue in the proceedings, if:

> "(a) the court is satisfied that the circumstances are exceptional; and
>
> (b) the court has taken into account (in addition to any other matters the court thinks relevant):
>
> (i) the importance of the evidence in the proceedings; and
>
> (ii) the nature of the subject matter of the proceedings; and
>
> (iii) the probative value of the evidence; and
>
> (iv) The powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence" (s 69ZT(3), FLA).

The court is required to give such weight as it considers appropriate to any evidence which is admitted as a consequence of a division or part of the EA applying in the proceedings (s 69ZT(4), FLA). In the event the court decides to apply a division or part of the EA, that of itself will not revive the operation of a rule of common law or a law of a state or territory which would not have applied in the proceedings due to the express exclusion of the division or part under s 69ZT(1).[19]

If a family report has been prepared, the court may:

- give copies of the report to each party, or the party's lawyer, and to an independent children's lawyer

- receive the report in evidence

- permit oral examination of the person making the report, and
- order that the report not be released to a person or that access to the report be restricted (r 15.04, FLR).

Section 69ZN of the FLA sets out the principles for conducting child-related proceedings under Div 12A of the FLA (see Chapter 7, ¶7-040 for more information on how the FLA details the court's general duties when giving effect to the principles listed at s 69ZN).

Footnotes

13 The term "child" is defined at s 100B(3) of the *Family Law Act 1975* to be a "child" under 18 years of age.

14 Family Law Rules 2004, r 15.02(2)(a).

15 *Family Law Act 1975*, s 69ZV(1).

16 Division 3 relates to the general rules about giving evidence, 4 relates to examination in chief and re-examination, and 5 relates to cross-examination. Section 26 deals with the court's control over questioning of witnesses, 30 relates to interpreters, 36 relates to a person being examined without subpoena or other process, and 41 relates to improper questions.

17 Relating to documents and other evidence.

18 Pt 3.2 to 3.8 of the *Evidence Act 1995* deal with hearsay, opinion evidence, admissions, evidence of judgments and convictions, tendency and coincidence, credibility evidence, and character evidence.

19 *Family Law Act 1975*, s 69ZT(5). For further commentary on s 69ZT(1), refer to *Khalil & Tahir-Ahmadi* (2012) FLC ¶93-506 and *McGregor & McGregor* (2012) FLC ¶93-507.

¶23-080 Affidavits

Rule 15.08 of the Family Law Rules 2004 (Cth) (FLR) details the requirements for an affidavit filed in accordance with the FLR. The form of the affidavit must also comply with the general requirements for documents filed with the court prescribed at r 24.01.

When making an affidavit, a party should ensure that the affidavit is:

- divided into consecutively numbered paragraphs, with each paragraph being confined to a distinct part of the subject matter (as far as possible) (r 15.08(a), FLR)
- confined to facts about the issues in dispute
- confined to admissible evidence
- sworn by the deponent, in the presence of a witness
- signed at the bottom of each page by the deponent and the witness, and
- filed after it is sworn (r 15.09(1), FLR).

All and any insertions, erasures and alterations of an affidavit must be initialled by the deponent and the witness (r 15.09(2), FLR).

Rule 15.09(3) provides that “a reference to a date (except the name of a month), number or amount of money, must be written in figures”. There are additional requirements for the swearing of an affidavit if the deponent is illiterate, blind or physically incapable of signing the affidavit (r 15.10, FLR). A person may make an affidavit outside of Australia in accordance with Pt 15.2 of the FLR.

There are specific rules with respect to any document which is to be annexed to, or used in conjunction with, an affidavit.

In the Family Court of Australia (FCA), practitioners should note the requirements of r 15.08(2) as to annexures to affidavits. Any document which is to be used in conjunction with an affidavit and tendered as evidence:

- must be identified in the affidavit r 15.08(2)(a), and
- must not be attached or annexed to the affidavit, or filed as an exhibit to the affidavit r 15.08(2)(b).

A tender bundle of annexures should be prepared and a hard copy of the document must be served on each person to be served at the same time as the affidavit is served on that person (see r 15.08(3)).

It is helpful if the annexure bundle is indexed and paginated when provided to the parties and the Court.

In the Federal Circuit Court of Australia (FCC) though, FCCR r 15.28(1) provides that a document which is to be used in conjunction with an affidavit must be annexed to the affidavit. In the event that it is impractical to annex the document due to either the nature of the document or its length, then the document may be an exhibit to the affidavit (r 15.28(2)).

Practitioners should also be aware of the requirements of Practice Directive **No 2 of 2017 Interim Family Law Proceedings (from 1 January 2018).**

That practice direction provides that, unless express leave is granted by the judge in whose docket the matter has been allocated, any affidavit filed in support of an interim application must not:

- exceed 10 pages in length for each affidavit, and
- contain more than five annexures.

Further, if the respondent seeks further interim orders in their filed response and those additional orders are opposed by the applicant, the applicant may then file a second affidavit in answer to the respondent's material provided it does not:

- exceed 10 pages in length for each affidavit, and

- contain more than five annexures.

The further affidavit filed by the applicant should set out:

- any additional orders sought by the applicant, and
- any additional relevant facts relied on in opposition to the respondent's orders.

Failure to comply with the terms of the practice direction may result in loss of any priority listing, an adjournment and/or a costs order.

If a party wishes to rely upon an affidavit which does not comply with the practice direction, if the judge who has been allocated the matter does not expressly give leave, then, in the discretion of the judge:

- non-complying affidavits will not be read, or
- the party with the material which does not comply with the practice direction will be required to select 10 pages out of their material that they wish to rely upon, and
- costs orders may be made.

A copy of the complete practice direction can be found at the FCC website:
http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/n

An affidavit which is filed with an application may only be relied upon in evidence for the purpose of the application for which it was filed (r 15.06, FLR).

The notation to r 15.06 provides that the rule applies unless the court orders otherwise pursuant to r 1.12. Rule 1.12 provides that the court may dispense with compliance with any of the rules at any time.

A party seeking to cross-examine a deponent must, at least 14 days before the relevant date, give to the party who filed the affidavit a written notice stating the name of the deponent who is required to attend court for cross-examination (r 15.14, FLR). If a deponent fails to attend court in response to a notice, the court may refuse to allow the

deponent's affidavit to be relied on, allow the affidavit to be relied on only on the terms ordered by the court, or order the deponent to attend for cross-examination (r 15.14(3), FLR).

¶23-090 Hearsay

The "hearsay rule" is defined at s 59 of the *Evidence Act 1995* (Cth) (EA). It provides that "evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation". As a general rule, hearsay evidence is inadmissible and should not be included in the affidavit evidence filed with the court. This general rule, however, is subject to the exception as to the representations of children (refer to ¶23-070) and the exceptions to the rule against hearsay contained at Pt 3.2 and 3.4 of the EA.

Section 75 of the EA provides that, in interlocutory or interim proceedings, the hearsay rule does not apply to evidence, provided that the party who adduced the evidence also adduces evidence of the source of the evidence adduced. This means that evidence which may otherwise be excluded by virtue of the operation of the hearsay rule is admissible at an interim hearing provided the source of the evidence is also identified. In the event hearsay evidence is included and the source of the evidence is not identified, the evidence will remain inadmissible.

Where hearsay evidence is being included in an interim hearing, practitioners should ensure details of:

- who told the witness the information
- where and when the witness was told, and
- whether any other witnesses might have seen or heard any of the conversation/interaction,

are also included in the affidavit.

¶23-100 Evidence of settlement negotiations

Evidence of a communication made in connection with an attempt to negotiate a settlement between persons in dispute, or between one or more persons in dispute and any third party, is not admissible (s 131(1)(a), *Evidence Act 1995* (Cth) (EA)). Similarly, any document that has been prepared in connection with an attempt to negotiate a settlement of a dispute, whether the document has been delivered or not, is not admissible (s 131(2)(a), EA). The communications referred to in this provision are often identified as being "without prejudice". There are a number of exceptions to the rule, and they are detailed in s 131(2) of the EA. These include:

- where the persons in dispute consent to evidence of settlement negotiations being adduced (s 131(2)(a), EA)
- the communication or document included a statement to the effect that it was not being treated as confidential (s 131(2)(d), EA)
- the evidence contradicts or qualifies evidence that is already admitted in the proceedings about the course of an attempt to settle the dispute (s 131(2)(e), EA)
- evidence that has been adduced in the proceedings, or an inference from evidence that has been adduced, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or qualify the evidence (s 131(2)(g), EA), and
- the communication or document is relevant in determining a liability for costs at the end of the proceedings or an interim hearing (s 131(2)(h), EA).

The list above is non-exhaustive and practitioners should review s 131 for the complete list of evidence which should not be adduced.

¶23-110 Statements and admissions made during family conferences

Section 10E of the *Family Law Act 1975* (Cth) precludes evidence of

anything said, or an admission made, in the presence of a family counsellor conducting family counselling, or a person to whom a family counsellor refers a person for medical or other professional consultation, from being admissible in any court or in any proceedings before a person authorised to hear evidence.

For more discussion on “family counselling” and “family counsellors”, see Chapter 5, ¶5-010–¶5-020.

¶23-120 Interim and procedural applications

If a party applies for an interim order at the start of a case, the application must be in the form of an Initiating Application (Family Law) (r 5.01(5), Family Law Rules 2004 (FLR)). If a party applies for an interim order after a case has commenced, the application must be in an Application in a Case (r 5.01(6), FLR).

An affidavit stating the facts relied on in support of any interim orders sought in Initiating Application (Family Law) or in an Application in a Case must be filed by the party at the time of filing the Initiating Application (Family Law) or Application in a Case (r 5.02(1), FLR). No affidavit setting out the facts relied on in support of the orders is required if the Application in a Case relates to a review of an order of a judicial registrar or registrar (r 5.02(2), FLR). Rule 9.05 of the Family Law Rules 2004 provides a respondent to an Application in a Case who opposes the orders sought in the application, or seeks that the court make different orders, must file a Response to an Application in a Case. The party filing a Response to an Application in a Case must also file an affidavit stating the facts relied upon in support of the response (r 9.06(1), FLR). In the event that the application seeks a review of an order of a judicial registrar or registrar, then the party filing the response is not required to file an affidavit in accordance with r 9.06(1).[20] All affidavits in a case started by an Application in a Case or a Response to an Application in a Case must be filed at least two days before the date fixed for the hearing (r 9.08(3), FLR). However, while r 11.02 provides a step in a matter taken after the time specified for the taking of the step is of no effect, the court has a general power to dispense with compliance with the rules in accordance with r 1.12. It

is always advisable though, wherever possible, to comply with any time limits and filing dates as detailed in the rules as leave to file or proceed out of time is a discretionary power and not one exercised by the court as of right.

Rule 5.10 provides the hearing of an interim or procedural application must not exceed two hours. Cross-examination will only be permitted at an interim or procedural hearing in exceptional circumstances. Subject to r 9.07 (which provides that an applicant may file a further affidavit in reply to a Response to an Application in a Case), a party to an interim or procedural hearing may only rely upon one affidavit of each party, and one affidavit from each witness, provided the evidence is relevant and cannot be given by a party to the application (r 5.09(b), FLR). If a party to an application fails to attend when the hearing commences, the party who has attended at the court may seek the orders sought in that party's application. This can also include adducing evidence to establish an entitlement to the orders sought against the party who is not in attendance (r 5.11(1), FLR). In the event that no party attends the hearing, the court may dismiss the application and response (r 5.11(2), FLR).

Footnotes

20 Family Law Rules 2004, r 9.06(2).

¶23-130 Final orders

Chapter 4 of the Family Law Rules 2004 (Cth) (FLR) sets out the general procedure for starting a case by way of an Initiating Application for Final Orders. Chapter 4 also sets out the rules for commencing a case for:

- an application when relying on cross-vesting laws, or
- seeking an order for a medical procedure, maintenance, child support, or

- a declaration as to the validity of a marriage.

The rules contained in Ch 4 do not apply to proceedings for:

- an application for divorce
- an application for interim or procedural orders
- an application for the review of a judicial registrar or registrar's order
- an application to enforce an obligation to pay money
- an application resulting from a contravention of an order or in relation to contempt, or
- an application relating to an appeal.

Rule 4.01 provides that an Initiating Application must include the full particulars of the orders sought by the applicant, and include all causes of action that may be disposed of conveniently in the same case. Be mindful when preparing the application to ensure the orders which are specified are capable of being made and enforced. An order simply directing a party to receive 80% of the property pool without other ancillary orders specifying precisely how the property is to be divided between the parties, is not capable of being enforced and therefore of no use. A party filing an Initiating Application in the FCA must not file an affidavit with the application, unless otherwise permitted or required to do so by Ch 4 of the FLR or r 2.02 (r 4.02, FLR). A party filing an application seeking orders with respect to:

- a medical procedure
- an application for a step-parent to provide maintenance
- an application for child support
- an application for a declaration as to nullity or validity of a marriage and divorce, and

- an application relating to passports

must file an affidavit at the time of filing the Initiating Application.

The FLR provide the evidence contained in the party's affidavit must be confined to facts about the issues in dispute and be limited to admissible evidence. Rule 15.13 provides that the court has power to strike out any material which:

- is inadmissible
- is unnecessary
- is irrelevant
- is unreasonably long
- is scandalous or argumentative, or
- sets out an opinion of a person who is not qualified to give the opinion.

In the event that the court orders material be struck from an affidavit, the party who filed the affidavit may be ordered to pay the costs of the other party thrown away (r 15.13(2), FLR). It is important for legal practitioners to balance the needs of the client to include emotive but irrelevant evidence with the needs of the court to determine matters based on relevant evidence directly connected with issues in dispute. While the client should always have a role when preparing their affidavit material, it is for the practitioner to exercise appropriate professional skill to ensure only relevant evidence is included.

Rule 15.14 applies only to a trial in the Family Court. A party seeking to cross-examine a deponent must give the party who filed the affidavit a written notice stating who is required to attend court for cross-examination at least 14 days before the trial. In the event the deponent fails to attend court in response to a notice under r 15.14(2), the court may refuse to allow the affidavit to be relied upon only on the terms ordered by the court, or order the deponent attend for cross-examination (r 15.14(3), FLR). In the event, a deponent attends at

court in response to a notice given under r 15.14(2), and is not cross-examined, or the cross-examination is of little or no evidentiary value, the party who required the deponent's attendance may be ordered to pay the deponent's costs for attending (r 15.14(4), FLR). The court may make orders for the attendance, and the payment of expenses, of a deponent who attends court for cross-examination (r 15.15, FLR).

SUBPOENAS

¶23-140 Introduction

Rule 15.17 of the Family Law Rules 2004 (Cth) (FLR) provides that a court may issue a subpoena, whether on its own initiative or at a party's request. There are three types of subpoenas which may be issued by the court:

- a subpoena for production
- a subpoena to give evidence, and
- a subpoena for production and to give evidence.

The term "subpoena" is defined in the Explanatory Guide to the FLR to be a witness summons issued by the court requiring a named person to attend the court to give evidence or bring documents, books or other things to the court.

A "subpoena for production" is defined in the Explanatory Guide as a witness summons requiring a named person to attend as directed and produce a document or other thing.

A "subpoena to give evidence" is defined in the Explanatory Guide as a witness summons requiring a named person to attend as directed for the purpose of giving evidence.

By the simple extension of the above definitions, a "subpoena for production and to give evidence" could be defined as a witness summons requiring a named person to attend as directed and produce a document or other thing and requiring the named person to attend

as directed for the purpose of giving evidence.

The general principle with respect to the issuing of subpoenas to produce documents was discussed by Smithers J of the Federal Court in the decision of *Lucas Industries Ltd v Hewitt*:[21]

> "The purpose of the process of subpoena is to facilitate the proper administration of justice between parties. For that purpose it is the policy of the law that strangers who have documents may be put to certain trouble in searching for and gathering together relevant documents and bringing them to court. It is according to the same principle that persons who have knowledge of facts are put to the inconvenience of being brought to court and required to give evidence".[22]

Footnotes

21 *Lucas Industries Ltd* v *Hewitt* (1978) 18 ALR 555.

22 Ibid, at p 570.

¶23-150 General requirements

Rule 15.17 of the Family Law Rules (Cth) (FLR) states a subpoena must identify the person to whom it is directed by name or description of office. It may also be directed to two or more persons if the subpoena is to give evidence only, or the subpoena requires the production of the same documents from each named person (r 15.17(5), FLR).

A subpoena for production must identify the document to be produced and the time and place for production, and may require the named person to produce the document before the date of the trial (r 15.17(6), FLR).

The decision in *Lucas Industries Ltd v Hewitt* was applied in the

decision of *Priest v State of New South Wales*,[23] in which Johnson J noted that "the test is whether the categories of documents are identified sufficiently clearly in the circumstances of the case".

Footnotes

23 *Priest* v *State of New South Wales* [2006] NSWSC 12.

¶23-160 Restrictions on the issuing of subpoenas

The Family Law Rules 2004 (Cth) (FLR) provide that the court must not issue a subpoena in the following circumstances:

- at the request of a self-represented party, unless the party has first obtained the registrar's permission to make the request, or
- for production of a document in the custody of the court or another court (r 15.18, FLR).

If a party seeks the production of a document from the court or a document which is in the possession of another court, the party must give the registry manager a written notice setting out:

- the name and address of the court having possession of the document
- a description of the document to be produced
- the date when the document is to be produced, and
- the reason for seeking production (r 15.34(1), FLR).

Upon receipt of a notice issued in accordance with r 15.34(1), the registrar may ask the other court to send the document to the registry manager (r 15.34(2), FLR). A party may apply for permission to inspect and copy a document produced to the court (r 15.34(3), FLR).

¶23-170 Service of subpoena

Rule 15.22 of the Family Law Rules 2004 (Cth) (FLR) provides that a subpoena for production, along with the brochure containing information about subpoenas, must be served on the named person by ordinary service or by a manner of service agreed between the parties (r 15.22(1A)(a)). In relation to a subpoena to give evidence, or a subpoena for production and to give evidence, service must be by hand (r 15.22(1A)(b)). The issuing party must also serve a copy of the subpoena on each other party, each interested person in relation to the subpoena and the independent children's lawyer (r 15.22(2)). Service must occur at least 10 days before production is required or seven days before the day on which attendance is required (r 15.22(3)).

At the time of service of the subpoena in accordance with r 15.28(1), the named person must be paid conduct money in accordance with r 15.23(1).[24] Rule 15.23 provides a named person is entitled to be paid conduct money by the issuing party at the time of service of the subpoena. The amount of the conduct money must be sufficient to meet the reasonable expenses of complying with the subpoena, and at least be equal to the minimum amount mentioned in Pt 1 of Sch 4 to the FLR. Schedule 4 contains a table setting out the minimum amounts paid for conduct money, and the amount to be paid with respect to travel and accommodation and meals. Part 2 of the Schedule details the amount payable to all witnesses per day, or part of a day, for necessary absence from the witness's place of employment or residence. Item 202 of Pt 2 of Sch 4 provides for the payment of such further amount as the court allows for the preparation of a report and absence from the expert witness' place of employment for an expert witness's attendance at the court.

An issued and unserved subpoena may be amended by the issuing party filing the amended subpoena with the amendments clearly marked with the registry (r 15.20, FLR).

A person named in a subpoena is not required to comply with a subpoena if:

- the named person was not served in accordance with the FLR, or
- conduct money was not tendered to the person at the time of service or within a reasonable time before the court date (r 15.24(1), FLR).

A named person not called to give evidence or produce a document to the court in compliance with the subpoena may be excused from complying with the subpoena (r 15.24(2), FLR).

Footnotes

24 Family Law Rules 2004, r 15.28(1)(b).

¶23-180 Compliance

Rule 15.26 of the Family Law Rules 2004 (Cth) (FLR) provides that:

> "if a named person or a person having sufficient interest in a subpoena:
>
> (a) seeks an order that the subpoena be set aside in whole or in part;
>
> (b) objects to the production of a document required by the subpoena;
>
> (c) seeks to be paid for any loss or expense relating to the person's attendance, or the production of a document, in compliance with the subpoena; or
>
> (d) seeks any other relief in relation to the subpoena;
>
> the person must attend court on the court date to apply for the order".

A named person can comply with a subpoena for production by

providing the documents on the court date, or, no later than two days before the court date, producing the documents, or copies of the documents with a verifying affidavit, to the registry manager (r 15.29(1), FLR).

The affidavit referred to in r 15.29(1) must state it is an affidavit under r 15.29, be attached with a copy of the subpoena for production, identify the attached documents as copies of the original documents referred to in the subpoena, and be sworn by the named person (r 15.29(2), FLR). “Copy” of a document is defined to include a photocopy or a PDF copy on a CD-Rom (r 15.29(4)).

The named person must inform the registry manager in writing as to whether the documents referred to in the subpoena are to be returned to the named person or to be disposed of when they are no longer required by the court (r 15.29(3), FLR).

¶23-190 Right to inspect and copy

If an issuing party serves the subpoena in accordance with r 15.22, each party to the proceedings may inspect a document produced in accordance with the subpoena and take copies of a document (other than a welfare record, criminal record, medical or police record) produced in accordance with the subpoena (r 15.30). Unless the court orders otherwise, an inspection must be by appointment and may be made without order of the court.

¶23-200 Objection to subpoena

If a named person objects to the production of a document identified in the subpoena, or objects to a document identified in the subpoena being inspected or copied by any of the parties, they must give written notice of the objection to the registry manager, the other parties and any independent children’s lawyers, before the day production is required (r 15.31(1)–(2), Family Law Rules 2004 (Cth) (FLR)).

A person is not entitled to inspect or copy a document produced in compliance with a subpoena for production, which is not admitted into evidence, unless r 15.30 applies, or the court has otherwise given the

party permission (r 15.32, FLR).

Rule 15.35 of the FLR applies to documents which have been produced to the court in accordance with a subpoena. If a document has been produced in compliance with a subpoena and is to be returned to the named person, and is tendered as an exhibit at a hearing or trial, the registry manager must return it to the named person at least 28 days, and not later than 42 days, after the final determination of the application or appeal (r 15.35(2), FLR). In the event that the document produced in compliance with the subpoena has not been tendered as an exhibit at a hearing or trial, and the party who filed the subpoena has been given seven days written notice of the registry manager's intention to return the document, the registry manager may return the document to the named person at a time that is earlier than the time mentioned in r 15.35(2), which is at least 28 days and not later than 42 days after the final determination of the application or appeal (r 15.35(3), FLR). In the event that the registry manager has written permission from the named person to destroy the documents, r 15.35(2) and 15.35(3) do not apply. The registry manager may then destroy the document, in an appropriate way, not earlier than 42 days after the final determination of the application or appeal (r 15.35(4), FLR). The note to r 15.35(4) states that a document which is tendered into evidence by a party and was not produced in compliance with a subpoena, must be collected by the party who tendered the document.

¶23-210 Non-compliance with subpoena

In the event that a named person does not comply with a subpoena, and the court is satisfied that the named person was served with a subpoena and given conduct money in accordance with r 15.23 of the Family Law Rules 2004 (Cth) (FLR), the court may then issue a warrant for the named persons' arrest, and order the person to pay any costs caused by the non-compliance (r 15.36, FLR). In a practical sense, the court may enlarge the date for the return of documents at first instance to allow the issuing party to make some enquiries as to why the documents have not been produced. Issuing a warrant for the arrest of the person to whom the subpoena would be a last resort to

ensure compliance with the subpoena. The note to r 15.36 provides that a person who does not comply with a subpoena may be guilty of contempt in accordance with s 112AP of the *Family Law Act 1975* (Cth) (FLA). Section 112AP applies to a contempt of court that does not constitute a contravention of an order under the FLA, or constitutes a contravention of an order under the FLA which involves a flagrant challenge to the authority of the court. In spite of any other law, a court having jurisdiction under the FLA may punish a person for contempt of the court pursuant to s 112AP(2) of the FLA.

WITNESSES

¶23-220 Court appointed expert witnesses

Part 15.5 of the Family Law Rules 2004 (Cth) (FLR) provides the scope within which the Family Court may appoint an expert to provide evidence in proceedings. Part 15.5, with the exception of r 15.55 which provides for the mandatory disclosure of an expert's report for a parenting case, does not apply to any of the following:

(a) evidence from a medical practitioner or other person who has provided, or is providing, treatment for a party or child if the evidence relates only to any or all of the following:

(i) the results of an examination, investigation or observation made

(ii) a description of any treatment carried out or recommended

(iii) expressions of opinion limited to the reasons for carrying out or recommending treatment and the consequences of the treatment, including a prognosis

(b) evidence from an expert who has been retained for a purpose other than the giving of advice or evidence, or the preparation of a report for a case or anticipated case, being evidence:

(i) about that expert's involvement with a party, child or subject matter of a case

(ii) describing the reasons for the expert's involvement and the results of that involvement

(c) evidence from an expert who has been associated, involved, or had contact with a party, child or subject matter of a case for a purpose other than the giving of advice or evidence, or the preparation of a report for a case or anticipated case, being evidence about that expert's association, involvement or contact with that party, child or subject matter, and

(d) evidence from a family consultant employed by a Family Court (r 15.41(1), FLR).

Example

(Rule 15.41, FLR)

An example of evidence excluded from the requirements of this Part (other than r 15.55) is evidence from a treating doctor or a teacher in relation to the doctor's or teacher's involvement with a party or child.

Legal practitioners should note that nothing in Pt 15.5 prevents an independent children's lawyer from communicating with a single expert witness (r 15.41(2), FLR).

The purpose of Pt 15.5 is to:

- ensure that parties obtain expert evidence only in relation to a significant issue in dispute
- restrict expert evidence to that which is necessary to resolve or determine a case
- ensure that if practicable, and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness
- avoid unnecessary costs arising from the appointment of more than one expert witness, and

- enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, if necessary in the interest of justice (r 15.42, FLR).

Definitions which are relevant to the application of Pt 15.5 are set out in the FLR. An “expert” is defined to be an “independent person who has relevant specialised knowledge, based on the person’s training, study or experience”. A “single expert witness” is defined as an “expert witness appointed by agreement between the parties or by the court to give evidence or prepare a report on an issue”.

¶23-230 Single expert witness

Parties may agree to jointly appoint a single expert witness to prepare a report in relation to a substantial matter in dispute in the case (r 15.44(1), Family Law Rules 2004 (Cth) (FLR)). A party does not require leave of the court to tender a report or adduce evidence from a single expert witness who is appointed jointly between the parties (r 15.44(2), FLR). The court has power, upon application or of its own initiative, to order expert evidence be given by a single expert witness (r 15.45(1), FLR). When considering whether to make an order in accordance with r 15.45(1), the court may take into account the following factors listed at r 15.45(2):

- the main purpose of the FLR
- whether expert evidence on a particular issue is necessary
- the nature of the issue in dispute
- whether the issue falls within a substantially established area of knowledge, and
- whether it is necessary for the court to have a range of opinion.

The appointment of a single expert witness is subject to the consent of the expert witness being appointed (r 15.45(3), FLR). A party does not require the court’s permission to tender a report or adduce evidence

from a single expert witness appointed by the court pursuant to r 15.45(1).

The orders the court may make with respect to the appointment, instruction of or conduct of a case involving a single expert witness are detailed at r 15.46 of the FLR. The court may make orders:

(a) requiring the parties to confer for the purpose of agreeing on the person to be appointed as a single expert witness

(b) that, if the parties cannot agree on who should be the single expert witness, the parties give the court a list stating:

(i) the names of people who are experts on the relevant issue and have consented to being appointed as an expert witness, and

(ii) the fee each expert will accept for preparing a report and attending court to give evidence

(c) appointing a single expert witness from the list prepared by the parties or in some other way

(d) determining any issue in dispute between the parties to ensure clear instructions are given to the expert

(e) that the parties:

(i) confer for the purpose of preparing an agreed letter of instructions to the expert

(ii) submit a draft letter of instructions for settling by the court

(f) settling the instructions to be given to the expert

(g) authorising and giving instructions about any inspection, test or experiment to be carried out for the purposes of the report, or

(h) that a report not be released to a person or that access to the report be restricted.

Payment of a single expert witness's fees and expenses is addressed at r 15.47 of the FLR. Rule 15.47(1) provides that parties are equally liable to pay a single expert witness's reasonable fees and expenses incurred in the preparation of a report. A single expert witness is not required to undertake any work in relation to the appointment until the fees and expenses are paid or secured (r 15.47(2), FLR). In event of a dispute about fees, a party or the expert witness may request the court to determine the dispute pursuant to r 15.46.

Rule 15.48 of the FLR states a single expert witness must prepare a written report with respect to the issue in dispute addressed by the witness. In the event the single expert witness was jointly appointed by the parties, the expert witness must provide a copy of the report to all parties at the same time. Rule 15.48(3) provides if the single expert witness was appointed by the court, the expert witness must give the report to the registry manager. The note contained in r 15.48 provides an expert witness may seek procedural orders from the court under r 15.60 if the expert witness considers it would not be in the best interest of a child or a party to the proceedings to give a copy of the report to each party.

A party is not permitted to tender a report or adduce evidence from another expert witness, if a single expert witness has been appointed whether jointly by the parties or by an order of the court, without the court's permission (r 15.49(1), FLR). Rule 15.49(2) provides three exceptions to the tendering of further evidence from another expert witness on an issue already addressed by a single expert witness:

- If there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue.

- If another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue.

- If there is another special reason for adducing evidence from another expert witness.

In the event, a party wishes to cross-examine a single expert witness

at a hearing or trial, the party must inform the expert witness, in writing, at least 14 days before the date fixed for the hearing or trial, that the expert witness is required to attend to give evidence (r 15.50(1), FLR). The court may limit the nature and length of cross-examination of a single expert witness (r 15.50(2), FLR).

Tip

See *Sanders & Sanders (No 2)* (2012) FLC ¶93-521 for a discussion by the Full Court as to communication with single experts. It is a timely reminder for all practitioners and experts alike.

¶23-240 Permission for expert's evidence

The court's permission is required for a party to tender a report or adduce evidence at a hearing or trial from an expert witness, who is not a single expert witness appointed in accordance with Pt 15.5 of the Family Law Rules 2004 (Cth) (FLR) (r 15.51(1), FLR). This requirement does not apply to an independent children's lawyer to the extent that an independent children's lawyer may tender a report or adduce evidence at a hearing or a trial from one expert witness on an issue without the court's permission (r 15.51(2), FLR).

Any party seeking permission from the court to tender a report or adduce evidence from an expert witness, who is not a single expert witness appointed in accordance with the Pt 15.5 of the rules, is required to file an Application in a Case, together with an affidavit stating the facts relied on in support of the orders sought in accordance with r 15.52(1) and 5.02(1). The court has the power to allow a party to make an application orally in accordance with the court's general power set out at r 11.01. The affidavit accompanying a party's Application in a Case seeking permission to tender a report or adduce evidence from an expert witness other than a single expert,

must address the following matters listed at r 15.52(2):

(a) whether the party has attempted to agree on the appointment of a single expert witness with the other party and, if not, why not

(b) the name of the expert witness

(c) the issue about which the expert witness's evidence is to be given

(d) the reason the expert evidence is necessary in relation to that issue

(e) the field in which the expert witness is an expert

(f) the expert witness's training, study or experience which qualifies the expert witness as having specialised knowledge on the issue, and

(g) whether there is any previous connection between the expert witness and the party (r 15.52(2), FLR).

In considering whether to permit a party to tender a report or adduce evidence from an expert witness, the court may take into account:

(a) the purpose of Pt 15.5

(b) the cost impacts of the appointment of an expert witness

(c) the likelihood of the appointment expediting or delaying the case

(d) the complexity of the issues in the case

(e) whether the evidence should be given by a single expert witness rather than an expert witness appointed by one party only, and

(f) whether the expert witness has specialised knowledge, based on the person's training, study or experience:

(i) relevant to the issue on which evidence is to be given, and

(ii) appropriate to the value, complexity and importance of the case (r 15.52(3), FLR).

If permission is granted to a party to tender a report or adduce evidence from an expert witness, the permission is limited to the named expert witness, and the field of expertise stated (r 15.52(4), FLR).

A party is not entitled to adduce evidence from an expert witness if the expert's report has not been disclosed or a copy has not been given to the other party (see r 15.58, FLR).

The circumstances when evidence from another expert may be admitted were considered by Bryant CJ in the matter of *Knight & Knight* [2007] FamCA 263. The Chief Justice's reasons can be compared with the decision of Murphy J of the Family Court in the matter of *Simonsen & Simonsen* [2009] FamCA 698 where leave to adduce further evidence was refused.

¶23-250 Instructions and disclosure of expert's report

A party who instructs an expert witness to give an opinion for a case must ensure the expert witness has a copy of the most recent version of, and is familiar with, Div 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules 2004 (Cth) (FLR). The party must also obtain a written report from the expert witness (r 15.54(1), FLR).

All instructions to an expert witness must be in writing and must include:

- a request for a written report
- advice that the report may be used in an anticipated or actual case
- the issues about which the opinion is sought
- a description of any matter to be investigated, or any experiment to be undertaken or issue to be reported on, and
- full and frank disclosure of information and documents which will

help the expert witness to perform the expert witness's function (r 15.54(2), FLR).

All instructions to a single expert witness appointed by agreement between the parties must be provided jointly by the parties and, if an independent children's lawyer has been appointed in the case, the independent children's lawyer.

Given the expert must confirm, at the time any report is prepared, that they have read and understand Div 15.5.4, 15.5.5 and 15.5.6 of the FLR, it is advisable to ensure those provisions are included in the written instructions to the expert at the time they are engaged.

It is also advisable to ensure the expert is provided with a copy of Expert Evidence Practice Note (GPN-EXPT), issued by the Federal Court of Australia, directed to expert witnesses in the Federal Court of Australia.

The guidelines set out in Practice Note CM7 are intended to assist the expert who is engaged to understand their duties and responsibilities and the court's expectations of the expert. An expert's report obtained with respect to a parenting case must be given to each other party at least two days before the first court event or within seven days after the party receives the report (r 15.55(1), FLR). Any supplementary report provided by the single expert witness, and any notice amending the report under r 15.59(5), must also be disclosed to all parties in the proceedings (r 15.55(2), FLR). An expert's report which has been disclosed in accordance with r 15.55, may be tendered as evidence by any party to the proceedings (r 15.55(3), FLR). Legal professional privilege is excluded from application in relation to an expert's report which must be disclosed under r 15.55 (r 15.55(4), FLR).

If a party to a proceeding has instructed an expert witness, and those instructions are not given jointly by the parties, the party instructing an expert witness must, if requested, give the other party details of any fee or benefit received by or for the expert witness, for the preparation of the report and for services provided, or to be provided (r 15.56, FLR).

If the court is satisfied a party (the disclosing party) has access to

information or a document is not reasonably available to the other party (the requesting party), and the information or a copy of the document is necessary to allow an expert witness to carry out the expert witness's function properly, the requesting party can apply for an order that the disclosing party:

(a) file and serve a document specifying the information in enough detail to allow the expert witness to properly assess its value and significance, and

(b) give a copy of the document to the expert witness (r 15.57, FLR).

In the event, a party fails to disclose an expert's report to another party or the independent children's lawyer, that party may not use the report or call the expert witness to give evidence, unless the other party and the independent children's lawyer consent to the report being used or the expert witness being called (r 15.58, FLR).

Rule 15.54 of the FLR does not apply to a market appraisal a property valuation opinion for the purposes of a procedural hearing or conference under r 12.02(g) or r 12.05(2) (r 15.53, FLR).

¶23-260 Expert witness's duties and rights

An expert witness owes the court a duty to assist the court with matters which are within the expert witness's knowledge and capability. This duty prevails over the obligation of the expert witness to the person instructing, or paying the fees and expenses of, the expert witness (r 15.59(1)–(2), Family Law Rules 2004 (Cth) (FLR)).

The FLR also impose the following duties upon expert witnesses:

"(3) The expert witness has a duty to:

- give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability

- conduct its functions in a timely way

- avoid acting on an instruction or request to withhold or avoid agreement when attending a conference of experts

- consider all material facts, including those that may detract from the expert witness's opinion

- tell the court:

  (i) if a particular question or issue falls outside the expert witness's expertise

  (ii) if the expert witness believes that the report prepared by the expert witness:

    (A) is based on incomplete research or inaccurate or incomplete information, or

    (B) is incomplete or may be inaccurate, for any reason, and

- produce a written report that complies with rules 15.62 and 15.63" (r 15.59(3), FLR).

The expert witness's duty to the court arises when the expert witness receives instructions under r 15.54, or is informed by a party that they may be called to give evidence in a case (r 15.59(4), FLR).

In the event, an expert witness changes an opinion after the preparation of a report, written notice must be given to that effect to the instructing party, or to the registry manager and each party (r 15.59(5), FLR).

In the case of *Carpenter & Lunn* (2008) FLC ¶93-377, a document was obtained after the conclusion of the trial. The wife appealed to the Full Court of the Family Court of Australia on the basis the proceedings were flawed as the expert's report did not have the benefit of the new document. The Full Court allowed the appeal, set aside the orders and remitted the application for rehearing.

¶23-270 Ability to seek orders

A single witness may, by written request, seek clarification of instructions, relate to any questions mentioned in Div 15.5.6 of the Family Law Rules 2004 (Cth) (FLR) (questions to single expert witness) or relate to a dispute about fees (note to r 15.60(1), FLR). The request must comply with r 24.01(1) and set out the procedural orders sought and the reasons the orders are sought (r 15.60(2), FLR). A copy of the written request must be served on each party and the court must be satisfied the copy has been served (r 15.60(3), FLR). The written request may be determined in chambers unless a party makes a written objection, within seven days, to the request being determined in chambers or the court decides that an oral hearing of the request is necessary (r 15.60(4), FLR).

¶23-280 Expert witness's evidence in chief

The evidence in chief an expert witness provides comprises the expert's report, any changes to the report in a notice under r 15.59(5), and any answers to questions under r 15.66 (r 15.61(1), Family Law Rules (Cth) (FLR)). An expert witness is afforded the same protection and immunity in relation to the contents of a report disclosed under the FLR, or an order as the expert witness could claim if the contents of the report were given by the expert witness orally at a hearing or trial (r 15.61(2), FLR).

The form and content of an expert's report is set out at r 15.62 and 15.63. Rule 15.62(1) provides an expert's report must be addressed to the court and the party instructing the expert witness, have attached to it a summary of the instructions given to the expert witness and a list of any documents relied on in preparing the report, and be verified by an affidavit of the expert witness. Rule 15.62(2) provides the affidavit verifying the expert's report referred to at r 15.62(1) must contain the following passage (r 15.62(2), FLR):

> "I have made all the inquiries I believe are necessary and appropriate and to my knowledge there have not been any relevant matters omitted from this report, except as otherwise specifically stated in this report.
>
> I believe that the facts within my knowledge that have been stated

in this report are true.

The opinions I have expressed in this report are independent and impartial.

I have read and understand Divisions 15.5.4, 15.5.5 and 15.5.6 of the *Family Law Rules 2004* and have used my best endeavours to comply with them.

I have complied with the requirements of the following professional codes of conduct or protocol, being [*state the name of the code or protocol*].

I understand my duty to the court and I have complied with it and will continue to do so".

An expert's report must include each of the matters referred to at r 15.63. In the event the report prepared by the expert does not comply with the rules, and specifically r 15.62 and 15.63, the court may:

- order the expert witness to attend court
- refuse to allow the expert's report or any answers to questions to be relied on
- allow the report to be relied on but take the non-compliance into account when considering the weight to be given to the expert witness's evidence, and
- take the non-compliance into account when making orders for:
  - an extension or abridgement of a time limit
  - a stay of the case
  - interest payable on a sum ordered to be paid, or
  - costs (r 15.64, FLR).

The court's power with respect to ordering costs is subject to s 117(2) of the *Family Law Act 1975* (Cth).

¶23-290 Questions to single expert witness

After the provision of an expert's report, any party wishing to ask the single expert witness a question must do so within seven days after the conference under r 15.64B or, if no conference is held, within 21 days after receipt of the single expert witness's report by the party (r 15.65(1), Family Law Rules 2004 (Cth) (FLR)). Any questions posed to a single expert witness must:

(a) be in writing and be put once only

(b) be only for the purpose of clarifying the expert's report, and

(c) not be vexatious or oppressive, or require the expert witness to undertake an unreasonable amount of work to answer (r 15.65(2), FLR).

Rule 15.65(3) of the FLR provides that a party asking a question of a single expert witness must also give a copy of any questions to the other party.

A single expert witness is required to answer any questions posed by a party in accordance with r 15.65 within 21 days of receiving the written notice (r 15.66(1), FLR). A single expert's answer to a question posed by a party must be in writing and refer specifically to the question. It must also answer the substance of the question, or object to answering the question (r 15.66(2), FLR).

In the event, the single expert witness objects to answering a question or is otherwise unable to answer a question, the single expert witness must state the reason for the objection or the inability to answer the question in the response provided to the party (r 15.66(3), FLR).

The answers must be attached to the affidavit under r 15.62(2), be sent to all parties at the same time, and be filed by the party asking the questions. The answers are taken to be part of the expert's report (r 15.66(4), FLR).

The party asking the questions are to pay the single expert witness's reasonable fees and expenses incurred by the single expert witness

when answering any questions (r 15.67(1), FLR). Despite the requirement to answer the questions within 21 days of receiving the written notice (r 15.66(1), FLR), a single expert witness is not required to answer any questions until the fees and expenses for answering them are paid or secured (r 15.67(2), FLR).

¶23-300 Evidence from two or more expert witnesses

Division 15.5.7 of the Family Law Rules 2004 (Cth) (FLR) applies where two or more parties intend to tender an expert's report or adduce evidence from different expert witnesses about the same, or a similar, question. Rule 15.69 provides the parties must arrange for the expert witnesses to confer at least 28 days before the relevant date. Rule 15.01 defines the "relevant date" for an affidavit, report or document proposed to be entered into evidence means the earlier of the first day of the final stage of the trial in which the affidavit, report or document is to be relied on in evidence or the first day when the affidavit, report or document is to be relied on in evidence. Rule 15.69 provides each party must give to the expert witness the party has instructed, a copy of the document entitled *Experts' Conferences — Guidelines for Expert Witnesses and Those Instructing Them in Cases in the Family Court of Australia*. The text of the prescribed document is contained in Sch 5 of the FLR. In relation to a conference of expert witnesses pursuant to r 15.69, the court may make an order including:

> "(a) which expert witnesses are to attend
>
> (b) where and when the conference is to occur
>
> (c) which issues the expert witnesses must discuss
>
> (d) the questions to be answered by the expert witnesses, or
>
> (e) the documents to be given to the expert witnesses, including:
>
> (i) Div 15.5.4, 15.5.5 and 15.5.6 of these Rules
>
> (ii) relevant affidavits

(iii) a joint statement of the assumptions to be relied on by the expert witnesses during the conference, including any competing assumptions

(iv) all expert's reports already disclosed by the parties" (r 15.69(2), FLR).

At the conference between the expert witnesses, the expert witnesses must identify the issues which are agreed and not agreed, and reach agreement on any outstanding issue. They must also identify the reason for disagreement on any issue, and identify what action may be taken to resolve any outstanding issues. Finally, they must prepare a joint statement outlining the matters mentioned in para (a) to (d) and deliver a copy of the statement to each party (r 15.69(3), FLR).

In the event of the expert witnesses reaching an agreement on an issue, the agreement does not bind the parties until the parties expressly agree to be bound by the agreement (r 15.69(4), FLR). The joint statement prepared by the expert witnesses at a conference, may be tendered as evidence of matters agreed on, and to identify the issues before the court on which further evidence will be called (r 15.69(5), FLR).

Rule 15.70 provides for the conduct of a trial with respect to expert witnesses. At a trial, the court may make orders with respect to expert witnesses and the way in which the evidence of the witness is given at trial. The rule provides that a court may order an expert witness to clarify their evidence after cross-examination, that the expert witness be available to give evidence about the opinion given by another expert witness, and that each expert witness is to be sworn and available to give evidence in the presence of each other.

¶23-310 Admissions

The *Evidence Act 1995* (Cth) (EA) defines the term "admission" as a previous representation that is:

- made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and

- adverse to the person's interest in the outcome of the proceeding (Dictionary, EA).

Section 84 of the EA provides that, if a party against whom evidence of an admission is adduced suggests that the admission made was influenced by a threat or fear of conduct by any person, the evidence of an admission is not admissible unless the court is satisfied that the admission *and* the making of the admission, was not influenced by:

- violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or

- a threat of conduct of any kind.

¶23-320 Proof of admissions

Section 88 of the *Evidence Act 1995* (Cth) provides that in the determination of whether evidence of an admission is admissible, the court is to find a person made the admission if it is reasonably open to find he or she made the admission.

¶23-330 Hearsay and opinion rules

The hearsay rule and the opinion rule do not apply to evidence of an admission pursuant to s 81(1) of the *Evidence Act 1995* (Cth) (EA). Section 81(2) of the EA further provides that the hearsay rule and the opinion rule do not apply to evidence of a previous representation:

(a) made in relation to an admission at the time the admission was made, or shortly before or after the admission was made (s 81(2)(a)), and

(b) to which it is reasonably necessary to refer in order to understand the admission (s 81(2)(b)).

Example

Section 81, *Evidence Act 1995*

D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W that:

- D made the admission to W as proof of the truth of that admission, and
- W formed the opinion that D was sane when he made the admission.

¶23-340 Exclusion of evidence of admission that is not first-hand

The hearsay rule is not excluded by the application of s 81 of the *Evidence Act 1995* (Cth) (EA) if the evidence of an admission is not first-hand. The hearsay rule will still apply to evidence of an admission unless it is given by a person who saw, heard, or otherwise perceived the admission being made, or, it is a document in which the admission is made (s 82, EA).

¶23-350 Third parties

The hearsay rule or opinion rule are not excluded by the application of s 81 of the *Evidence Act 1995* (Cth) (EA) to evidence of an admission in respect of a third party (s 83(1)). The term "third party" is defined in s 83 of the EA to be a party to the proceeding concerned, other than the party who made the admission, or adduced the evidence. The evidence may be used if the third party consents (s 83(2)). Any consent to the use of the admission cannot be only with respect to a part of the evidence (s 83(4)).

¶23-360 Admissions made with authority

Section 87 of the *Evidence Act 1995* (Cth) (EA) provides that when determining whether a previous representation made by a person is also taken to be an admission by a party, "the court is to admit the representation if it is reasonably open to find that:

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made

(b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority, or

(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party".

The hearsay rule does not apply to a previous representation made by a person that tends to prove that:

- the person had authority to make statements on behalf of another person in relation to a matter
- the person was an employee of another person or had authority otherwise to act for another person, or
- the scope of the person's employment or authority (s 87(2), EA).

¶23-370 Notice to admit facts

The Family Law Rules 2004 (Cth) (FLR) encourages parties to make admissions in relation to facts and documents so as to reduce delay and limit costs (Note to Div 11.2.1). A party may ask the other party that a fact is true or a document is genuine by serving a notice to admit on another party (r 11.07(1), FLR).

A notice to admit must include a note to the effect that failure to serve a notice disputing a fact or document will result in the party being taken to have admitted that the fact as true or the document is genuine (r 11.07(2), FLR).

A party must attach any documents that are mentioned in a notice to admit (r 11.07(3), FLR). If it is not practicable to attach a copy of the document to the notice to admit, the party serving the notice must identify the document, specify a convenient place and time at which the document may be inspected, and produce the document for inspection at the specified place and time (r 11.07(4), FLR).

¶23-380 Notice disputing fact or document

If a party served with a notice to admit seeks to dispute a fact or document specified in the notice to admit, the party must serve, within 14 days, a notice disputing the fact or document (r 11.08(1), Family Law Rules 2004 (Cth) (FLR)). In the event that the party does not serve a notice disputing the fact or document within the time specified after receiving a notice to admit, the party is taken to admit the fact as true or the document as genuine, for the purposes of the proceedings only (r 11.08(2), FLR).

If a party serves a notice disputing the fact or document in accordance with r 11.08(1) and the fact or genuineness of the document is later proved in the proceedings, the party who served the notice disputing the fact or document may be ordered to pay the costs of proving the fact or document (r 11.08(3), FLR).

A party may withdraw an admission that a fact is true or a document is genuine only with the court's permission or the consent of all parties (r 11.09(1), FLR). The court has a discretion to order that any party who has applied to withdraw an admission, pay the other party's costs thrown away (r 11.09(2), FLR).

FEDERAL CIRCUIT COURT

¶23-390 Introduction

The Federal Circuit Court Rules 2001 (Cth) (FCCR) apply to proceedings in the Federal Circuit Court. The FCCR commenced on 30 July 2001. The object of the FCCR is to assist the just, efficient and economical resolution of proceedings before the Federal Circuit Court. In accordance with the object of the *Federal Circuit Act 1999* (Cth) stated at r 1.03(1), the FCCR aim to assist the Federal Circuit Court to operate as informally as possible, to use streamlined processes and to encourage the use of appropriate dispute resolution procedures (r 1.03(2), FCCR). To assist the court to operate in accordance with the objects of the FCCR, the parties must avoid undue delay, expense

and technicality and consider options for primary dispute resolution as early as possible (r 1.03(4), FCCR).

Rule 1.05 provides that it is intended that the practice and procedure of the Federal Circuit Court is to be governed principally by the rules contained in the FCCR. If in a particular case the FCCR are insufficient or inappropriate, the court may apply the Federal Court Rules, the Family Law Rules 2004 (Cth) (FLR) or the Family Law Rules 1984 (Cth), in whole or in part and modified or dispensed with, as may be necessary from time to time (r 1.05(2), FCCR).

As with the FLR, the FCCR contains a general provision that the court may in the interests of justice dispense with compliance, or full compliance, with any of the rules at any time (r 1.06(1), FCCR). If the court gives a direction or makes an order in a proceeding before the Federal Circuit Court that is inconsistent with any of the FCCR, the direction or order of the court will prevail in that proceeding (r 1.06(2), FCCR).

The general requirements for any documents filed in the Federal Circuit Court are detailed at r 2.01. The exception to r 2.01 is that it does not apply to a document that is annexed to an affidavit (r 2.01(2), FCCR). Any document filed in connection with the proceeding before the Federal Circuit Court must bear the distinctive number of the proceedings (r 2.02, FCCR). Unless the Federal Circuit Court makes any order providing otherwise, “strict compliance with forms is not required in the Federal Circuit Court and substantial compliance is sufficient” (r 2.04(1), FCCR). A document prepared in the form prescribed for a similar purpose in the Family Court or the Federal Court may be taken to substantially comply with the appropriate form for a proceeding in the Federal Circuit Court (r 2.04(2), FCCR).

Rule 2.04(3) provides the heading for any document filed in the proceedings, unless otherwise provided for under the FCCR.

¶23-400 Expert evidence

An “expert” is defined at r 15.06A of the Federal Circuit Court Rules 2001 (Cth) (FCCR), to mean a person (other than a family and child

counsellor or a welfare officer) who has specialised knowledge about matters relevant to the question based on that person's training, study or experience. An expert witness who is assisting the Federal Circuit Court is to be guided by the practice direction guidelines for expert witnesses published by the Federal Court (r 15.07, FCCR). The note to r 15.07 provides that while the practice direction guidelines are not intended to address all aspects of an expert's duties, the key points in the guidelines are:

- an expert witness has a duty to assist the court on matters relevant to the expert's area of expertise
- an expert witness is not an advocate for a party
- the overriding duty of an expert witness is to the court and not to the person retaining the expert, and
- if expert witnesses confer with the direction of the court it would be improper for an expert to be given or to accept instructions not to reach agreement.

Rule 15.08 applies if two or more parties to a proceeding call expert witnesses to give opinion evidence about the same or a similar question. The court may give any direction that it thinks fit in relation to:

> "(a) the preparation by the expert witnesses (in conference or otherwise) of a joint statement of how their opinions on the question agree and differ; or
>
> (b) the giving by an expert witness of an oral or written statement of:
>
> i. his or her opinion on the question; or
>
> ii. his or her opinion of another expert on the question; or
>
> iii. whether in the light of factual evidence lead at trial, he or she adheres to, or wishes to modify, any opinion earlier given; or

(c) the order in which the expert witnesses are to be sworn, are to give evidence, are to be cross-examined or are to be re-examined; or

(d) the position of witnesses in the courtroom (not necessarily in the witness box)" (r 15.08(2), FCCR).

The court may, by request or by its own motion, appoint an expert to enquire into and report on a question arising in the proceeding. The court appointed expert will also give directions about an experiment or test (other than a testing procedure for s 69W of the FLA) for the purposes of the inquiry or report, and give further directions, including to extend or supplement the enquiry or report [of an expert]. The court expert should be a person agreed upon between the parties (r 15.09, FCCR).

Once the report is prepared, the court expert must give the report to the registrar together with the number of copies as directed by the registrar (r 15.10(1), FCCR). Rule 15.10(2) provides that the registrar must send a copy of the report to each of the parties. The court may then receive the report into evidence, allow the examination of the court expert, or give other directions as to the use of the report in accordance with r 15.10(3). A party who wishes to cross-examine a court expert must arrange for the attendance of the court expert at the hearing or trial, may issue a subpoena requiring the expert's attendance, and, unless otherwise directed by the court, must pay the reasonable expenses of the expert's attendance (r 15.10(4), FCCR). Rule 15.11 of the FCCR provides that, unless otherwise directed by the court, parties are jointly liable to pay the reasonable remuneration and expenses of the court expert for the preparation of a report. This rule mirrors r 15.47(1) of the Family Law Rules 2004.

If a court expert has prepared a report on a question, a party may adduce evidence from another expert on the question with leave of the court (r 15.12, FCCR).

¶23-410 Subpoenas and notices to produce

For the purposes of the Federal Circuit Court Rules 2001 (Cth) (FCCR) the term “issuing party” is defined as a party at whose request a subpoena is issued. A “person subpoenaed” is defined as a person required by a subpoena to produce a document or give evidence. The Federal Circuit Court, on its own initiative or at the request of a party, may issue a subpoena for production, a subpoena to give evidence, or a subpoena for production and to give evidence (r 15A.02(1), FCCR).

A subpoena issued by either the Federal Circuit Court or a registrar of the court must specify the name or designation by office or position of the person being subpoenaed (r 15A.02(3), FCCR). A subpoena requiring a person to produce a document or thing (subpoena for production) must include an adequate description of the document or thing to be produced (r 15A.02(4), FCCR). A party should not request that the Federal Circuit Court or a registrar issue a subpoena for production and to give evidence, if the production of a document or thing would be sufficient (r 15A.02(5), FCCR).

A subpoena requiring the attendance of a person must be made returnable on a day when the proceeding is listed for a hearing (r 15A.04(2), FCCR). A subpoena requiring production only, however, may be made returnable at a date fixed by the court (r 15A.04(1), FCCR). Unless the court directs otherwise, a subpoena may not be served less than seven days before attendance or production under the subpoena is required (r 15A.04(3), FCCR), and must be served within three months from the date of issue (r 6.18, FCCR). Unless otherwise directed by the court, a party must not request the issue of more than five subpoenas in a proceeding before the Federal Circuit Court (r 15A.05(1), FCCR).

Any subpoena issued by either the Federal Circuit Court or a registrar of that court must be served in accordance with the provisions of Pt 6 of the FCCR (r 15A.06(1), FCCR). Rule 6.06(1) of the FCCR provides that service by hand is required for a subpoena which requires the attendance of a person. Rule 6.06(1) is subject to the exceptions listed at r 6.06(2). Service by hand is not required if:

- there are current proceedings for which there is a notice of address for service for the person to be served, or

- the court directs that an application may be served in another way, or
- a lawyer accepts service for a party and subsequently files an address of service, or
- a lawyer accepts service for a person other than a party.

The issuing party must give a copy of the subpoena to each other party in the proceedings and any independent children's lawyer within a reasonable time before attendance or production under the subpoena is required (r 15A.06(2), FCCR).

The person serving a subpoena must give the person subpoenaed sufficient conduct money for return travel between their place of residence or employment and the court (r 15A.07(1), FCCR). This amount must be at least $25 (r 15A.07(2), FCCR).

A party who has requested that the court or registrar of the court issue a subpoena may, by giving written notice served upon the person subpoenaed and on each other party, undertake not to require the person subpoenaed to comply with the subpoena (r 15A.08, FCCR). All or part of a subpoena may be set aside by an order of the court (r 15A.09, FCCR).

¶23-420 Costs of complying with subpoena

The court may order that payment be made for any loss or expense incurred when complying with a subpoena (r 15A.10, Federal Circuit Court Rules 2001 (Cth) (FCCR)).

If a subpoena is addressed to a person who is not a party in the proceedings, and that person has given the issuing party notice that substantial loss or expense would be incurred in properly complying with the subpoena, the court, if satisfied that substantial loss or expense is incurred in properly complying with the subpoena, may direct the issuing party to pay the person subpoenaed (r 15A.11(1) and (2), FCCR). The court may fix the amount payable to the person subpoenaed, having regard to the scale of fees and allowances

payable to witnesses in the Supreme Court of the State or Territory where the person is required to attend (r 15A.11(3), FCCR). Any amounts payable with respect to the costs of complying with a subpoena is in addition to any conduct money that must be paid to the person subpoenaed when serving the subpoena (r 15A.11(4), FCCR). In the event that a party, who is required to pay an amount under r 15A.11 with respect to the costs of complying with the subpoena, obtains an order for costs during a proceeding, the court may allow the amount to be paid with respect to complying with the subpoena to be included in the costs recoverable in the proceedings, or make any other order the court thinks appropriate (r 15A.11(5), FCCR).

¶23-430 Production of documents and access by parties

A person who inspects or copies a document under the Federal Circuit Court Rules 2001 (FCCR) or an order must use the documents only for the purposes of the proceedings, and not disclose the contents of the document or give a copy of it to any other person without the court's permission (r 15A.12(2) FCCR). However, a solicitor may disclose the contents or give a copy of the document to the solicitor's client or counsel, and a client may disclose the contents or give a copy of the document to his or her solicitor (r 15A.12(3), FCCR).

To secure leave of the court to review and, in certain circumstances, copy documents produced under subpoena, parties file Notice of Request to Inspect confirming that all of the requirements of service have been met and that no objection to the subpoena has been received.

¶23-440 Right to inspection

If a person subpoenaed, another party or an interested person has not made an objection under r 15A.14 Federal Circuit Court Rules 2001 (Cth) (FCCR) by the date required for production, each party and any independent children's lawyer may, after that date, inspect a subpoenaed document and take copies of a subpoenaed document, other than a child welfare record, criminal record, medical record or

police record (r 15A.13(2), FCCR).

No inspection of documents can take place until the court has granted leave to the parties and the independent children's lawyer to do so. Leave will not be granted until a Notice of Request to Inspect (described above) has been filed. The Notice of Request to Inspect must not be filed before the date for the production of the documents has passed, and there have been 10 clear days since service of the subpoena on all relevant parties.

¶23-450 Failure to comply with subpoena

The court or a registrar may issue a warrant for the arrest of the person who fails, without lawful excuse, to comply with a subpoena. The court can also order that person to pay any costs of failure to comply (r 15A.16(1), Federal Circuit Court Rules 2001 (Cth) (FCCR)).

In a practical sense, the court may enlarge the date for the return of documents at first instance to allow the issuing party to make some enquiries as to why the documents have not been produced. Issuing a warrant for the arrest of the person to whom the subpoena would be the last resort to ensure compliance with the subpoena.

¶23-460 Notice to produce

A party may, by notice in writing, require another party to produce a specified document that is in the possession, custody or control of the other party (r 15A.17(1), Federal Circuit Court Rules 2001 (Cth) (FCCR)). Unless otherwise directed by the court, a party who receives a written notice to produce under r 15A.17(1) must produce the document at the hearing (r 15A.17(2), FCCR).

¶23-470 Affidavits

Division 15.4 of the Federal Circuit Court Rules 2001 (Cth) (FCCR) details the rules in relation to the drafting of affidavits for proceedings in the Federal Circuit Court.

An affidavit filed in the Federal Circuit Court must be divided into consecutively numbered paragraphs. Where possible, each paragraph should be confined to a distinct part of the subject (r 15.25, FCCR). The person making the affidavit is required to sign each page of the affidavit (r 15.26(1), FCCR).

The FCCR provide that an affidavit must also have a clause placed at the end of the affidavit (jurat) which:

- states the name of the person swearing the affidavit
- states whether the affidavit is sworn or affirmed
- states the day and place the person makes the affidavit
- states the full name and capacity of the person before whom the affidavit is made
- is to be signed by the person making the affidavit in the presence of the person before whom it is made, and
- is to be signed by the person before whom it is made (r 15.26(2), FCCR).

Rule 15.27 provides for the certification of an affidavit by a person who is blind, illiterate or physically incapable of signing an affidavit. In the event that the person swearing the affidavit is blind, illiterate or physically incapable of signing the affidavit, the person before whom the affidavit is sworn must certify in or below the jurat, that:

- the affidavit was read to the person making it (r 15.27(1)(a), FCCR)
- the person seemed to understand the affidavit (r 15.27(1)(b), FCCR), and
- in the case of a person who is physically incapable of signing, that the person indicated that the contents of the affidavit were true (r 15.27(1)(c), FCCR).

Rule 15.28 provides that a document that is to be used in conjunction with an affidavit must be annexed to the affidavit (r 15.28(1), FCCR). In the event that it is impractical to annex the document due to either the nature of the document or its length, then the document may be an exhibit to the affidavit (r 15.28(2), FCCR).

Any annexure to an affidavit must be paginated, and bear a statement signed by the person before whom the affidavit is made identifying it as the particular annexure mentioned in the affidavit (r 15.28(3), FCCR).

An exhibit to an affidavit must be marked with the title and number of the proceeding, be paginated, and bear a statement signed by the person before whom the affidavit is made identifying it as the particular exhibit mentioned in the affidavit (r 15.28(5), FCCR).

The court or registrar has the power to order that material be struck from an affidavit if it is:

- inadmissible
- unnecessary
- irrelevant
- prolix
- scandalous
- argumentative, or
- contains opinions of a person or persons who are not qualified to give those opinions (r 15.29(1), FCCR).

Any costs incurred as a result of material being struck out of the affidavit are to be borne by the party who filed the affidavit, unless otherwise directed by the court or registrar (r 15.29(2), FCCR).

Practitioners should also be aware of the requirements of Practice Directive No 2 of 2017 Interim Family Law Proceedings (from 1 January 2018), which took effect in the FCC from 1 January 2018 in

respect of interim family law proceedings. See ¶23-080 on Affidavits for details.

¶23-480 Notice to admit facts

Rule 15.30 of the Federal Circuit Court Rules 2001 (Cth) (FCCR) provides that if a party makes an admission, the court may, on application of another party, make an order to which the party applying is entitled on the admission.

A party to a proceeding may give notice and ask another party to admit the facts or documents specified in the schedule to the notice (r 15.31(1), FCCR).

A party is taken to admit the fact or authenticity of the document if it does not, within 14 days, serve a notice on the party who served the notice disputing the fact or authenticity of the document (r 15.31(2), FCCR).

Under r 15.31(3), the court may give a party leave to withdraw an admission made under r 15.31(2).

If a party serves a notice disputing a fact or authenticity of a document, and the fact or authenticity of the document is later proved, then the party who served the notice disputing the fact or authenticity of the document must pay the costs of the proof (r 15.31(4), FCCR).

COURT PROCEDURE

STARTING A CASE

ENDING A CASE WITHOUT A TRIAL

CASE PREPARATION

Editorial information

Written by Chris Othen

¶24-000 Family Law Rules 2004

The Family Law Rules 2004 (Cth) (FLR) are intended to be a complete set of rules governing the procedures of the Family Court.

Although aspects of the Family Court's procedure are found in other sources (such as the *Family Law Act 1975* (Cth) (FLA) and the Family Law Regulations 1984 (Cth)), the FLR are generally comprehensive.

This chapter deals with procedural aspects of bringing proceedings at first instance at the Family Court of Australia, from pre-action matters through to final orders.

¶24-010 The structure of the Rules

Preliminary	Ch 1	
	Sch 1	Pre-action procedures
Starting a case	Ch 2	Applications generally
	Ch 3	Divorce
	Ch 4	Applications for final orders
	Ch 5	Applications in a case
	Ch 6	Parties
	Ch 7	Service
	Ch 8	Right to be heard and

		address for service
	Ch 9	Response and reply
Ending a case early	Ch 10	Ending a case without a trial
Case preparation	Ch 11	Case management
	Ch 12	Case management by registrars
	Ch 13	Disclosure
	Ch 15	Evidence
	Sch 5	Experts' conferences
Orders during cases	Ch 14	Property orders
Trial	Ch 16	Trials and judicial case management
	Ch 16A	Less Adversarial Procedure
Orders	Ch 17	Orders
	Ch 18	Delegation of Court powers
Costs	Ch 19	
Enforcement	Ch 20	Financial orders and obligations
	Ch 21	Parenting orders, contravention and contempt
Appeals	Ch 22	
Documents	Ch 23	Registration
	Ch 24	Filing

Special cases	Ch 25	Corporations Act
	Ch 26	Bankruptcy Act
Scale of costs	Sch 3	
Conduct Money	Sch 4	

Preliminary

Chapter 1 provides an overarching framework for the Family Law Rules 2004 (Cth) (FLR), including the Family Court's philosophy, the purpose of the FLR, and compulsory pre-action procedures.

A number of fundamental rules can be found in Ch 1:

r 1.03	If the application of any rule is inconsistent with a rule in Ch 1, the rule in Ch 1 applies.
r 1.04	The **main purpose** of the FLR: to ensure each case is resolved in a just and timely manner, and at a cost which is reasonable in all the circumstances to the parties and the court.
r 1.05	Before starting a case, the parties must comply with the pre-action procedures.
r 1.06	The court must apply the FLR, and actively manage cases to promote the main purpose.
r 1.08	The parties and their lawyers are responsible for achieving the main purpose.
r 1.09	If there is no provision or rule to deal with a situation or a difficulty arises, the court must make such order as it sees fit.
r 1.10	The court may make any order about the FLR, and of its own initiative.
r 1.12	The court may dispense with the FLR.
r 1.14	The court may shorten or extend time for compliance with a procedural order or rule.

r 1.15	If no time for compliance is specified, the action must be taken as soon as practicable.
r 1.17	Notes and examples in the FLR are not part of the FLR, and are explanatory only.
r 1.21	How to calculate time.

¶24-020 Pre-action procedures

Each party is expected to make a genuine effort to resolve issues in dispute prior to starting a case, using the pre-action procedures.

The pre-action procedures are contained in Sch 1. They are divided into Pt 1 for financial (property and maintenance) matters, and Pt 2 for parenting matters. The provisions mirror one another in many respects. However, in relation to parenting matters, parties wishing to apply for an order under Pt VII must first attend a registered family dispute resolution practitioner in an attempt to try and resolve the matter (see ¶24-030).

The parties are not obliged to comply with the pre-action procedures if:

- there are good reasons (para 1(2) of Sch 1)
- for a parenting case — the case involves allegations of child abuse or family violence (r 1.05(2)(a))
- for a property case — the case involves allegations of family violence or fraud (r 1.05(2)(b))
- the application is urgent (r 1.05(2)(c))
- the applicant would be unduly prejudiced (r 1.05(2)(d))
- there has been a previous application in the same cause of action in the 12 months immediately before the start of the case (r 1.05(2)(e))

- there is a genuinely intractable dispute (para 1(4)(d) of Sch 1)
- a time limit is close to expiring (para 1(4)(f) of Sch 1)
- the case is an application for divorce (r 1.05(2)(f))
- the case is a child support application or appeal (r 1.05(2)(g)), or
- the case involves a court's jurisdiction in bankruptcy (r 1.05(2)(h)).

The first obligation is to participate in primary dispute resolution, including mediation and negotiation between lawyers.

If this is unsuccessful, or one party refuses to do so, the party wishing to begin a case must serve a notice of intention to start a case, setting out the issues in dispute, the orders to be sought if a case is begun, a genuine offer to resolve the issues, and a time limit for responding.

In response, the other party is expected to do the same, within the time limit for compliance.

Parties are not expected to start their case unless there is no reply to the party's notice, or settlement is not reached after reasonable correspondence.

Disclosure is to take place as if the matter were in court, and the financial part of the procedures sets out a list of the documents the parties are expected to exchange.

Part 15.5 of the FLR applies to pre-action expert evidence. The requirement that single joint experts be used is less stringent; they should be used if practicable under the pre-action procedures (para 5(2)(c) to Pt 1 of Sch 1 of the FLR).

Lawyers have obligations relating to pre-action procedures, at [6] to each Part of Sch 1.

Lawyers must:

- advise clients of ways of resolving the dispute without starting legal action

- advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty
- subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action
- notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay
- advise clients of the estimated costs of legal action
- advise clients about the factors that may affect the court in considering costs orders
- give clients documents prepared by the court (if applicable) about:
  - the legal aid services and dispute resolution services available to them
  - the legal and social effects and the possible consequences of proposed litigation for children
- actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable, and
- if a client wishes not to disclose a fact or document that is relevant to the case, take the appropriate action, that is, cease to act for the client.

A failure to comply with the pre-action procedures without good reason puts a party at risk of a costs order. Costs orders for failure to follow the pre-action procedures have been rare (see *Cross & Beaumont* [2007] FamCA 568; *LM & ZJL & SZ* [2007] FMCAfam 691;

Sanders & Jamieson (No 2) [2007] FamCA 1417 and *Smythe & Holly* [2007] FamCA 302).

¶24-030 The effect of s 60I of the Family Law Act 1975

Further pre-action provisions must be followed before parenting cases are started.

The provisions *only* apply to parenting cases.

Section 60I of the *Family Law Act 1975* (Cth) makes it impossible to bring a parenting case without a certificate from a family dispute resolution practitioner, except in certain limited circumstances.

Family dispute resolution practitioners are accredited and the court can make accreditation rules in this regard (s 10A).

The services are provided on a local basis through family relationship centres and private practitioners, which offer general counselling, mediation and information services to separating couples. Further information and locations of family relationship centres may be found at www.familyrelationships.gov.au.

All applicants for parenting orders, regardless of whether previous orders have been made or the matter has otherwise been before the court in the past, must file a s 60I certificate and otherwise satisfy the requirements set out in s 60I(7)–(12).

The certificate must be filed at the same time as starting a case, unless:

- the order is to be made by consent
- it is in response to an application that another party has made for a Pt VII order
- the court is satisfied that there are reasonable grounds to believe that:
  - there has been abuse of the child by one of the parties,
  - there would be a risk of abuse of the child if there were to be

a delay in applying for the order,

– there has been family violence by one of the parties,

– there is a risk of family violence by one of the parties, or

• all the following conditions are satisfied:

– the application is made in relation to a particular issue

– a Pt VII order has been made in relation to that issue within the period of 12 months before the application is made

– the application is made in relation to a contravention of the order by a person

– the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order, or

• the application is made in circumstances of urgency

• one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason), or

• other circumstances specified in the regulations are satisfied (none have been specified as yet).

Otherwise, the certificate is necessary under s 60I(7). The types of certificate available to the family dispute resolution practitioner are:

• the person did not attend family dispute resolution with the practitioner and the other party or parties, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to attend

• the person did not attend family dispute resolution with the practitioner and the other party or parties, because the

practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution

- the person attended family dispute resolution with the practitioner and the other party or parties, and that all attendees made a genuine effort to resolve the issue or issues

- the person attended family dispute resolution with the practitioner and the other party or parties, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues.

¶24-040 The main purpose

The main purpose of the Family Law Rules 2004 (Cth) (FLR) is to ensure each case is resolved in a just and timely manner, and at a cost that is reasonable in all the circumstances to the parties and the court (r 1.04).

The court is directed to achieve this in a number of ways at r 1.07:

- encourage parties to negotiate a settlement, if appropriate

- be proportionate to the issues in a case and their complexity, and the likely costs of the case

- promote the saving of costs

- give an appropriate share of the court's resources to a case, taking into account the needs of other cases, and

- promote family relationships after resolution of the dispute, where possible.

Each party has a responsibility to promote and achieve the main purpose (r 1.08), by:

- ensuring that any orders sought are reasonable in the

circumstances of the case and that the court has the power to make those orders

- complying with the duty of disclosure
- ensuring readiness for court events
- providing realistic estimates of the length of hearings or trials
- complying with time limits
- giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event
- assisting the just, timely and cost-effective disposal of cases
- identifying the issues genuinely in dispute in a case
- being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact
- limiting evidence, including cross-examination, to that which is relevant and necessary
- being aware of, and abiding by, the requirements of any practice direction or guideline published by the court, and
- complying with these FLR and any orders.

A lawyer for a party has a responsibility to comply, as far as possible, with the above matters.

A lawyer attending a court event for a party must be familiar with the case, and be authorised to deal with any issue likely to arise.

¶24-050 Calculating time

Under r 1.21, days on which the registry is closed are counted for the purpose of calculating time for compliance with the Family Law Rules

2004 (Cth) or an order of the court.

The exception is when the time for compliance is five days or less; in that case, days when the registry is closed are excluded.

When calculating time for compliance running from a particular date or event, the date or the day on which the event occurs is not counted.

If the registry is closed on the last day for compliance, compliance on the next day the registry is open suffices.

STARTING A CASE

¶24-060 Introduction

On 12 April 2013, the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court published a Protocol for the division of work between the two courts. Unless the case fits one of the following criteria then the case should be commenced in the Federal Circuit Court. If the case is considered to be in the wrong court by the Registrar or judge then, of the court's own motion or on application, and with no right of appeal, the proceedings can be transferred to the other court at any time.

The criteria are:

1. International child abduction.

2. International relocation.

3. Disputes as to whether a case should be heard in Australia.

4. Special medical procedures (of the type such as gender reassignment and sterilisation).

5. Contravention and related applications in parenting cases relating to orders which have been made in Family Court proceedings, which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing.

6. Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.

7. Complex questions of jurisdiction or law.

8. If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.

Chapter 2 of the Family Law Rules 2004 (Cth) (FLR) is the starting point for guidance about the appropriate procedure to use when starting a case.

Table 2.1 of the FLR shows which form to use in particular cases, and Table 2.2 sets out the documents which need to be filed in each case.

Chapter 3 deals with the special case of divorce applications. Divorces are dealt with by the Federal Circuit Court, which has its own procedure, under the Federal Circuit Court Rules 2001 (Cth).

Occasionally, divorces are transferred to the Family Court (for example, when the registrar or judge cannot be satisfied that there are appropriate arrangements in place for the children and a parenting case is pending), in which case Ch 3 applies.

Chapter 4 deals with Applications seeking final orders (Initiating Applications) in more detail, including special cases, and the procedure for Applications in a Case is at Ch 5.

¶24-070 Basic procedure

When starting a case, usually you need to file:

- an Initiating Application form, and

- if financial orders are sought, a Financial Statement (and a completed Superannuation Information Form for each superannuation interest).

An affidavit generally must not be filed in support of an Initiating Application, as required by r 4.02 (although note special cases below).

If interim or procedural orders are sought at the time the case is started, the interim orders must be sought in the Initiating Application (r 5.01(5)). If made at any point after the case has commenced, the application must be made separately by way of an Application in a Case (r 5.01(6)). This appears to be so even if at the time of filing a Response to the Initiating Application, the Respondent wishes to make a new application for interim orders, beyond responding to any interim application in the Initiating Application. There needs to be at least one affidavit in support filed at the same time as the interim application.

¶24-080 Rules about documents

For some documents, eg a marriage certificate, an image, photocopy or certified copy of a document can be filed instead of the original (r 2.02).

If a document cannot be filed, the case can still be filed. An affidavit setting out the reasons why the document was not filed, and a written notice containing an undertaking to file the document within a period of time specified in the notice must be provided at the time the case is started.

If a document is not in English, the person filing the document must file a translation of the document in English and an affidavit, by the person who made the translation, verifying the translation and setting out the person’s qualifications to make the translation.

¶24-090 Applications seeking final orders (Initiating Applications)

The Initiating Application must give full particulars of the orders sought (r 4.01(1)(a), Family Law Rules 2004 (Cth)).

It is not sufficient to provide a summary of orders sought, or generic orders. The orders sought must be specific and include each type of

order sought. If a lump sum order is sought, it should specify the amount or how the amount is to be calculated. If a superannuation splitting order is sought, it should include the base amount or percentage sought, or how this will be calculated. If property is to be transferred or sold, the item of property should be identified.

The application must include all causes of action which can conveniently be disposed of in the same case (r 4.01(1)(b)).

At times this rule may appear to conflict with the requirements of the pre-action procedures. If parenting matters, for example, have been discussed at length without resolution, but there has been no financial disclosure, it may be a breach of the pre-action procedures to apply for property orders at the same time as parenting orders.

In cases where allegations of child abuse are made, a Form 4 Notice of Child Abuse or Family Violence must also be filed and served on the other party and on the person with whom the child is alleged to be at risk. There are special requirements for the filing of Initiating Application in cases involving applications for special medical procedures (see r 4.09), step-parent maintenance (r 4.16) and passports (r 4.30). Rules 7.16, 7.17 and 24.07 provide for filing and service by electronic means. Often, the proceedings would be the subject of an interim application and an Application in a Case, together with an affidavit, must be filed in addition to the Initiating Application.

¶24-100 Notifications in parenting cases

The notification process in cases involving allegation of abuse or family violence in relation to a child is outlined in Pt 2.3.

Pursuant to r 2.04D, a Notice of Child Abuse, Family Violence or Risk of Family Violence is filed, and an affidavit containing the evidence supporting the allegations in the form must have already been filed or be filed at the same time.

A copy of the Notice of Child Abuse, Family Violence or Risk of Family Violence is sent to the relevant prescribed child welfare authority by the court.

If a family violence order has been made which affects the child or one of the parties, a copy must be filed at the time the application is made.

If the order has been made but a copy is not available, then details of the order (including parties, the court in which it was made, the date it was made and details of the order itself) must be provided, along with an undertaking to file it within a specified time period (r 2.05).

¶24-110 Specific applications

Chapter 4 of the Family Law Rules 2004 (Cth) (FLR) deals with the procedure for certain kinds of applications. The requirements are additional to the general requirements for Initiating Applications (r 4.04).

Cross-vesting applications

Where a party relies on a cross-vesting law, r 4.06 applies.

The additional requirements are:

- the Initiating Application (or a Response to an Initiating Application — discussed at ¶24-240 below) must state the particular law relied on

- if the party is applying after the case has started, an Application in a Case seeking procedural orders must be made. The procedure is dealt with at ¶24-120 below, and

- an affidavit must be filed in either case (including in support of the Initiating Application or Response to an Initiating Application) stating:

  – that the claim is based on the state or territory law and the reasons why the Family Court should deal with the claim

  – the rules of evidence and procedure (other than those of the relevant Family Court) on which the party relies

  – if the case involves a special federal matter — the grounds for claiming the matter involves a special federal matter.

An application to transfer the case to another court is made using an Application in a Case (r 4.07).

Application for a medical procedure

Rule 4.08 — who may apply?

A parent of the child, a person who has a parenting order in relation to the child, the child, the independent children's lawyer, and any other person concerned with the care, welfare and development of the child may make an application for a medical procedure.

Parents and parties to existing parenting orders must be made respondents (if they are not the applicant).

Rule 4.09 — evidence in support

The evidence must satisfy the court that the proposed medical procedure is in the best interests of the child.

The evidence must include evidence from a medical, psychological or other relevant expert witness that establishes the following:

- the exact nature and purpose of the proposed medical procedure
- the particular condition of the child for which the procedure is required
- the likely long-term physical, social and psychological effects on the child
  - if the procedure is carried out, and if the procedure is not carried out, the nature and degree of any risk to the child from the procedure
  - if alternative and less invasive treatment is available — the reason the procedure is recommended instead of the alternative treatments
- that the procedure is necessary for the welfare of the child
- if the child is capable of making an informed decision about the procedure — whether the child agrees to the procedure

- if the child is incapable of making an informed decision about the procedure — that the child:
  - is currently incapable of making an informed decision
  - is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future
- whether the child's parents or carer agree to the procedure.

The evidence can be given by affidavit, or orally, with the court's permission. The evidence should be filed at the time of making the application.

The prescribed child welfare authority (defined in s 4(1), *Family Law Act 1975* (Cth)), needs to be served with the application (r 4.10).

The case must be listed before a judge of the Family Court on the first return date, as soon as possible, and, if practicable, no less than 14 days after the date of filing (r 4.11).

The court can determine the case on the first return date, or make procedural directions (r 4.12).

Maintenance applications

The first return date is a case assessment conference, and, if the matter is not resolved at it, the court can make procedural orders, including directions for the filing of affidavits and for trial (r 4.14).

Rule 4.15 sets out the information each party needs to bring to the case assessment conference:

- a copy of the party's taxation return for the most recent financial year
- the party's taxation assessment for the most recent financial year
- the party's bank records for the period of 12 months ending on the date when the maintenance application was filed

- if the party receives wage or salary payments — the party's three most recent pay slips

- if the party owns or controls a business — the business activity statements for the business for the previous 12 months, and

- any other document relevant to determining the income, needs and financial resources of the party.

Child support and child maintenance applications

Division 4.2.5 deals with child support applications, except appeals from court orders made under the *Child Support (Assessment) Act 1989* (Cth) (the Assessment Act) (in which case, Ch 22 of the FLR applies as with all appeals from court orders) or applications for leave to appeal a court order. It also deals with child maintenance applications.

Child Support cases

The Child Support Agency may intervene on being served with the application, but is not automatically made a party (note 3 to r 4.16).

Applications are made by way of an Initiating Application (r 4.17(1)), with a supporting affidavit (r 4.18(1)), unless the application is an appeal on a question of law from the Social Security Appeals Tribunal. In such case, a Notice of Appeal (Child Support) is used, and a copy of the Social Security Appeals Tribunal's reasons must be attached to it (r 4.21).

The affidavit must contain:

- a schedule setting out:
  - the section of the Assessment Act or the *Child Support (Registration and Collection) Act 1988* (Cth) (the Registration Act) under which the application or appeal is made
  - the grounds of the application or appeal
  - the issues to be determined in the case

- a copy of any decision, notice of decision or assessment made by the child support registrar relevant to the application or appeal, and

- a copy of any document lodged by a party with the child support registrar, or received by a party from the child support registrar, relevant to the decision or assessment.

Applications:

- to amend an assessment which is more than 18 months old under s 111 of the Assessment Act

- for a departure order under s 116 of the Assessment Act, or

- for non-periodic child support under s 123 (or to modify such orders under s 129 of the Assessment Act):
  - to set aside a Child Support Agreement under s 136 of the Assessment Act

  - to apply for urgent maintenance while an application for administrative assessment is pending under s 139 of the Assessment Act, or

  - to apply for recovery of child support where no liability existed under s 143 of the Assessment Act

have the additional requirement that Financial Statements be filed and a copy of the relevant order or agreement be attached to the affidavit.

If the application relates to a child support agreement, the agreement must be registered (r 4.19).

Rules 4.20 and 4.22 contain important time limits for making applications or appealing the decisions of the Child Support Agency.

Service under r 4.23(1) must be on the parent or eligible carer of the child, and the child support registrar. Forgetting to serve the registrar will generally prevent the application proceeding.

The first hearing is a case assessment conference where practicable. Rule 4.26 sets out which documents to bring to the case assessment conference and the hearing of the application in applications under s 111, 116, 123, 129, 136, 139 and 143 of the Assessment Act (these applications are all described above, and the rule is in similar terms to r 4.15 in maintenance cases).

Child maintenance applications

Proceedings are commenced by Initiating Application (r 4.17(1)) with just a completed Financial Statement in support (r 4.18(1)). No affidavit in support is filed in support of the final orders application.

The first court date is a case assessment conference (r 4.25(1)). If the case does not settle, the registrar may list the case for hearing and make orders for the filing of affidavits and other procedural steps.

Documents to bring to the case assessment conference and the hearing of the case are specified at r 4.26.

Applications for nullity, and validity of marriages, divorces and annulments

Applications are made by way of an Initiating Application, with a supporting affidavit under r 4.29 containing:

- the facts relied on
- for an application for an order that a marriage is a nullity or a declaration as to the validity of a marriage — details of the type of marriage ceremony performed
- for an application for a declaration as to the validity of a divorce or annulment of marriage:
  - the date of the divorce or order of nullity
  - the name of the court that granted the divorce or order of nullity, and
  - the grounds on which the divorce or order of nullity was ordered.

As with a divorce, the hearing of the application is set on filing it, at least 42 days after filing (or at least 56 days, if the respondent is outside Australia).

Applications relating to passports (r 4.30 and 4.31)

Applications are made by way of an Initiating Application with a supporting affidavit stating the facts relied upon.

A hearing date must be set as soon as practicable after the filing of the application.

¶24-120 Applications in a Case

The rules about Applications in a Case are in Ch 5 to the Family Law Rules 2004 (Cth) (FLR).

Interim, procedural or ancillary orders are sought using an Application in a Case. The FLR sometimes specify that an Application in a Case is to be used in a particular situation (eg applying to review a decision of a registrar or judicial registrar).

Where interim parenting orders are sought about time during the Christmas school holiday period, r 5.01A requires that the application be filed by no later than 4 pm on the second Friday in November immediately prior to the Christmas holiday period at issue.

An affidavit in support must generally be filed. A specific exception is applications for review (r 5.02(2)).

Before filing an Application in a Case, a genuine effort must be made to resolve the issue, unless the applicant would be unduly prejudiced, the matter is urgent, or the circumstances make the application necessary (r 5.03).

Generally, an Application in a Case can only be made when an Initiating Application has been made, and no final orders have been made on that application (subrule 5.01(1) and (2)). Rule 5.01(3) excludes applications for permission to start a case or to extend time to do so, starting cases for a child or a person under a disability under r 6.10, or an application for costs. Rule 5.01(4) qualifies the rule, so

that it does not restrict the independent children's lawyer, the Department of Public Prosecutions, or trustees in bankruptcy or to a personal insolvency agreement from filing applications.

Applications in a Case are listed as near to 28 days after filing as practicable. Note that r 5.05(1) does not require a registrar to make this listing a hearing of the application. It can be listed for a procedural hearing, or a case assessment conference instead. If the application is made at the same time as an Initiating Application, then both applications are generally listed for the first time together at the Case Assessment Conference.

Cases can be listed earlier than this if the registrar is satisfied that the stated reason for urgency is significant and credible, and harm may be avoided, remedied or mitigated if the case is heard earlier. The registrar will need to see evidence in support of this in the supporting affidavit, and an order for short service must be sought in the Application in a Case.

Attendance by electronic communication is dealt with first by seeking the consent of all other parties, and by making a request for permission in writing. Rule 5.06 has detailed provisions about the information necessary.

Under r 5.07(1), a party or witness in prison must attend by electronic communication.

As discussed below at ¶24-240, important time limits apply when responding to an application in a case:

- the Response to an Application in a Case with affidavit in support must be filed and served seven days prior to hearing, and
- all affidavits relied upon by both parties must be filed and served at least two days prior to hearing.

Failure to comply with these time limits risks the court determining that late documents cannot be relied upon, based on a lack of procedural fairness.

¶24-130 Hearings of interim or procedural applications

When considering whether to make an interim order, in addition to the law applicable to the specific application, the court can take into account, under r 5.08 of the Family Law Rules 2004 (Cth) (FLR):

- in a parenting case — the best interests of the child
- whether there are reasonable grounds for making the order
- whether, for reasons of hardship, family violence, prejudice to the parties or the children, the order is necessary
- the main purpose of these FLR (see r 1.04), and
- whether the parties would benefit from participating in one of the dispute resolution methods.

¶24-140 Evidence

Evidence is by way of a maximum of one affidavit from each party, and one affidavit from each witness, provided the evidence is relevant and cannot be given by the party (r 5.09, Family Law Rules 2004 (Cth)). Rule 9.07 permits another affidavit to be filed, if in response to the application, new issues are raised.

Under r 15.21, a party or an independent children's lawyer may seek the issue of a subpoena to produce documents for the hearing of an application seeking interim, procedural, ancillary or other incidental orders without permission from the court.

The interim hearing can only last up to two hours, and cross-examination is only permitted in exceptional circumstances (r 5.10).

Orders can be made in the absence of a party (provided the court is satisfied as to service) if the other party attends and applies for the orders they sought in their Application or Response to be made.

¶24-150 Applications without notice

Rules 5.12 and 5.13 of the Family Law Rules 2004 (Cth) have detailed provisions about when interim and procedural orders can be made

without notice, and the evidence necessary to do so.

The affidavit in support must set out all facts fully, and practitioners must bear in mind their own and their client's onerous duty to the court to provide all relevant facts when applications are made without notice. See *Thomas A Edison* v *Bullock* (1912) 15 CLR 679 on the nature of the applicant's duty in ex parte applications.

¶24-160 Hearing in the absence of parties

Either party can request a hearing in the absence of the parties. If the other party does not object (by written notice to the court and the other party no less than seven days prior to the hearing (r 5.15)), then the court can proceed to hear the matter in the parties' absence.

The court can decide not to hear the matter in the parties' absence (r 5.16).

The procedure is contained at r 5.17. It contains important limits on the supporting submissions by each party, and provides that the submissions must be filed at least two days prior to the hearing.

¶24-170 Postponement of interim hearings

All parties must agree, and the registry must receive written notice signed by all parties or their lawyers no later than noon on the day before the hearing date (r 5.18, Family Law Rules 2004 (Cth)).

¶24-180 Parties

Rule 6.02(1) of the Family Law Rules 2004 (Cth) states that:

> "A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case".

In a parenting case, the parties must include:

- the parents

- anyone who is a party to a parenting order
- anyone with whom the child lives, and
- if there is a state child order, the child welfare authority.

Adding a party is usually done by including the party in the application or response, or later in the case, by amending the application or response, and serving it and any other relevant document on the new party (r 6.03).

A person can also apply to intervene in a case and become a party. If the court's permission is required, application is by way of an Application in a Case, with a supporting affidavit setting out the facts relied upon, and attaching a schedule of orders to be sought if the intervener is permitted to become a party.

Certain people are entitled to become parties without the court's permission. Examples include the Attorney-General, and creditors under s 79(10) who may not be able to recover their debt if a s 79 order were to be made. The procedure is at r 6.06, and involves the filing of a Notice of Intervention by Person Entitled to Intervene with an affidavit in support.

A party can apply by way of an Application in a Case to be removed as a party (r 6.04).

The Attorneys-General of the Commonwealth and the states must all be given notice of proceedings in which a genuine issue in the case arises under the Constitution or involves its interpretation (r 6.07).

¶24-190 Case guardians

A case guardian is required if a child or a person under a disability wishes to seek orders (r 6.08, Family Law Rules 2004 (Cth) (FLR)).

Under r 6.09, any adult competent to carry out duties as a case guardian, with no interest in the case adverse to the person needing the case guardian, can act as case guardian, provided they consent to the appointment.

Any party, the person seeking to become case guardian, or the person authorised to be the case guardian, can apply for orders relating to the appointment (by way of an Application in a Case with supporting affidavit).

If the person has already been appointed to manage a person's affairs under a state, territory or Commonwealth law, they are taken to be appointed as case guardian if the procedure at r 6.10(2) is followed.

If no suitable case guardian can be found, the court can ask the Attorney-General to nominate one, under r 6.11.

The case guardian has the same duties and responsibilities as a party, including complying with the duty of disclosure, following the FLR, and being the potential payer under a costs order (r 6.13).

¶24-200 Death of a party

Rule 6.15 of the Family Law Rules 2004 (Cth) deals with the situation when a party dies in a property case, or during the enforcement of a financial obligation.

Either the other party or the personal representatives of the deceased party must apply for procedural orders. The court can order that the legal personal representative be substituted as a party for the deceased party.

¶24-210 Bankruptcy

Rule 6.17(1) of the Family Law Rules 2004 (Cth) provides that if a person is bankrupt or goes bankrupt during proceedings, the person is obliged to notify:

- the other parties in the case about the bankruptcy or personal insolvency agreement
- the trustee of the bankrupt estate or personal insolvency agreement about the case, and
- the court in which the case is pending.

The information to be provided to the trustee is at r 6.18, and to the court at r 6.19. It has to be provided within seven days of the relevant event (the person going bankrupt, or if already bankrupt, the person becoming a party).

If a party is involved in bankruptcy proceedings, notice in writing must be given to the court and the other parties. Rule 6.20 sets out the necessary information to be provided.

¶24-220 Service

There are three kinds of service, and the circumstances where each one is required is summarised in Table 7.1 (r 7.03, Family Law Rules 2004).

“Special service” is generally required for originating processes, such as an Initiating Application or a divorce application.

The documents served have to be received personally by the person required to be served (r 7.05).

“Special service by hand” is required for contravention and contempt applications. The documents have to be given to the person to be served. If the person served refuses to receive them, service is effected by placing them down in the presence of the receiver and telling them what the documents are (r 7.06).

If special service by hand is required, the party on whose behalf they are being served may not carry out service, although they may be present at the same time.

“**Ordinary service**” suffices for any other document, including documents filed after a case has started, and an Application in a Case not filed at the same time as an Initiating Application.

The time for service is as soon as possible after filing, and in any event no more than 12 months after the filing date (r 7.04(1)(a)).

Joint applications, and affidavits of service, are among the documents which do not have to be served (r 7.04(2)).

The respondent to any application must be served with the

appropriate brochure. For most cases, the appropriate brochure is the s 12F brochure *Marriage, Families and Separation*, but other applications have their own brochures (eg enforcement warrants, subpoenas and maintenance applications).

Types of special service

By post or electronic communication (r 7.07)

An Acknowledgement of Service must also be served, and a stamped addressed envelope provided for its return to the party serving the document.

Through a lawyer (r 7.08)

If the lawyer accepts service in writing, special service can be effected on a party through the lawyer, either by handing it to the lawyer, or under r 7.06 or r 7.07.

On a person with a disability (r 7.09)

If there is a case guardian, they must be served on behalf of the person with the disability. If there is no case guardian, service on an adult who has the care of the person suffices.

On a prisoner (r 7.10)

Service must be effected on the prisoner through the person in charge of the prison. The prisoner must be informed at the time of service of the requirement that they attend by electronic communication.

On a corporation under s 109X of the Corporations Act 2001 (Cth) (r 7.11)

Service on a company is by leaving it at the registered office of the company, or serving it personally on a director of the company.

Ordinary service (r 7.12)

Any kind of special service is good ordinary service.

If the person has given an address for service, the document can be left or sent there. Service can be by fax or email, if those details are provided on the Notice of Address for Service. Rule 7.16 sets out the requirements for service by fax.

If there is no address for service, giving it to the person, or leaving it at or posting it to the person's last known address is sufficient.

If a lawyer accepts service in writing, sending it to the lawyer is sufficient, by post, or through the DX.

Proof of service (r 7.13)

An Acknowledgement of Service signed by a lawyer acting for the party served is sufficient proof of service. No affidavit of service is required.

If the person files a Notice of Address for Service or a response, this is sufficient evidence of service.

In all other cases, an Affidavit of Service must be filed to prove service.

If special service was by post or electronic communication, the Affidavit of Service must attach the signed Acknowledgement of Service, and evidence that the signature is the respondent's (usually by way of an affidavit of proof of signature).

Dispensing with service, or attaching conditions

A common misconception is that once you have unsuccessfully attempted service of a document in one or two ways, an application to dispense with service will be granted as a matter of course.

The matters the court needs to be satisfied of are at r 7.18(2):

- the proposed method of bringing the document to the attention of the person to be served
- whether all reasonable steps have been taken to serve the document or bring it to the notice of the person to be served
- whether the person to be served could reasonably become aware of the existence and nature of the document by advertisement or another form of communication that is reasonably available
- the likely cost of service, and

- the nature of the case.

Once an order dispensing with service has been made, the document is taken to have been served. The court can also order that service is dispensed with, once a condition set by the court has been complied with (eg an advertisement has been placed in a particular publication).

An order for substituted service on a party's Facebook page was made in *Byrne & Howard* [2010] FMCAfam 509. The order was made as a last resort and in circumstances where the court was reasonably confident that the party to be served was aware of the proceedings.

Other matters

To work out when a document is taken to have been served, refer to r 7.17.

If service has to be carried out in a non-convention country, r 7.20 provides guidance on the required process and method of proving service.

¶24-230 Right to be heard and representation

Natural persons are entitled to be heard by acting in person or through a lawyer.

Corporations and authorities can appear through one of their officers or through a lawyer. They cannot be represented by any other person (note 3 to r 8.01, Family Law Rules 2004 (Cth)).

An address for service must be given (r 8.05).

Independent children's lawyers are not parties, although they must conduct themselves as if they were. The appointment can be made following an oral application, or an Application in a Case (r 8.02).

Lawyers may cease acting for a party by serving a Notice of Ceasing to Act on the party, and filing it no more than seven days later. The court can also give permission (r 8.04). The circumstances in which a lawyer can actually cease acting for a client are limited by a lawyer's professional obligations and the terms of the retainer between lawyer and client.

"McKenzie friends"

It is only in exceptional cases that the court will permit an unqualified advocate to present a case on behalf of a party, without appointing a case guardian.

The court will, however, usually permit a person to provide support and help, including handling papers, sitting at the bar table, offering quiet guidance about the kind of things to say, and so on: a "*McKenzie friend*", named after the English case which established the principle.[1]

The line between a supporting role and acting as advocate can be a narrow one. As litigants in person become a more common sight at court, practitioners need to be alive to the risk of a *McKenzie friend* exceeding their role and acting as an advocate.

Footnotes

1 *Watson and Watson* (2002) FLC ¶93-094.

¶24-240 Response

Chapter 9 of the Family Law Rules 2004 (Cth) deals with how to respond to applications.

Applications seeking final orders (Initiating Applications)

A Response to an Initiating Application is filed. As with an Initiating Application, an affidavit in support generally must not be filed (r 9.02). The form can be used to respond to specific applications in the Initiating Application, and if under Ch 4 an affidavit can be filed in support of a specific application, by operation of Table 2.2, an affidavit can be filed in support of the Response to an Initiating Application.

Tip

Remember that if the Initiating Application does not seek an interim order, but your client wishes to, the interim application is **not** included in the Response to Initiating Application. An Application in a Case must be filed instead.

Objections to jurisdiction can be made in the Response to an Initiating Application. If alternative orders are included in the Response to an Initiating Application, the respondent is not taken to concede that the court has jurisdiction (r 9.03). The objection to jurisdiction, however, will need to be dealt with first.

A Reply must be filed by the applicant if the respondent has sought orders under a different cause of action than that or those set out in the Initiating Application, and the applicant opposes the orders sought in Response to an Initiating Application (r 9.04).

If the orders sought are in the same cause of action as in the Initiating Application, and the applicant wishes to amend the orders sought, filing an amended Initiating Application will usually be appropriate, rather than filing a Reply.

The Reply is also used where the respondent adds a third party in the Response to an Initiating Application. A Reply is used to respond by the third party in those circumstances (r 9.04A).

Applications in a Case

A Response to an Application in a Case and an affidavit in support must be filed (r 9.06).

Under r 9.07, it is sufficient for an applicant to file another affidavit, if the respondent seeks orders under a new cause of action in the Response to an Application in a Case, and the applicant does not agree with the orders.

Time limits (r 9.08)

A Response to an Initiating Application is required to be filed at least seven days prior to the first hearing, with any affidavit permitted to be filed.

Affidavits in a contested Application in a Case from both sides must be filed at least two days before the interim hearing.

ENDING A CASE WITHOUT A TRIAL

¶24-250 Introduction

There are four main ways of ending a case without a trial, all contained at Ch 10 of the Family Law Rules 2004 (Cth) (FLR):

- an offer to settle is accepted
- the case is discontinued
- a summary order is made, or
- the parties apply for consent orders.

¶24-260 Offer to settle

Offers to settle are made by sending an offer in writing to the other parties.

Offers to settle must not be filed in court (r 10.01).

Offers to settle are taken to be without prejudice unless they are express “open” offers (r 10.02).

The common law requirement that without prejudice offers are not referred to in open court prior to judgment is enshrined in the FLR at r 10.02. The rule does not apply to offers marked as “open” (r 10.02(4)).

Offers are withdrawn by written notice to that effect given to the other party prior to acceptance. A later offer has the effect of withdrawing an earlier offer (r 10.03(3)).

An offer can be accepted at any time before it is withdrawn or the court makes an order disposing of the application or appeal to which the offer relates (r 10.04). It is for this reason that offers should generally have an expiry date.

If an offer is accepted, then the parties must lodge a draft consent order at court (r 10.04(3)). Unlike in some civil jurisdictions, the court has the discretion whether or not to make orders, even those with the consent of all parties. This means that accepting an offer does not create a contract or other enforceable obligation as between the parties. (Note: an exception to this is r 10.04(3). However, such requirement can be avoided by withdrawing consent to the settlement reached.)

Making a counter offer does not mean that the offer the counter offer responds to is automatically rendered incapable of acceptance. An offer can be accepted by a party even if that party has served a counter offer (r 10.05).

Compulsory offer under r 10.06

In a property case, under r 10.06, each party must make a genuine written offer to settle within 28 days after the conciliation conference. The only other requirement is that the offer must state that it is made in accordance with Div 10.1.2 of the FLR. It is otherwise no different from any other offer made under the FLR.

The Federal Circuit Court Rules 2001 have no equivalent provision to r 10.06.

The offer cannot be withdrawn unless another genuine offer to settle is made simultaneously (r 10.07).

¶24-270 Discontinuance

A party is entitled to discontinue a case or any part of a case by filing a Notice of Discontinuance (r 10.11, Family Law Rules 2004 (Cth)).

The court's permission to discontinue is only required when a party dies before the case is determined, or it is less than seven days prior to a divorce hearing (r 10.11(2)).

Discontinuing a case does not discontinue the other party's case.

The other party or parties can apply for costs within 28 days after the Notice of Discontinuance is filed.

If a party files a Notice of Discontinuance, and is ordered to pay the costs of another party, but then starts a new case on substantially the same grounds as the discontinued case, the party owed costs can apply for the new case to be stayed until the costs are paid (r 10.11(5)).

¶24-280 Summary orders

The Family Court's summary judgment procedure is at r 10.12 of the Family Law Rules 2004 (Cth). The grounds for a summary order are:

- the court has no jurisdiction
- the applicant has no legal capacity to apply for the orders sought
- the case is frivolous, vexatious or an abuse of process, or
- there is no reasonable likelihood of success.

The prospects of persuading the Family Court that it ought to exercise its summary jurisdiction on the latter ground in property adjustment, parenting and maintenance applications are generally very low; it is rare that one can say that there is no arguable case in such cases. Summary applications are more commonly seen when parties attempt to have orders, Financial Agreements, and Binding Child Support Agreements set aside, as in those cases specific grounds must be proven to stand any prospect of success.

In *Aldred and Aldred*; *Westpac Banking Corp*, Nygh J said:[2]

> "The inherent jurisdiction of the Court is not confined to the dismissal of frivolous and vexatious proceedings in the strictest sense, but extends to the dismissal of actions 'which must fail or which the plaintiff cannot prove and which is without a solid basis'".

Nygh J regarded the test as being whether the "case for relief" on the "pleadings and assuming that all facts alleged . . . are true, is such that it cannot possibly succeed".[3]

The Full Court in the case of *LL & PL & SDP*[4] (which was an unsuccessful appeal of a decision not to dismiss summarily an application by a case guardian to be relieved of the appointment, and was under the Family Law Rules 2004 (Cth)) endorsed Nygh J's statement.

Footnotes

2 *Aldred and Aldred*; *Westpac Banking Corp* (1986) FLC ¶91-753 at p 75,491.

3 Ibid, at p 75,492.

4 *LL & PL & SDP* [2005] FamCA 715.

¶24-290 Separate decisions

The court can separate out issues for determination, if a party applies under r 10.13, or under its own initiative.

If the separate decision will dispose of all or part of the case, make a trial unnecessary or substantially shorter, or save substantial costs, then the court may decide to do so. Common examples include applications for leave to proceed out of time, or threshold questions under Pt VIIIAB of the *Family Law Act 1975* in de facto financial causes.

The outcomes of an application for a separate decision (under r 10.14) include:

- dismissal of any part of the case
- a decision on an issue
- a final order on any issue
- order a hearing about an issue or fact, or
- with the consent of the parties, order arbitration about the case or part of the case.

¶24-300 Consent orders

Consent orders can be made during current cases orally, or by lodging

a draft consent order at court.

In parenting cases, at the time of making the application during existing cases, either the parties or their lawyers must inform the court orally of any allegations of abuse or family violence or risk of them and how the orders address them, or attach an annexure to the draft orders dealing with the same matters (r 10.15A, FLR).

Where a case guardian is to consent to an order on behalf of a party, under r 6.13, the case guardian must file an affidavit with the facts relied upon to satisfy the court the consent order is in the party's best interests.

When there is no current case, an Application for Consent Orders is generally required. The exceptions are:

- for step-parent maintenance under r 4.16 of the Family Law Rules 2004 (Cth) (FLR)
- relying on a cross-vesting law
- approving a medical procedure
- for a parenting order when s 65G of the *Family Law Act 1975* (Cth) applies (when under the terms of the order, a child is to live with someone who is not a parent, grandparent or otherwise related, or parental responsibility is allocated to a non-relation, and no relation is allocated parental responsibility), or
- for an order under the *Child Support (Assessment) Act 1989* (Cth) or *Child Support (Registration and Collection) Act 1988* (Cth).

In those cases, an Initiating Application must be filed once consent is received by all parties, and the specific provisions for each case in Ch 4 of the FLR will need to be followed (r 10.15).

Not less than 28 days prior to the order being made, if there is an order which will bind the trustee of a superannuation plan, a draft must be served on the trustee to allow the trustee to object (r 10.16).

Under r 10.17, the court can make the consent order, or dismiss the

application. It can also require a party to file more information.

If 90 days pass after the date of swearing of the first affidavit in the Application for Consent Orders before it is filed, the respondent's consent lapses automatically by operation of r 10.18.

CASE PREPARATION

¶24-310 Introduction

The court has wide powers of case management, which it can exercise on application by a party or of its own initiative to achieve the main purpose of the Family Law Rules 2004 (Cth) (FLR).

Rule 11.01 contains a non-exhaustive list of the court's general powers, which range from ordering the attendance of a party at a court event or post-separation program to orders about conducting or developing a case.

The court's general powers of case management help overcome difficulties in its system of cases with forms instead of pleadings. For example, the Family Court forms do not set out the facts relied upon in support of the orders sought, and, generally, affidavits are not filed until the end of the case preparation. At times this approach means that a party does not understand the case they are to face. Under r 11.01, the court has the power to order a party to provide further and better particulars.

The general powers allow a case to be actively managed by the court, and litigants can take full advantage of the provisions to move matters forward or direct the matter.

Rules 11.02 and 11.03 emphasise the importance of complying with directions of the court, the FLR or other legislative procedural steps. Rule 11.02(1) provides that a step taken after the time specified for taking the step in the Rules or in an order of the court is of no effect. A failure to comply may lead the court to:

- dismiss all or part of the case

- set aside a step taken or an order made
- determine the case as if it were undefended
- make any of the orders mentioned in r 11.01
- order costs
- prohibit the party from taking a further step in the case until the occurrence of a specified event, or
- make any other order the court considers necessary, having regard to the main purpose of the FLR (see r 1.04).

A party may apply for relief from the effect of this rule and any order made subsequent to it. Under r 11.03(2), the court considers:

- whether there is a good reason for the non-compliance
- the extent to which the party has complied with orders, legislative provisions and the pre-action procedures
- whether the non-compliance was caused by the party or the party's lawyer
- the impact of the non-compliance on the management of the case
- the effect of non-compliance on each other party
- costs, and
- whether the applicant should be stayed from taking any further steps in the case until the costs are paid.

While modern case management systems have fresh considerations compared with 19th century English Courts, such as the premium placed on speed and efficiency and the relevance of the effects on other litigants in the system (see r 1.04, 1.06, 1.07 and 1.08 regarding the main purpose of the Rules, and the High Court decision of *Aon*

Risk Services v *ANU* [2009] HCA 27), as a general principle regarding the exercise of case management powers, Bowen LJ's statement in *Cropper* v *Smith* (1884) 26 Ch D 700 has not lost force in over 120 years since it was made:

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace".

¶24-320 Frequent frivolous and vexatious cases

Each court registry no doubt has a few litigants who bring frequent, hopeless cases, much to the torment of the registry staff and other parties. Under s 102QB of the *Family Law Act 1975*, the court can make a vexatious proceedings order against such a litigant. The orders include an order staying or dismissing pending proceedings, or prohibiting a person from bringing proceedings.

The standard, however, is very high. The court has to be satisfied the person has frequently brought or conducted vexatious proceedings before making an order (s 102QB(1)).

The order made is a final order, and cannot be made without giving the person a reasonable opportunity to be heard (s 102QB(4)–(5)).

Once a person is subject to an order prohibiting the commencement of further proceedings, that person has to apply for leave to start a proceeding subject to the order (s 102QE).

A special procedure has been devised so that the person designed to be protected by the order is not vexed by spurious applications for

leave, as follows:

1. The person subject to the order makes an application using an Application in a Case.

2. An affidavit is filed which must comply with s 102QE(3):
    a. It must list all the occasions the person has applied for leave.
    b. It must list all other proceedings the person has ever brought in any Australian court or tribunal.
    c. It must set out all facts whether supportive or adverse known to the applicant in relation to the application.

3. The application must not be served on any person unless the court orders (s 102QE(4)).

4. The court then considers whether to dismiss or grant the application. If it is dismissed (and the court must dismiss it if it thinks the proceedings are vexatious), then that is the end of it.

5. If the court considers it may grant it, before doing so, the person against whom the proceedings are intended to be brought must be served along with any other person named in the order, and then there is a hearing in which all are given a reasonable opportunity to be heard. The application can then be dismissed or granted, including on conditions (s 102QG).

Rule 11.05 contains brief administrative arrangements for such applications.

In the case of *Vlug and Poulos*,[5] the Full Court stated that the power (under the old Family Law Rules) to limit the ability of parties to bring proceedings should be exercised with caution and reserved for the clearest of cases. In *JP & JP*,[6] a case decided after the Family Law Rules 2004 (Cth) were enacted, the Full court did not interfere with the decision of a judge who had followed *Vlug*.

Footnotes

Footnotes

5 *Vlug and Poulos* (1997) FLC ¶92-778.

6 *JP & JP* [2005] FamCA 755.

¶24-330 Want of prosecution

If a party has not taken a step for a year, the case can be dismissed for want of prosecution. The court must give each party at least 14 days notice of its intention to do so (r 11.06, Family Law Rules 2004 (Cth)).

¶24-340 Admitting facts

A party can require another party to admit or deny a fact, by service of a Notice to Admit. It does not need to be filed, and, although there is a suggested form available, it is not a prescribed form. The notice must state that a failure to admit or deny the fact will mean that the fact is taken to be admitted (r 11.07, Family Law Rules 2004 (Cth)).

The notice can also be used to require a party to admit or deny that a document is genuine. The document should be attached to the notice unless the other party already has it, or it is impracticable to do so. In the latter case, the notice must specify when and where the document can be inspected.

Under r 11.08, the party receiving the notice has 14 days to serve a notice disputing facts on the other party, and a failure to do so means that the fact is taken to be admitted, for the purposes of the case. Costs consequences can follow the service of a notice disputing facts, if at trial the fact is proven.

Rule 11.09 provides that an admission of the truth of a fact (whether express or by failing to respond to a notice to admit) can only be withdrawn by consent or with the court's permission. The court has a discretion to order costs thrown away.

¶24-350 Amending applications under r 11.10

An Initiating Application and a Response to an Initiating Application can be amended at any time prior to the procedural hearing at which the matter is allocated its first day before the judge. After that, the document can only be amended with the permission of the court as the consent of all other parties is no longer enough.

An Application in a Case or a Response to an Application in a Case can be amended at any time before the first court event. After that, the document can only be amended with the consent of all other parties or permission of the court.

These limitations do not apply when one is served with an amended document; r 11.13 provides that as of right a party's Initiating Application or Response to an Initiating Application can be amended within 14 days of service of the amended document.

Where a new cause of action or party is to be added to an Initiating Application or a Response to an Initiating Application, the form must be amended, and the court must set a procedural hearing after it has been filed.

The only requirements in the Family Law Rules 2004 (Cth) (FLR) about amending documents are (at r 11.12) that a copy of the document should be filed with the amendment clearly marked, and, if the document is amended by court order, endorsed with the date of the order.

Filing a new version of the document with the sections to be amended deleted completely by computer and the new provisions shown underlined does not appear to comply with the FLR, even if the end result is a tidier document. At times the fact that there has been a change in orders sought is of significant importance, and so changes should not be obscured.

Rule 11.12 suggests as an example that the amendment be shown in the way pleadings have traditionally been amended; by putting a line through the old text and inserting the new text underlined. Examples are not part of the FLR; however, this method of amending the form

shows the court and the other parties clearly in what respects the form has been amended with reference to one document only, instead of having to compare two or more documents.

The result of a heavily amended form may be confusion about the orders which are sought at trial. Provision of a draft minute of orders sought at the trial is an appropriate way to avoid this.

Under r 11.14, the court can disallow an amendment.

¶24-360 Small claims

The small claims procedure, being rarely used, was removed from the Rules from 1 March 2009. The procedure is still available in Western Australia.

¶24-370 Transfer of proceedings

The Family Court can order the transfer of a case to another place, or another court (r 11.17, Family Law Rules 2004 (Cth) (FLR)).

Under r 11.18(1), the considerations for the court are as follows:

- the public interest
- whether the case, if transferred or removed, is likely to be dealt with:
  - at less cost to the parties
  - at more convenience to the parties, or
  - earlier
- the availability of a judicial officer specialising in the type of case to which the application relates
- the availability of particular procedures appropriate to the case
- the financial value of the claim

- the complexity of the facts, legal issues, remedies and procedures involved
- the adequacy of the available facilities, having regard to any disability of a party or witness, and
- the wishes of the parties.

In the case of a proposed transfer to the Federal Circuit Court, s 33B(6) of the *Family Law Act 1975* (Cth) provides that in addition to the considerations set by the FLR (ie r 11.18), the court must consider:

- whether proceedings in respect of an associated matter are pending in the Federal Circuit Court
- whether the resources of the Federal Circuit Court are sufficient to hear and determine the proceeding, and
- the interests of the administration of justice.

¶24-380 The court process and court events under Ch 12, 16 and 16A

Chapters 12 and 16 manage most cases commenced using the Initiating Application form, applied by both registrars and judges.

The first date an application for final orders may have is before a registrar, to determine whether the protocol of division of labour between the two courts has been properly applied by the applicant, and to transfer offending matters to the Federal Circuit Court.

A procedural hearing before a registrar is listed when a matter is transferred to the Family Court from the Federal Circuit Court.

The case then follows the familiar route through the family consultant process (parenting) and/or conciliation conference (property).

If the matter does not resolve, then the case is given a date for “trial management hearing” referred to at r 16.08, also known as the “first

day before the judge". This is followed by "further days before the judge" (usually directions hearings and/or callovers for allocation of trial dates), and ultimately the trial. The case is managed by the judge and as required the registrar through to trial in a docket system. Western Australia has retained a structure of resolution and determination phases.

The managed structure does not apply to the specific applications at Ch 4, which have their own procedure (r 12.01).

Cases which are commenced using a different form (eg reviews, appeals, and enforcement order applications) also have their own procedure.

Enactment of the *Family Law (Amendment) Act 2006* resulted in parenting matters, either separately or together with property matters, being heard under Ch 16A of the FLR, the less adversarial trial procedure. The extent to which the procedure in "less adversarial trials" differs from ordinary trials varies between judges. It is common, for example, for parenting cases to which Ch 16A applies to proceed in relatively traditional manner with case management hearings until the case is ready for a trial over consecutive days, whereas when originally introduced and in its original form, Ch 16A more commonly saw parenting cases split over individual separate trial days.

The procedural pathways are as follows:

Parenting cases

Initial Procedural Hearing

▼

Child Responsive Program

▼

Procedural Hearing

▼

Compliance Check

▼

First day before the judge

▼

Continuation of Trial

▼

Final stage of Trial.

Property cases

Case Assessment Conference

▼

Conciliation Conference

▼

Procedural Hearing

▼

Compliance Check

▼

First day before the judge

▼

Further days before the judge

▼

The Trial.

¶24-385 Court documents

Financial cases are managed using Financial Questionnaires filed by each party after the Case Assessment Conference and a “Balance Sheet” (a schedule showing each party’s estimate of the value of each asset, liability, add-back, superannuation entitlement and resource of the parties with notes clarifying any point of dispute), prepared collaboratively by the parties and regularly reviewed by the Registrar and judge during the process.

In parenting cases, a comprehensive parenting questionnaire is completed.

The financial and parenting questionnaires form part of the evidence, and parties can be cross examined on their contents.

¶24-390 Initial hearing

The case assessment conference is the first court event in property cases (r 12.03, Family Law Rules 2004 (Cth)) and is conducted by a registrar.

Necessary disclosure before a case assessment conference is listed in r 12.02. The documents include tax returns and assessments, financial statements for businesses and trusts, business activity statements, and a market appraisal or opinion for each property in which a party has an interest.

If the parties have followed the pre-action procedures, much of this information will have been provided already.

The purpose of the case assessment conference and procedural hearing is to make administrative directions as required, and to enable parties to resolve some or all of the issues between them.

If there are particular issues in the case which need disclosure to assist in resolution at the conciliation conference, directions for provision of them should be sought at the case assessment conference.

In parenting only cases, the first court event is an initial procedural hearing, conducted by a registrar (r 12.04). Provided the case is suitable (ie it is not a Magellan case which continues to have its own pathway), then generally the registrar will refer the case to the child responsive program.

In combined cases, the initial procedural hearing is dispensed with, and the first event is the case assessment conference, at which, again, the parenting aspect will generally be referred to the child responsive program.

Note the mandatory disclosure provisions of r 15.55; an expert report relating to parenting matters obtained by either party must be disclosed. It must be disclosed two days prior to the case assessment conference/initial procedural hearing, if it exists at that time.

After the case assessment conference, the parties have nine weeks to

prepare and file the balance sheet. The applicant has 28 days to prepare the first draft, the respondent 21 days to make changes, and the applicant 14 days to prepare the final version and file it (r 12.06).

Pursuant to r 12.06(1), Financial Questionnaires are to be filed 21 days after the conciliation conference. They fulfil two roles. Firstly, they take the place of the old conciliation conference document and secondly, they also form part of the evidence should the matter go to trial. It is therefore not a document to be completed summarily or with any concessions.

¶24-395 Conciliation conference

Any case including a property application has a conciliation conference following the case assessment conference, before the case is prepared for the first day before the judge.

Disclosure before the conciliation conference is supposed to be more thorough and complete than before the case assessment conference. The point of the conciliation conference is to have confidential discussions and court mediation to settle the matter, so the more documents which are disclosed to narrow the issues between the parties, the better the prospects of settling the matter. It is an opportunity to demonstrate the strengths of a client's case, and for parties to obtain useful guidance from the registrar about likely outcomes at trial.

Rule 12.02 should be the starting point when preparing for a conciliation conference, and the documents to be gathered should be brought to your client's attention as early as possible. It sets out a list of the documents required to be disclosed. While no immediate sanction may follow a failure to provide documents, ill-preparedness of a case at a conciliation conference may cause a case to become more drawn out than should be necessary, and potentially give rise to a costs argument after the matter has been determined. If there are issues to raise and documents to be disclosed, the conciliation conference is the time to do it.

Under s 79(9) of the *Family Law Act 1975* (Cth), a property adjustment

order cannot be made unless the parties have attended a conciliation conference. The conciliation conference can be dispensed with in cases of urgency and under “special circumstances”, or if it is not practicable to hold one.

Each party must make a genuine effort to reach agreement at a conciliation conference (r 12.07).

If the matter does not settle at the conciliation conference, it can either be listed for a further conciliation conference, or listed for a procedural hearing.

¶24-400 Procedural hearing, compliance check and trial management hearing

Once the conciliation conference has taken place, all matters are managed by a judge.

The first event after the conciliation conference and/or child responsive program is a procedural hearing. In combined property and parenting cases, it takes place as soon as practicable after the last of the conciliation conference and the child responsive program has come to an end.

In property cases, the purpose of a procedural hearing is to clarify any disputes about the balance sheets and questionnaires, and to arrange for the filing of undertakings as to disclosure and the payment of the hearing fee (r 12.08).

In parenting cases, the procedural hearing is used to refer parties to further dispute resolution services and to appoint an independent children’s lawyer (r 12.09).

In all cases, it is at the procedural hearing that the case receives its first day before the judge and it is allocated a compliance check 21 days prior to that day.

The first day before the judge can be expedited in appropriate cases. Rule 12.10A sets out the basis on which such an application should be made, and considerations include whether the applicant has conducted themselves reasonably and without delay, prejudice to the

other party, and whether there are relevant circumstances which warrant the case being given priority to the possible detriment to other cases. Relevant circumstances are contained in r 12.10A and include whether delay would cause the purpose of the case to be lost, financial hardship not able to be rectified by an interim order, violence, or the avoiding of emotional or psychological harm to a child.

The compliance check before the registrar is governed by r 16.02. It is usually conducted by telephone. If the matter is not ready, the first day before the judge can be adjourned and other directions made to manage the case.

If either party wishes to adjourn the first day before the judge, they must do so as soon as practicable before the allocated date, and must have a substantial and significant reason (r 16.03). This rule applies to vacating any other date when the case is allocated before a judge.

The court's powers of case management, now to be exercised by the judge at and from the first day before the judge, are contained in r 16.04.

Rule 16.05 governs the attendance on days before the judge by electronic communication. The process is formal, rather than simply writing to the court making the request. The application needs to be made at least 28 days before the allocated date, and the affidavit in support needs to cover the matters set out at r 16.05(3). The application is to be dealt with by the docket judge. Applications to do so from a foreign country must also comply with r 16.06.

Attendance at the first day before the judge by the parties and their lawyers is compulsory. A failure to do so can result in the hearing proceeding on an undefended basis. Evidence can be adduced by the party attending and their application heard. If no parties attend, all applications can be dismissed by the judge (r 16.07).

¶24-405 Conduct of the trial

Part 16.3 deals with the conduct of both parenting and property proceedings.

Parenting cases under Div 12A of Pt VII of the *Family Law Act 1975* (Cth) nominally have their own chapter, Ch 16A, and this includes property cases when the parties consent to the property case being dealt with under Div 12A. However, the procedure is little different from other cases, following recent amendments. The parties and the family consultant can be sworn in on the first day of the trial (r 16A.10), and then bound to it for the duration of the trial, and this is the main difference.

The concept of a trial commencing on the first day before the judge, continuing on further days and then reaching a final stage, has largely been abandoned. It is still possible for evidence to be taken in parenting cases on the first day before the judge (r 16.08(1)(c)), and if that happens then the same judge must preside at trial.

The first day before the judge is known as the trial management hearing. Its function is for the judge to determine what issues are to be decided, deals with any outstanding interim applications or makes arrangements for them to be heard, and in parenting cases, can hear evidence, including from the family consultant who conducted the child responsive program (r 16.08(3)). In financial cases, the balance sheet will also be considered.

The judge has wide case management powers. Affidavits can only be filed with leave, unless the rules specifically permit the filing of an affidavit (r 15.05).

The proceedings continue on days to be allocated pursuant to r 16.09. Under r 16.10, it is at the trial that remaining evidence is heard, along with submissions.

In most cases, the matter will be listed before the judge to make procedural directions, and once the case is ready, list it for trial. The trial then proceeds in traditional manner.

¶24-410 Attendance at conferences

The parties and their lawyers (if any) must attend a conference unless excused by the court (r 12.11, Family Law Rules 2004 (Cth)).

Rules 5.06 and 5.07 apply to attendance by electronic communication at a court event as if it were a hearing.

Under r 12.13, the consequences for non-attendance at a case assessment conference as an applicant can mean the dismissal of the application. If a respondent neither attends nor files a response, orders can be made in terms of the application.

A failure to attend a case assessment conference, conciliation conference or procedural hearing may mean the court lists the matter for dismissal or an undefended hearing.

¶24-420 Disclosure

Rule 13.01(1) of the Family Law Rules 2004 (Cth) provides that:

> "Each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner".

The duty continues from the start of the pre-action procedures until the case is finalised. In other words, it continues until the time for starting an appeal has lapsed or all avenues for appeal have been exhausted.

If a document is or has been in the possession of, or under the control of a party, and it is relevant to an issue in the case, it must be disclosed (r 13.07).

¶24-430 Disclosure in financial cases

The specific provisions at Div 13.1.2 of the Family Law Rules 2004 (Cth) apply to the parties to a marriage, and to other parties to the extent that the disclosure is relevant to the issues in dispute (r 13.02).

Rule 13.04 contains a long list of matters in relation to which the parties have a duty of full and frank disclosure, although the list should not be seen as in any way limiting the general duty of disclosure at r 13.01.

Note r 13.04(1)(g), which extends the duty of disclosure to include any disposal of property that may affect, defeat or deplete a claim in the 12

months immediately before the separation of the parties, or since the final separation of the parties. If made with the consent or knowledge of the other party or in the ordinary course of business, the duty of disclosure does not apply (r 13.04(2)).

A Financial Statement must be filed in financial cases, but if a party is aware that the Financial Statement does not fully discharge their duty of full and frank disclosure, an affidavit must be filed (r 13.05).

The Financial Statement must be amended if a party's circumstances have changed significantly within 21 days of the change occurring. An affidavit will suffice, if it can set out the changes clearly in 300 words or less (r 13.06).

¶24-440 Disclosure in all cases

Under r 13.08 of the Family Law Rules 2004 (Cth), inspection of documents can be required of a party by way of written notice, and the party required to produce the document must make it available for inspection within 21 days. The procedure for inspection is at r 13.10.

Under r 13.12, a party must disclose, but need not produce, a document a copy of which has already been disclosed (unless the other party requires production of the original, in which case the original must be produced under r 13.11), if the document is unchanged. Documents for which a claim for privilege from disclosure is made also need not be produced.

Rule 13.13 deals with objections to production on the grounds of privilege, or because the document cannot be produced. If the other party challenges the objection in writing, the other party must file an affidavit within seven days of setting out details of the objection.

A failure to disclose a document means that it cannot be relied upon by the non-disclosing party without the consent or permission of the court. It may amount to a contempt of court, and the court may order costs or dismiss part or all of the defaulting party's case (r 13.14).

An undertaking as to disclosure is required by r 13.15, and a direction to file one is usually made at the procedural hearing after the

conciliation conference.

If the undertaking is false or misleading in a material particular, and the party signing it was aware of it, or should reasonably have known about it, it is an offence under r 13.15(2). It also may amount to a contempt of court.

There is nothing to prevent a party giving an undertaking as to disclosure at any point in the case, noting that the terms of it acknowledge a continuing duty of disclosure after the undertaking is given. In appropriate cases, registrars may direct a party to file one at a suitable point in proceedings, particularly if there is a dispute about whether or not there has been such disclosure.

¶24-450 Disclosure in certain cases (r 13.17 and 13.18)

The orders a party may seek about disclosure are limited to an order that a party deliver a copy of a document, or produce a document for inspection in the following cases:

- an application for divorce
- an application in a case
- an application for an order that a marriage is a nullity, or a declaration as to the validity of a marriage, divorce or annulment
- a maintenance application
- a child support application or appeal, and
- a contravention application.

¶24-460 Disclosure in cases started by way of an Initiating Application (Div 13.2.3)

Division 13.2.3 does not apply to the following applications (r 13.19, Family Law Rules 2004 (Cth) (FLR)):

- an application for an order that a marriage is a nullity, or a

declaration as to the validity of a marriage, divorce or annulment

- a maintenance application, and
- a child support application or appeal.

In all other cases started with an Initiating Application, the parties may deal with disclosure by way of a list of documents. Rule 13.20 sets out the procedure. It is not a standard compulsory step, but, once it has been initiated by a party, the other party must comply if that party is not to breach the rules.

It does not follow that because one party has requested a list of documents from the other, the first party must automatically provide disclosure by list. The obligations under the FLR only apply to those parties who have been requested to provide a list of documents under r 13.20.

Where documents have been requested to be produced, but because of the size and number of the documents it is not convenient to produce copies, r 13.21 requires the disclosing party to make the documents available for inspection within 14 days of receiving the notice request to produce.

This step can only be taken once the matter has been allocated its first day before the judge.

Orders for disclosure can be made on application by a party. Rule 13.22 sets out the remedies, which include an order that a party comply with a request for disclosure in accordance with this Division, and that a party file an affidavit relating to their failure to disclose a document.

The costs of complying with this Division can be ordered to be paid by another party, if it would be oppressive to the disclosing party to comply with their duty of disclosure (r 13.23).

Under r 13.22(4), an application for production of a particular document for the conciliation conference can be made at the case assessment conference, but can only be granted in exceptional circumstances. There is no express time limitation on when an

application can be made under the broader r 13.22(1), but given the terms of r 13.22(4) and the fact that one of the orders for disclosure which may be sought is for a party to comply with a request for a list of documents, it is unlikely the application would be considered at least on a contested basis until the case has been allocated its first day before the judge.

¶24-470 Answers to specific questions (Div 13.4)

Division 13.3 does not apply to the following applications (r 13.25, Family Law Rules 2004 (Cth)):

- an application for an order that a marriage is a nullity, or a declaration as to the validity of a marriage, divorce or annulment
- a maintenance application, and
- a child support application or appeal.

A party can require another party to answer specific questions, after the matter has been allocated its first day before the judge.

Each party can only make one such request. There can be no more than 20 questions, and the questions must be in writing (r 13.26). If the requesting party has required the other party to provide a list of documents, the other party need not respond to the specific questions until after the time for compliance with the disclosure provisions has passed.

The answers are to be provided within 21 days of service of the questions, in the form of an affidavit. Any objections must be dealt with in the affidavit, by citing the facts relied upon (r 13.27).

Under r 13.28, a party can apply for an order under this Part.

¶24-480 Notice to produce

Rule 15.76 of the Family Law Rules 2004 (Cth) provides that no less than seven days before a hearing, or 28 days before a trial, a party

can be required to produce a specified document by the other party serving a written notice to produce. There is no specific form for this.

¶24-490 Information from non-parties

The information from non-parties procedure, being rarely used, was removed from the Family Law Rules 2004 (Cth) from 1 March 2009. The procedure is still available in Western Australia.

ORDERS DURING CASES

¶24-500 Property

A range of interim financial orders can be made during property cases under Ch 14 of the Family Law Rules 2004 (Cth).

Contrary to the oft-repeated mantra that only one order for property settlement can be made, the court can make interim financial orders, without exercising on a final basis its powers under s 79 of the *Family Law Act 1975* (Cth) (FLA). The source of its power to do so, apart from s 79, is s 80.

Section 80 of the FLA is an enabling provision. It applies to the whole of Pt VIII of the FLA, including s 79 proceedings. Section 90SS is the equivalent section for Pt VIIIAB. Under s 80(1)(h), the court can make an order pending the disposal of proceedings, and under s 80(1)(k), any order it thinks necessary to do justice.

The issue was complicated by the limit on the court's jurisdiction under s 79 only to make one final s 79 order.[7]

However, in *Harris*[8] the Full Court stated:

> ". . . s 80 adds to the armoury of s 79 by providing various ways in which the general power in s 79 may be exercised in individual cases . . .".

And at [42]:

> "We do not doubt that the Court has power in a proper case in s

> 79 proceedings to make what may be conveniently described as an interim order, that is an order dealing with some of the property of the parties prior to the final hearing".

The Full Court raised a number of issues for consideration by the court before making an interim property order. In the first of those considerations:

> "The exercise of the power should be confined to cases where the circumstances presented at that time are compelling. As a generality, the interests of the parties and the Court are better served by there being one final hearing of s.79 proceedings. However, circumstances may arise before there can be a final hearing which dictate that some part of the property of the parties should be the subject of orders. A common example is where both parties agree to the disposal of some assets pending the trial".[9]

Harris has been partially over ruled by the Full Court in *Strahan & Strahan (Interim property orders)* [2009] FamCAFC 166 (see also *Seitzinger & Seitzinger* (2014) FLC ¶93-626). The Full Court rejected the first consideration, saying (at [132]):

> ". . . It is not necessary to establish compelling circumstances. All that is required is that in the circumstances it is appropriate to exercise the power. In exercising the wide and unfettered discretion conferred by the power to make such an order, regard should be had to the fact that the usual order pursuant to s 79 is a once and for all order made after a final hearing".

In *HMT and FHL*,[10] Watts J reviewed the decisions on the issue of whether only one s 79 order can be made, and the distinction between a partial property order and an interim financial order. Watts J noted that *Hickey* did not directly consider the matters raised in *Harris*:

> "There seems no doubt that interim orders can be made prior to a matter reaching a final property hearing. These types of orders are, to quote *Harris*, orders which are capable of being reversed or adjusted if it is subsequently considered necessary to do so".[11]

Watts J concluded that:

> ". . . there is power to vary an interim order by a further interim order without the need to wait until the final hearing to do so".[12]

In the case of *Strahan & Strahan (Interim property orders)* [2009] FamCAFC 166, the Full Court conducted a thorough analysis of earlier cases about the distinction between "interim", "partial" and "final" property orders, and how property orders made during a case might breach the principle that there is only one order, one exercise of discretion under s 79, and concluded at [13] that:

> "There is only one exercise of the power under s 79 of the Act. However, this power may 'be exercised by a succession of orders until the power . . . is exhausted' and the power is exhausted 'when there remains no property . . . with respect to which orders by way of alteration of interests in property could be or have been made'.: Gabel v Yardley per Bryant CJ and Coleman J at [57]. As Finn J in Gabel v Yardley at [125] said: 'it is only the final order, which deals on a final basis with all known property of the parties, which completes the one single exercise of the s 79 power'. Further, an earlier order whether made under s 79(6) or s 80(1)(h) is capable of alteration at any time prior to, or as part of the final exercise of the s 79 power: Gabel v Yardley per Bryant CJ and Coleman J at [69]–[73] and Finn J at [126]".

The orders available are:

- under r 14.01:
  - – the inspection, detention, possession, valuation, insurance or preservation of property
  - – to sell or otherwise dispose of property that will deteriorate, decay or spoil
  - – to deal with the proceeds of the sale or disposal in a certain way
  - – to authorise a person to enter, or to do another thing to gain entry or access to, the property

– to authorise a person to make observations, and take photographs, of the property

– to authorise a person to observe or read images or information contained in the property including, for example, playing a tape, film or disk, or accessing computer files, or

– to authorise a person to copy the property or information contained in the property

• under r 14.03:

– order that the court inspect a place, process or thing, or witness a demonstration

• under r 14.04:

– an Anton Pillar order

• under r 14.05:

– a Mareva injunction.

The evidence required for each application is set out in each rule.

Footnotes

7 *Hickey and Hickey and A-G for the Commonwealth of Australia (Intervener)* (2003) FLC ¶93-143.

8 *Harris* (1993) FLC ¶92-378 at [36].

9 Ibid, at [43].

10 *HMT and FHL* [2006] FamCA 206.

11 Ibid, at [147].

12 Ibid, at [173].

¶24-510 Superannuation

The provision for service of an application/response on the trustee of a superannuation fund in relation to which a Pt VIIIB order is sought is at r 14.06 of the Family Law Rules 2004 (Cth). The trustee must receive at least 28 days notice of the orders proposed to be made before a Pt VIIIB order can be made.

This provision also applies to the making of consent orders under r 10.16.

FINAL ORDERS

¶24-550 Final orders

Orders are made when they are signed in chambers, or they are pronounced in court (r 17.01(1), Family Law Rules 2004 (Cth)).

Orders take effect from the date they are made, unless the order states otherwise (r 17.01(2)).

The court has the inherent power to vary or set aside its own orders in certain circumstances, expressly set out in r 17.02. Applications should be made under this Rule before any appeal, in the appropriate case:

- orders made in the absence of a party
- orders obtained by fraud
- interlocutory orders
- an injunction or for the appointment of a receiver
- orders not reflecting the intention of the court

- all parties to the order consent
- clerical mistakes, and
- accidental slips or omissions.

Errors in orders can only be amended administratively under the slip rule if the error is obvious when reading them. If the court issues its reasons for judgment by mistake or there are clerical errors in them, or there has been an accidental slip or omission, the court can amend them under r 17.02A. This extension of the slip rule is useful where, for example, confusion is caused by a slip in the reasons making them inconsistent with the order made. As with all slip rule cases, it must be obvious what the court intended for the slip rule to be used. If it is not available, the aggrieved party can only appeal.

Rule 17.03 prescribes the rate of interest which runs on payments due under orders.

FEDERAL CIRCUIT COURT OF AUSTRALIA PROCEDURE

¶24-600 Introduction

The Federal Circuit Court of Australia (FCCA) has a general federal law jurisdiction as well as a family law jurisdiction. It has its own rules, the Federal Circuit Court Rules 2001.

Rule 1.05 provides that those Rules principally govern proceedings in the FCCA, but specify in Sch 3 which of the Family Law Rules 2004 (FLR) apply in family law and child support proceedings. In addition, subrule 1.05(2) permits the application of the FLR where the court's own rules are insufficient or inappropriate. Expert witness evidence is a common example and is dealt with at ¶24-615.

The best approach with procedure at the FCCA is to assume that its own Rules are sufficient, and look for your answers there first. It is prudent to be confident the Rules really are insufficient or

inappropriate before making that submission to a FCCA judge.

Practice directions and notes to practitioners can be found on the court's website: www.federalcircuitcourt.gov.au.

The process of a case through the FCCA is more streamlined with the intention that cases are disposed of more quickly. This process is discussed from ¶24-620 onwards.

¶24-610 Family Law Rules which always apply

Schedule 3 to the Federal Circuit Court Rules 2001 is now reproduced with a summary of each rule applied. Where these rules conflict with similar rules in the Federal Circuit Court Rules 2001, then the Family Law Rules 2004 apply:

Rule	**Purpose**
r 1.19–1.20	Prohibitions on recording and publishing proceedings (cf s 121 *Family Law Act 1975*)
Pt 2.2	Service of family law brochures
r 4.08–4.10	Special procedure for starting medical procedure cases
Pt 6.15	Progress of cases after a party dies
Pt 6.5	Progress of cases after bankruptcy or personal insolvency agreement
r 16.10	The final stage of the trial
Pt 21.2	Duties of post-separation parenting program providers
Pt 23.1	Registration of agreements, orders and child support debts
r 24.11	Notice of monies paid into court

¶24-615 Expert evidence and Family Reports

One significant difference in the procedures of the Family Court of Australia and the Federal Circuit Court of Australia (FCCA) is expert evidence.

The Federal Circuit Court Rules 2001:

- import the relevant parts of the Federal Court practice direction on expert evidence as to the duty of experts and form of report (r 15.07)
- provide no restriction on parties bringing their own expert evidence
- include no single joint expert rules, and
- include rules only for the appointment of a court expert to report into a question arising in the proceedings.

Single joint expert witnesses are generally used in family law proceedings in the FCCA, particularly, for valuation evidence. It would not necessarily be wrong to use the equivalent provisions of the Federal Court Rules and practice directions, a procedure sometimes followed.

As such, parties conducting their proceedings, and judges, have more flexibility in the FCCA. If there is genuinely a dispute as to methodology or necessity for expert evidence in a case, the single joint expert provisions of the Family Court Rules 2004 need not apply, and the parties can be directed to file such expert evidence as they wish to reply upon. The court can direct the experts to confer and produce a joint statement, and also direct how they are to give their evidence.

Family Reports are dealt with at Div 23.1. The division addresses what the court considers in deciding whether or not to order one, and the court's powers in relation to them.

¶24-620 Commencing proceedings

Proceedings are commenced using an Initiating Application.

The Federal Circuit Court of Australia has its own, simpler, Response and Reply forms.

Interim applications are brought with the court's own Application in a Case form. One affidavit per witness can be relied upon, and if you wish to rely on an affidavit which has already been filed, this can be noted on the application. The general response form can be used to respond to Applications in a Case.

The most important difference in the procedure at commencement of applications for final orders is that an affidavit must be filed with the application and the response.

Forms can be found on the court's website, www.federalcircuitcourt.gov.au.

¶24-625 Interim proceedings

An important distinction in interim proceedings is that the court has made a general direction pursuant to s 51 of the *Federal Circuit Court of Australia Act 1999* that unless otherwise directed, each affidavit relied upon must be limited to 10 pages.

¶24-630 Procedure on the first court date

The precise procedure varies from judge to judge, and registry to registry. However, the following guide should permit your case to run as smoothly as is possible in a system which in some registries is seriously overloaded.

A docket system

Cases are generally judge managed, and each judge has a docket of cases kept from start to finish where possible.

Urgent interim cases

These can be heard on the first return date. The lists are usually sufficiently busy that real urgency and brevity will increase the prospects of this occurring. Otherwise, interim hearings will either be given a fixture if sufficiently complex, or adjourned to a duty list.

Parenting cases

The parties will usually be sent to see a family consultant at the court who will provide a child dispute memorandum. Absent urgency or other pressing reason, the court will usually require this to occur before making any interim determination, and before making directions for trial.

Independent children's lawyers (ICL's) can be appointed at any time. In cases involving allegations of family violence, child abuse, neglect, high conflict, drug and/or alcohol abuse or significant mental health concerns (or all of the above), the court will likely consider appointing an ICL on the first return date.

Financial cases

Conciliation conferences are rarely useful unless the parties have a single joint balance sheet prepared which lists each item of property and each liability, and the value asserted by each party recorded. Such a document should be prepared and handed to the judge on the first return date, even if the best which can be done is to record the assertions contained in the financial statements of the parties.

The court will usually direct the parties to agree on valuations or provide for expert valuation evidence to be obtained, if the balance sheet is not agreed on the first return date. The case will then return for directions on a later date.

The Rules already provide (at r 24.04) for production of standard documents to take place within 14 days of the first return date, so a direction will only be made if the court is presented with a list of documents required. This could be in the form of a letter previously sent, or a minute drawn up by a practitioner.

Conciliation conferences

If there are no disclosure issues and you have provided an agreed single joint balance sheet on the first return date, a conciliation conference will be allocated.

In cases with more complex issues or reasonably valuable property, the case is usually referred to private mediation, a power the Federal

Circuit Court has in its own Act.

The usual directions are for the filing of a single joint balance sheet and for each party to file a “conciliation conference document” including an offer for the purposes of the conference. This is intended to help the registrar prepare for the conference, and maximise the chances of a resolution being reached there.

There is no prescribed form for this; it is enough to write a letter to the registrar, or prepare a mediation paper. The document should be returned to you at the end of the conference.

Suggested topics for such a document would be:

- a short chronology with key dates, such as when the relationship commenced, when separation occurred, and the birth dates of any children
- any disputes about the nature and extent of assets and liabilities, including their treatment in the balance sheet
- a statement about whether it would or would not be just and equitable to make any order for property adjustment
- the financial, non-financial, and welfare of the family contributions contended for:
  - at commencement of the relationship
  - during the period of cohabitation, and
  - after separation
- the offer of settlement for the purpose of the proceedings, including the percentage division. Ideally, the effect of the settlement in dollar terms should also be set out.

¶24-632 Directions for trial

Directions for trial are usually given once there is a child dispute memorandum and/or a conciliation conference has been held,

whichever last occurs.

In child support or maintenance only cases, directions for trial may well be made on the first return date.

The Federal Circuit Court of Australia has an avowed aim of completing its cases within six months. In the busier registries, one can realistically allow three or four times this period when managing the client's expectations. Nonetheless, the procedure in busy registries is no different; as soon as the preliminary matters just outlined are dealt with, directions for trial will be made and often, trial dates allocated, even if the trial is over a year away.

The directions are usually limited to a date for the filing of affidavit evidence and updated financial statements, and the contents and date for filing of the case outline document.

¶24-635 Financial cases

Part 24 of the Federal Circuit Court Rules 2001 sets out the requirement to file a financial statement, the duty of disclosure, the documents one is generally expected to produce, and rules of the service of proposed orders on superannuation fund trustees.

Interrogatories (known as "answers to specific questions" in the Family Law Rules 2004) are not permitted in the Federal Circuit Court of Australia (FCCA), unless a judge has declared pursuant to s 45(1) of the *Federal Circuit Court of Australia Act 1999*, it is in the interests of the administration of justice to allow them.

The relevant parts of the Family Law Rules 2004 would apply after such a declaration (r 14.01).

Similarly, discovery is prohibited by s 45 and can only be permitted if declared to be in the interests of the administration of justice. It would be rare for discovery to take place in a FCCA family law matter; cases sufficiently complex to require discovery by list of documents would generally find themselves propelled with alacrity to the Family Court of Australia.

However, the court has powers to order production of specific

documents to court (r 14.04) and to order a party to swear an affidavit disclosing whether a particular document or class of document is or was in the possession or control of the party (r 14.06).

¶24-640 Child support cases

Part 25A sets out the procedure for child support cases.

The Federal Circuit Court of Australia almost exclusively deals with child support appeals from the Social Security Appeals Tribunal, and Pt 25A sets out the relevant procedure.

For detailed commentary, refer to the Child Support and Maintenance chapter (Chapter 21).

¶24-645 Divorce cases

It is very rare for a divorce proceeding to be heard in the Family Court of Australia and, pursuant to practice direction, all divorce applications must commence in the Federal Circuit Court of Australia (FCCA).

The whole divorce procedure in the FCCA, including commencement, response, service, hearings and applications in a divorce, is found at Pt 25 of the Rules. See also s 48 to 59 of the *Family Law Act 1975*.

For detailed commentary, refer to the Divorce chapter (Chapter 3).

COSTS

Editorial information

Updated by Mary Whelan and Louise Gillespie[1]

¶25-000 Overview

General principle

Section 117(1) of the *Family Law Act 1975* (Cth) (FLA) lays down a general principle that each party to proceedings under the Act shall bear their own costs. This is in contrast to other types of civil litigation where costs normally follow the event.

The general principle is subject to s 117(2). Sections 117AA and 118 make separate provision for costs orders in relation to overseas enforcement and international conventions, and frivolous and vexatious proceedings respectively.

If there are justifying circumstances, then the court may, under s 117(2), make such order as to costs or security for costs, whether by way of interlocutory order or otherwise, as the court considers just.

Section 117(2A) sets out the matters to which the court shall have regard in determining what order (if any) is to be made under s 117(2).

If satisfied that proceedings are frivolous or vexatious, the court may (pursuant to s 118(1)(b)) make such order as to costs as considered just.

Under s 117 of the FLA, it is necessary for the court:

- to consider that the order as to costs be just, and
- in the particular case, there are circumstances that justify it in making the order.

In the absence of there being circumstances, in a particular case, that justify the court in making an order for costs, then s 117(1) provides that each party bears his/her own costs of the proceedings under the Act. As noted by the Full Court in *Collins and Collins*,[2] s 117 "negates any principle that costs should follow the event or that the husband should bear the costs of the wife in matrimonial proceedings".

The provisions that govern the assessment and calculation of party and party costs for matters with proceedings under the *Family Law Act 1975* are as follows:

- **Fresh applications commenced in the Family Court after 30 June 2008** — Ch 19 FLR and Sch 3 to the FLR.
- **Applications commenced prior to 1 July 2008** — Sch 6 to the FLR.
- **Family Court exercising its bankruptcy jurisdiction** — Ch 26 FLR.
- **Proceedings in the Federal Circuit Court** — Pt 21 of the Federal Circuit Court Rules 2001 (Cth) (FCCR).

On 1 July 2008, the Family Court withdrew from its role in regulating lawyer and client costs for fresh applications commenced after 30 June 2008, or where a lawyer was first retained by a client after 30 June 2008, or where the lawyer and client entered into a new costs agreement and/or retainer after 30 June 2008 in respect of applications commenced prior to that date. Lawyer–client costs matters in cases under the *Family Law Act 1975* are otherwise regulated by state or territory legislation governing the legal profession in the state or territory where the lawyer practises.

Unless the lawyer and client agree otherwise in writing, matters where first instructions were received before 1 July 2008 and an application was pending in the Family Court as at 30 June 2008 are regulated by Sch 6 to the FLR.

It is noted that r 19.03(1) and 19.04 of the FLR, which provide for costs information disclosure at the time of settlement and court events continue to apply to all matters with proceedings on foot in the Family Court.

The regulation of lawyer and client costs in matters with proceedings in the Federal Circuit Court, or where no proceedings have been initiated, is governed by state or territory legislation regulating the legal profession in the state or territory where the lawyer practises (r 21.09(3) of the FCCR).

Footnotes

2 *Collins and Collins* (1985) FLC ¶91-603 at p 79,877.

¶25-020 Operation of the provisions relating to costs

Chapter 19 and Sch 6 to the Family Law Rules 2004 (Cth) (FLR) apply to party and party costs. Apart from Ch 19 and Sch 6, there are other chapters within the FLR which may apply to a cost issue. Regard should also be had to the Dictionary and Explanatory Guide to the

FLR.

The following tables summarise the relevant sections of the *Family Law Act 1975* (Cth) (FLA) and chapters of the FLR applicable to costs.

Family Law Act 1975

Provision	Issue	Detail
s 69X(4)	Parentage testing	Costs of parentage testing
s 90AE(4)(d)	Third party administrative costs	Third party administrative costs in relation to an order under Pt VIIIAA
s 90AJ	Third parties	Expenses of third parties
s 94(2B)(b)	Appeal	Orders in relation to conduct of appeal
s 94AAA(8)	Appeal	Single judge or Full Court may make an order by consent for the disposal of an appeal including an order for costs
s 106A(4)	Enforcement (deeds and instruments)	Payment of costs and expenses in relation to a deed or instrument
s 106B(2)	Setting aside transactions	Charge for costs or maintenance over property which is the subject of a transaction to defeat a claim
s 106B(4)	Setting aside transactions	Order for payment of costs of person acting in collusion in a transaction
s 117	Costs	Costs in proceedings under the FLA generally
s 117AA	Overseas	Costs in proceedings relating

	enforcement	to overseas enforcement and international conventions
s 118	Frivolous	The court may make an order as to costs if proceedings are frivolous or vexatious
s 123(1)(g)	Rules	Judges may make rules prescribing matters relating to costs of proceedings

Family Law Rules 2004

Provision	Issue	Detail
r 1.05(2)	Pre-action procedure	The court may take into account a party's failure to comply with the pre-action procedures when considering when to order costs
r 1.07	Main purpose	In achieving the main purpose, the court applies the rules in a way that: • is proportionate to the issues in a case and their complexity and the likely costs of the case • promotes the saving of costs
r 1.08	Main purpose	The responsibility of parties and lawyers in achieving the main purpose. A lawyer attending a court event for a party must: • be familiar with the case • be authorised to deal with any issue likely to arise. Court may take into account

		a failure to comply with this rule when considering costs
r 1.12	Dispensation	Court may dispense with Rules
r 1.14	Extension of time	The party who applies for an extension of time may be ordered to pay any other party's costs in relation to the application
r 5.03	Application in a case	Before filing, a party must make a reasonable and genuine attempt to settle. The court may take into account a party's failure to comply with r 5.03(1) when considering an order for costs
r 5.05(4)	Application in a case	Court may order costs against a party who has unreasonably had a matter listed for urgent hearing
r 6.13	Case guardian	Court may order a case guardian to pay costs
r 6.14	Case guardian	Court may order the costs of a case guardian to be paid by a party or from the income or property of the person for whom the case guardian is appointed
r 8.02(2)(b)	Independent children's lawyer	Court may order that the costs of the independent children's lawyer be met by a party (also refer to s 117(3) — when court may make an

		order and in what proportions, and s 117(4) — when court must not order payment)
r 10.02	Offers of settlement	A party must not mention the fact that a without prejudice offer has been made or the terms of the offer in any document filed or at a hearing, unless in a document filed with an application relating to an offer or an application for costs
r 10.06	Offer to settle	A compulsory offer to settle is a factor that may be taken into account when the court exercises its discretion in relation to costs under s 117(2A)(f)
r 10.11(4)	Discontinuing a case	If a party discontinues a proceeding, another party may apply for costs within 28 days after the Notice of Discontinuance is filed
r 10.11(5)	Discontinuing a case	If a party is required to pay costs because of a discontinuance and the party starts another case on the same or substantially the same grounds, before paying the costs, then the other party may apply for the case to be stayed until the costs are paid

r 10.13	Application for separate decision	A party may apply for a decision on any issue if the decision may save substantial costs
r 11.02	Non-compliance	Failure to comply with rules/procedural orders
r 11.02(2)(e)	Case management — non-compliance	If a party does not comply with the Rules, Regulations or a procedural order then the court may order costs
r 11.06(3)	Case management — non-compliance	When determining a party's application for relief from the default provisions in r 11.02(1) or r (2), the court may consider: • costs • whether the applicant should be stayed from taking any further steps in the case until costs are paid
r 11.06(3)	Case management — want of prosecution	If an application is dismissed for want of prosecution (ie no step in a case for one year), and a party is ordered to pay costs and before the costs are paid the party starts another application on the same or substantially similar grounds, the other party may apply for a stay until the costs are paid
r 11.08(3)	Case management — notice disputing fact	If a notice disputing a fact or document is served and the fact or document is proved in

		the case then the party who served the notice may be ordered to pay costs
r 11.09(2)	Case management — withdrawing an admission	When allowing a party to withdraw an admission, the court may order a party to pay the other party's costs thrown away
r 13.11	Disclosure — costs for inspection	A party who fails to inspect a document under a notice given under r 13.08, r 13.09 or r 13.20(3) may not inspect at a later time unless the party tenders an amount for the reasonable costs of providing another opportunity for inspection
r 13.14	Disclosure — failure to disclose	If a party does not disclose a document required under the Rules, the party may be ordered to pay costs
r 13.15	Disclosure — false or misleading statement	If a party makes a statement or signs an undertaking the party knows or should reasonably have known is false or misleading in a material particular, then apart from being an offence the court may order costs
r 13.22	Disclosure — application for order	A party may seek an order for disclosure on satisfying the court that the order is necessary for disposing of the case or an issue of

		reducing costs
r 13.23	Disclosure — oppressive	If the costs of a party's compliance with their duty of disclosure is oppressive, the court may order the other party to pay the costs or contribute to the costs or give security for costs
r 14.01	Property orders — non-party	A party may be ordered to pay a non-party's costs in respect of a preservation order or an order to view or inspect property
r 15.13(2)	Evidence — struck out	Where material in an affidavit is struck out, the party who filed the affidavit may be ordered to pay costs
r 15.14(4)	Evidence — witness	If notice is given to a deponent for cross-examination and the witness attends and is not cross-examined or the cross-examination is of little or no evidentiary value, then the party who calls the witness may be ordered to pay costs of the witness' attendance and the costs incurred by the other party
r 15.36	Evidence — witness	A witness may be required to pay costs for non-compliance with a subpoena
r 15.40	Assessor	Remuneration of assessor

r 15.42(d)	Expert evidence	The purpose of the Rules is to avoid unnecessary costs of multiple experts
r 15.52(3)	Expert — permission	The court takes account of the impact of the costs on the proceedings when considering an application for permission for expert witnesses
r 15.64	Expert evidence	If an expert does not comply with the Rules, the court may make a costs order (against the expert)
r 15.67	Expert evidence	Single expert witness' costs for providing answers to any questions
Ch 19	Party and party costs	The costs payable as between parties in fresh applications filed in the Family Court after 30 June 2008. The relevant considerations are detailed in this chapter
r 19.03	Costs disclosure to be given to a party if an offer to settle is made during a property matter	Disclosure to be made regarding the actual costs paid or owing up to the date of the offer and the estimated future costs to complete the case
r 19.04	Costs disclosure before various court events	Written notice to be given to a party and to the other party by a lawyer before a conciliation conference, first day of allocated dates

		mentioned in r 16.10 and 16.13 and any other court events that the court orders
r 20.01(2)(f)	Enforcement	Costs including costs of enforcement are an obligation to pay money capable of being enforced
r 20.06	Enforcement	The affidavit to be filed for enforcement orders is to include details of amount claims for costs including the costs of any proposed enforcement
r 20.07(f)	Enforcement	General enforcement powers of the court — to make orders for costs
r 20.08(2)(c)	Enforcement	An enforcement order must state the total amount to be paid including any costs of enforcing the orders
r 20.23	Enforcement	The payee under an enforcement warrant is required to notify the enforcement officer of the costs incurred to register the warrant
r 20.47(1)(c)	Receiver	In considering an application to appoint a receiver, the court must have regard to the probable costs of appointing and paying a receiver
r 20.50(3)(b)	Receiver	The court may make an order for costs and expenses in

		respect of an objection to an account submitted by a receiver
r 20.52(c)	Receiver	If a receiver contravenes an order or the Rules, the court may order the receiver to pay costs of the application
r 20.56	Receiver	Warrant for seizure and detention of property
Sch 1	Pre-action procedures	General: cl 1(3): consequences for non-compliance cl 1(5)(c): limit costs cl 1(6)(h): proportionality cl 2(3): the court may take into account compliance and non-compliance with the pre-action procedures when making orders about case management and considering orders for costs cl 2(4): unreasonable non-compliance may result in a costs order cl 4(10): the object of the pre-action procedure is to control costs
Sch 1	Pre-action procedures	Lawyer's obligations: cl 6(1)(f): to advise clients of costs cl 6(1)(g): to advise clients of the factors the court considers when making the costs orders

Sch 3	Scale	Part 1 — fees for lawyer's work done Part 2 — fees for counsel's work done Part 3 — basic composite amount for undefended divorce Part 4 — basic composite amount for enforcement warrant
Sch 6	Costs — rules before 1 July 2008 (Ch 19)	Party and party and lawyer and client costs in family law cases commenced before 1 July 2008. This schedule duplicates the old Ch 19 with some minor exceptions. The relevant considerations are detailed in this chapter
Dictionary		assessment hearing conduct money costs agreement costs assessment order costs notice fresh application itemised costs account security for costs unreasonable (in relation to costs)
Explanatory guide		adjourn costs thrown away indemnity basis lawyer and client costs party and party costs proportionate, for a case

¶25-030 Discretion to order costs

The general rule in s 117(1) of the *Family Law Act 1975* (Cth) that each party to proceedings shall bear his/her own costs, is subject to s 117(2). If the court is of the opinion that there are circumstances that justify it, the court may make such order as to costs and security for costs, by way of interlocutory order or otherwise, as considered just. The matters to which the court shall have regard in determining what order (if any) should be made under s 117(2), are set out in s 117(2A).

The High Court made it clear, in *Penfold and Penfold*,[3] that s 117(2A) "requires a finding of justifying circumstances as an essential preliminary to the making of an order". Beyond this, there is no "additional or special onus" on the applicant for costs which requires the court to make a preliminary finding that special or exceptional circumstances exist before making an order for costs.[4]

Footnotes

3 *Penfold and Penfold* (1980) FLC ¶90-800.

4 *Jensen and Jensen* (1982) FLC ¶91-263.

¶25-040 Section 117(2A): matters to be taken into account

In deciding whether the circumstances justify the making of an order for costs, the discretion of the court must be exercised having regard to the matters set out in s 117(2A) of the *Family Law Act 1975* (Cth) (FLA) so far as they are relevant. While the court by s 117(2A) "shall" have regard to the matters there enumerated, the list of relevant considerations is effectively open-ended, as s 117(2A)(g) provides that "such other matters as the court considers relevant" shall be taken into account. The weight to be given to a particular consideration under s 117(2A) is a matter for the discretion of the

court.

In *I and I (No 2)*,[5] the Full Court held that the relevant matters in s 117(2A) "must all be taken into account and all balanced in order to determine whether the overall circumstances justify the making of an order for costs".

No one factor under s 117(2A) prevails over any other factor, it is matter of weight that is accorded to each of the relevant factors in the trial judge's discretion — *Medlon & Medlon (No 6) (Indemnity Costs)* (2015) FLC ¶93-664 per Strickland J.

In considering what order if any should be made under s 117(2), the court is required to have regard to the following factors.

The financial circumstances of each of the parties to the proceedings

It has been stated in a number of cases that a disparity in financial resources between the parties may justify an order for costs in favour of the party with fewer financial resources.

The Full Court of the Family Court has affirmed this approach in *Marinko and Marinko* (1983) FLC ¶91-307. In that case, the Full Court said:

> "[The trial Judge] referred, properly in our view, to *Kelly and Kelly (No 2)* (1981) FLC ¶91-108 … in support of the view that the disparity in financial circumstances between the parties is a matter which, alone, can justify an order for costs."[6]

Case study

In *Loomis & ML Lawyer* (2016) FLC ¶93-731, the Family Court of Australia found no merit in submissions made by the husband that he ought not be ordered to pay the costs of a self-represented solicitor whom he had sought to add as a party to the proceedings on the basis that the husband lacked the means to meet any such order as to costs. The Family Court noted that if

costs orders were not made against a party who demonstrated an inability financially to meet such orders, those parties would effectively be indemnified and insured in any such proceedings, which would be contrary to the objects of the Act.

Whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party

In *Schwarz and Schwarz*,[7] the Full Court stated that the receipt of legal aid is but one factor to be taken into account, and does not of itself prevent an award for costs being made against a party.

The conduct of the parties to the proceedings in relation to the proceedings, including their conduct in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents, and similar matters

The Family Law Rules 2004 (Cth) (FLR) provide for costs in particular circumstances when procedures have not been complied with (see, in particular, r 10.11(4), 11.02(2)(e), 11.08(3), 11.09(2), 13.11 and 13.14).

Examples of conduct which may lead to a costs order under s 117(2A)(c) of the FLA are:

- giving false or misleading evidence, especially where extra time and expense is occasioned to disprove the evidence[8]
- failure of a party to provide proper information or obstruction in the collection of material[9]
- providing a distorted estimate of the value of property, which can result in considerable valuation costs[10]
- wasting time by pursuing ultimately unsuccessful issues, such as attempting to show that a parent's new partner is unsuitable to

spend time with a child, or trying to discover assets which are alleged to be hidden by the other party[11]

- prejudicing a party by reason of lengthy irrelevant material, either in affidavits or in oral evidence[12]

- late amendments, for example to add new grounds of appeal, which may also result in an adjournment.[13]

Whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court

Enforcement proceedings are the most prominent example of cases to which s 117(2A)(d) will be relevant.

The court will take into account whether the failure to comply with the previous order(s) was the result of the deliberate action or inaction of one party, or whether the defaulting party has extenuating circumstances that explain his/her default or show that the default was wholly beyond his/her control.[14]

Whether any party to the proceedings has been wholly unsuccessful in the proceedings

In most jurisdictions, the general rule is that costs follow the event, that is to say the party who succeeds is allowed the costs that he or she incurred in bringing his/her just claim or in defending the unjust claim.

In family law, however, it is frequently thought that the claims and counterclaims made by the parties are not so much asserting matters of right, but are making different contentions as to which way a difficult situation should be resolved. The fact that the husband obtains an order requiring the matrimonial home to be sold and the proceeds equally divided does not mean that the wife's claim that she should receive more than half was without any legal basis or any factual support. The fact that in a disputed parenting case the wife succeeds does not necessarily mean the husband's position was unmeritorious. It is these sorts of problems which specially characterise family law

matters and which provide the basis of s 117(1).

Where, however, a court comes to the conclusion that the applicant really was entitled all along to the orders sought and the defence has been substantially without merit, then there would seem to be little reason why the ordinary rules about costs following the event should not apply.[15]

Whether either party to the proceedings has, in accordance with s 117C or otherwise, made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer

In *Robinson and Higginbotham*,[16] Nygh J summarised the purpose and effect of s 117(2A)(f):

> "… when one looks at paragraph (f) it is quite clear that the purpose of that provision is to ensure that offers to settle, if made seriously, are considered seriously, to ensure that the cost of litigation is avoided, the workload of this Court is lightened, and one other consideration is certainly that a party with greater wealth is not placed in a position whereby he or she can wear out the other by simple attrition".

By virtue of the use of the words "or otherwise" in s 117(2A)(f), an offer to settle need not be made in accordance with s 117C before it may be taken into account.[17] The terms of the settlement must, however, be framed clearly.[18]

In *Farmer & Panshin* (2014) FLC ¶93-587, the Full Court allowed an appeal against an order for costs. The costs order was initially made against the appellant because of a failure to accept an offer to settle but, on appeal, counsel put forward that the appellant actually received a greater proportion of the assets than was ever offered. It is important, therefore, to ensure careful consideration of the terms of an offer rather than a mere act of offering alone.

Such other matters as the court considers relevant

This provision is quite distinct from para (a)–(f) of s 117(2A) which "are focused upon the parties to the proceedings and their circumstances

and conduct".[19] In *Telfer and Telfer*,[20] Lindenmayer J referred to s 117(2A)(g) as "perhaps the all-encompassing paragraph" which is, however, an "independent source of discretion and its effect is not limited by the particular matters set out in the previous paragraphs".

For a more recent example of the application of s 117(2A)(g), see *Brott and Joachim*.[21]

Footnotes

5 *I and I (No 2)* (1995) FLC ¶92-625 at p 82,277.

6 *Marinko and Marinko* (1983) FLC ¶91-307; *Mallet* v *Mallet* (1984) FLC ¶91-507.

7 *Schwarz and Schwarz* (1985) FLC ¶91-618.

8 *Penfold and Penfold* (1980) FLC ¶90-800.

9 *Greedy and Greedy* (1982) FLC ¶91-250; *Weir and Weir* (1993) FLC ¶92-338; *Kohan and Kohan* (1993) FLC ¶92-340; *Johnson* v *Johnson (No 2) (Costs)* (2000) FLC ¶93-040.

10 *Talbot* v *Talbot* (1979) FLC ¶90-696.

11 *Rouse and Rouse* (1981) FLC ¶91-073.

12 *Ensabella and Ensabella* (1980) FLC ¶90-867.

13 *Bradley* v *Weber* (1997) FLC ¶92-770.

14 *Madden and Madden* (1979) FLC ¶90-710.

15 *Penfold and Penfold* (1980) FLC ¶90-800.

16 *Robinson and Higginbotham* (1991) FLC ¶92-209, Nygh J at p 78,417.

17 *Harris and Harris* (1991) FLC ¶92-254; *Kilich and Wood* (2003) FLC ¶93-169.

18 *Johnston and Johnston* (2004) FLC ¶93-189.

19 *Re JJT & Ors*; *Ex parte Victoria Legal Aid* (1998) FLC ¶92-812 at p 85,183 per Gummow J.

20 *Telfer and Telfer* (1996) FLC ¶92-688 at p 83,189.

21 *Brott and Joachim* (2006) FLC ¶93-259.

TYPES OF COSTS ORDERS

¶25-050 Interim

The Family Court has power to make an anticipatory order for costs requiring that one party to the proceedings provide another party with funds to conduct those proceedings.

The need for such relief has been recognised for many years. In *Strahan & Strahan* (interim property orders),[22] their Honours said (at [79]):

> "The need for a party to proceedings under the Act to seek an order for the provision of funds to enable the payment of his/her legal costs of participating in the proceedings has been recognised for many years. It is a reflection of an important matter that distinguishes litigation under the Act from civil litigation between parties who are not parties to a marriage, namely that 'very often the wealth of the parties is controlled by one rather

> than both of them': *Blueseas Investments Pty Ltd* v *Mitchell* [1999] FamCA 745; (1999) FLC ¶92-856 at 86,128 per Full Court (Nicholson CJ, Lindenmayer and O'Ryan JJ)."

In *Strahan*, the Full Court reviewed earlier decisions on interim cost orders.[23] For an interim order there must be sufficient assets from which the interim distribution can be made. The requirement of justice is an important consideration but there is no requirement to show "compelling circumstances". The Full Court said (at [123]):

> "In considering the Full Court's use of the expression 'compelling circumstances' in *Harris* it is important to remember, as Riethmuller FM recently observed in *Wenz v Archer* … that 'some care needs to be taken to ensure that explanations of the reasons for the result in a particular case should not be taken as new principle'."

The Full Court observed that the Full Court in *Zschokke and Zschokke*[24] agreed that the requirement of justice must remain a "basic" condition in the making of an order under s 117.

The fact that an interim costs order has been made is a matter to be taken into account by the trial judge (at least in proceedings for the alteration of interests in property) on the final hearing of the proceedings.[25]

An unresolved issue relates to the quantification of the anticipated costs, that is, are potential interim costs to be calculated according only to the scale of costs promulgated by the Family Law Rules 2004 (Cth) (FLR), or may they be calculated having regard to the terms of any costs agreement between the applicant and his/her solicitors? It is submitted, given the express recognition in Sch 6 to the FLR and applicable state and territory costs regimes of costs agreements between solicitor and client, that anticipated costs may be calculated having regard to the real costs and disbursements to be incurred by the client under a costs agreement.[26]

More recently in *Kyriakos & Kyriakos and Anor* (2013) FLC ¶93-528, the Full Court reviewed a number of relevant authorities in relation to interim cost orders and importantly, set aside an order for provision of

a litigation fund to a party due to failure to identify the source of power under which the order was made.

It now seems clear that such an order under the Act could be based on any one or more of the following heads of power:

- periodic or lump sum spouse maintenance under s 72 and 74 (or their Pt VIIIAB equivalent)
- a partial or interim property order under s 79 as permitted under s 80(1)(h) (or their Pt VIIIAB equivalent)
- a costs order under s 117.

There is continuing uncertainty about whether an application might be based on s 114.

Footnotes

22 (2011) FLC ¶93-466.

23 Including *Harris & Harris* (1993) FLC ¶92-378.

24 (1996) FLC ¶92-693.

25 *Zschokke and Zschokke* (1996) FLC ¶92-693; *Farnell and Farnell* (1996) FLC ¶92-681.

26 For further discussion of the power to make an order for interim costs, see *S* v *S* (1997) FLC ¶92-762 at pp 84,382–84,384 per Nicholson CJ and *Grace* v *Grace* (1998) FLC ¶92-792 at p 84,890 per the Full Court.

¶25-060 Security for costs

Section 117(2) makes provision for orders as to “security for costs”.

This is an order which requires the provision of security against costs that have not yet been incurred. Section 117(2) of the *Family Law Act 1975* (Cth) (FLA) provides that the court may make such order as to security for costs whether by way of interlocutory order or otherwise as the court considers just. The applicable rules of court are found in Pt 19.3 of the Family Law Rules 2004 (Cth) (FLR) and Div 21.1 of Pt 21 of the Federal Circuit Court Rules 2001 (Cth) (FCCR).

The nature of orders for security for costs were summarised by Butler J in *Brown and Brown; Eley and Henty (Interveners)*:[27]

> "Costs security orders prevent abuse of Court process by inter alia preventing impecunious persons from litigating without responsibility. …
>
> Generally orders are made where the defendant is an unwilling participant in the litigation and should not be prejudiced by the plaintiff's lack of funds … But the Court must carefully balance this consideration against the possibility that the plaintiff might be shut out or unfairly dealt with if security is ordered."

The order for security for costs is not an "immediately operative determination as to where the burden of costs falls" but, rather, the "requirement of the provision of security is imposed as a condition for the continuation of proceedings by the party against whom the order is made".[28]

The broad discretion of the Family Court with respect to the making of orders for security for costs is exercised by reference to the provisions of s 117(1) and the considerations set out in s 117(2A).

Normally, mere impecuniosity of a litigant will not in itself be a basis for ordering that person to provide security. However, there is an exception in relation to appeals. In *Adult Guardian and Mother's parents and B and Child's Representative*,[29] the Full Court considered it was of "serious concern" that litigation would be stifled because the respondent was impecunious. That consideration, however, must be balanced against concern for the position of the other parties, who would be left to bear their own costs. In those circumstances, the merits of the appeal assume particular importance.

A respondent may apply for an order that the applicant give security for the respondent's costs (r 19.05(1) and 21.01(1) FCCR). Application is by way of an Application in a Case supported by an affidavit. An applicant who has filed a reply may also apply for security from the respondent (r 19.05(3) and 21.01(2) FCCR).

The factors which a court may consider are set out in r 19.05(2) and include:

- the applicant's financial means
- the prospects of success or merits of the application
- whether an order for security for costs would be oppressive or would stifle the case, and
- the likely costs of the case.

Case study

Frazier & Valdez (2016) FLC ¶93-729

The Full Court of the Family Court of Australia made an order for security for costs in favour of the mother, fixed in the sum of $15,000 in relation to the hearing of the father's appeals against orders made dismissing the father's application for the primary judge to disqualify himself, and against orders made in a contravention application and for the father's application to vary final parenting orders. The Full Court found that a relevant factor was the existence of a previous order which the father had consented to, to pay the mother $16,000 for her costs for various applications and proceedings, which remained unpaid. At the time of the mother's application in an appeal for security for costs, the father had failed to comply with that order. The Full Court made orders for security for costs in favour of the mother despite finding that the mother had the capacity to meet her estimated costs, and that the father may not have the capacity to meet the mother's costs. The court fixed the security for costs on a party/party basis.

Footnotes

27 *Brown and Brown*; *Eley and Henty (Interveners)* (1991) FLC ¶92-265 at p 78,778.

28 *Re JJT & Ors*; *Ex parte Victoria Legal Aid* (1998) FLC ¶92-812, per Callinan J at p 85,203.

29 *Adult Guardian and Mother's parents and B and Child's Representative* (2002) FLC ¶93-116.

¶25-070 Indemnity costs

The ordinary rule is that, where the court orders the costs of one party be paid by another party, the order is for the payment of those costs on the party and party basis. The court "should not depart lightly from the ordinary rules relating to costs between party and party and the circumstances justifying the departure should be of an exceptional kind".[30]

Examples of situations where indemnity costs might be awarded include where:

- a party should have known he/she had no chance of success and must be presumed to have an ulterior motive in the proceedings[31]
- a party makes false or irrelevant allegations[32]
- there is evidence of particular misconduct causing loss of time to the parties and the court[33]
- a party unduly prolongs a case with groundless contentions,[34] and

- a party imprudently refuses an offer of compromise.[35]

The mere existence of facts and circumstances capable of warranting an order for costs on an indemnity basis does not mean that the court is obliged to exercise the discretion to make such an order, as costs ultimately remain to be exercised in the discretion of the court having regard to the factors in s 117(2A).[36]

The Explanatory Guide to the Family Law Rules 2004 (Cth) (FLR) provides a definition of "indemnity basis" as follows:

> "… an entitlement to costs, including costs under a costs agreement, for all costs incurred, other than costs that are unreasonable in amount or that have been incurred unreasonably".

Under r 19.34 FLR, if a court orders costs to be paid on an indemnity basis, the Registrar, when assessing the costs, must allow all costs reasonably incurred and of a reasonable amount having regard to:

- the Sch 3 scale
- any costs agreement between the party to whom costs are payable and the party's lawyer, and
- charges ordinarily payable by a client to a lawyer for the work done.

Pursuant to r 19.08(3) FLR, a party applying for an order for costs on an indemnity basis must inform the court if the party is bound by a costs agreement in relation to those costs and, if so, the terms of the costs agreement. A copy of the costs agreement must be produced (see *Addison and Leahy*).[37]

Footnotes

30 *Kohan and Kohan* (1993) FLC ¶92-340 at p 79,614 per the Full Court of the Family Court; *Yunghanns* v *Yunghanns* (2000) FLC ¶93-029 at pp 87,470–87,471.

31 *Fountain Selected Meats (Sales) Pty Ltd* v *International Produce Merchants Pty Ltd* (1988) 81 ALR 397.

32 Ibid.

33 *Tetijo Holdings Pty Ltd* v *Keeprite Australia Pty Ltd* (unreported, Federal Court of Australia, 3 May 1991).

34 *Ragatta Developments Pty Ltd* v *Westpac Banking Corporation* (unreported, Federal Court of Australia, 5 March 1993).

35 *Munday* v *Bowman* (1997) FLC ¶92-784 at p 84,660.

36 Per Sheppard J in *Colgate-Palmolive* v *Cussons Pty Ltd* (1993) 46 FCR 225. See also *Danks & McCabe* (2017) FLC ¶93-767.

37 *Addison and Leahy* [2008] FamCA 248 at [95].

¶25-080 Against whom can costs orders be made?

Apart from the principal parties in proceedings, costs orders may be made in favour of or against other individuals or bodies as detailed below.

Non-parties

The High Court, in *Re JJT & Ors*; *Ex parte Victoria Legal Aid*,[38] recognised that s 117(2) of the *Family Law Act 1975* (Cth) (FLA) authorises orders for costs against persons who are not parties to proceedings, in the exceptional circumstances in which that course is appropriate. This includes where the party to the litigation is impecunious, and the non-party has played a part in the litigation and

has an interest in it.[39]

Third parties

The Family Court has power under s 117(2) to order costs against a third party who intervenes in litigation and, hence, becomes a party to the proceedings.[40] Under r 14.01 of the Family Law Rules 2004 (Cth) (FLR), the court may order a party to pay a third party's costs relating to a viewing or inspection of property or in respect of preservation orders. For payment of third party costs in relation to subpoenas, refer to r 15.23, 15.28(2) and 15.36.

In proceedings under Pt VIIIAA of the FLA, the court may make an order for the payment of the reasonable expenses of the third party incurred as a result of any order or injunction made under that part (s 90AJ).

The independent children's lawyer

The Family Court has the power, pursuant to s 117(2) of the FLA, to make a costs order either in favour of, or against, an independent children's lawyer (formerly "child representative").[41] The power exists notwithstanding that an independent children's lawyer may not be, strictly speaking, a party to the proceedings. It is only a question of discretion, and when that discretion should be exercised having regard to the matters in s 117(2A).

Under r 8.02(2)(b), if a court makes an order for the appointment of an independent children's lawyer, it may order that the costs of the independent children's lawyer be met by a party.

Further, s 117(3) provides that, where an independent children's lawyer has been appointed, the court may make an order under s 117(2) as to costs or security for costs requiring that each party to the proceedings bear the costs of the independent children's lawyer in such proportion as the court considers just. This provision is circumscribed by s 117(4), which provides that, where an independent children's lawyer has been appointed, and a party is in receipt of legal aid, or the court considers that a party would suffer financial hardship if it had to bear a portion of the independent children's lawyer's costs, then the court must not make an order against that party in relation to

the costs of an independent children's lawyer.[42]

Finally, when considering an order for costs under s 117(2), the court must disregard the fact that the independent children's lawyer is funded under a legal aid scheme (s 117(5)).

Legal aid authorities

The Legal Aid Commission is in an analogous position to that of the Crown, in that it is entitled pursuant to s 117 to seek to recover costs based on the scale for the services rendered by lawyers acting in proceedings.[43] The Legal Aid Commission is not restricted to recovering only the actual costs to the commission of being represented by an employed lawyer.

It appears that the court may not make an order for costs against a legal aid authority. The High Court, in *Re JJT & Ors*; *Ex parte Victoria Legal Aid*, quashed an interim costs order made against Victoria Legal Aid in favour of the child's representative (now the independent children's lawyer) on the basis that there was no jurisdiction to make such an order.

Lawyers

The power to make an order for costs directly and personally against a lawyer arises at common law from the inherent jurisdiction of the court over lawyers in their capacity as officers of the court, and from the duty of the lawyer to conduct litigation with propriety.[44]

The FLR detail the obligations of lawyers to parties to proceedings (both in the pre-action period and during the proceedings), and the consequences for failing to meet those obligations. Costs orders for failure to follow the pre-action procedures have been rare (see *Cross & Beaumont* [2007] FamCA 568; *LM & ZJL & SL* [2007] FMCAfam 691 and *Sanders & Jamieson (No 2)* [2007] FamCA 1417).

Under Ch 19 and r 21.07 FCCR, the onus rests on the lawyer to ensure compliance with the Rules, and a failure to do so may result in a costs order. The Rules protect the client more so than previous rules and regulations, and are designed to meet the purpose of the FLR set out in Ch 1, including that the costs for the parties are reasonable.

The FLR prescribe the consequences for a failure to meet the expectations by the court of the lawyer in the form of personal costs penalties or, in more extreme cases, by referral to the professional regulatory body for sanction.

While the FLR and FCCR do not alter the existing common law, there may be a potential that the interests of the lawyer in avoiding a personal costs order may conflict with the interest of his/her client. While the court must give the lawyer the opportunity of being heard before any costs order is made against him/her, the lawyer could be placed in a position of having to blame his/her client (and breach their confidence) and render themselves unable to continue to act for that client.

Under r 19.10 FLR, a person may apply for an order against a lawyer for costs thrown away during a case for reasons including:

- failure to comply with the FLR or an order
- failure to comply with the pre-action procedures
- improper or unreasonable conduct, and
- undue delay or default by the lawyer.

The court has the power to order that the lawyer:

- not charge the client for the work specified in the order
- repay the money the client has already paid towards those costs
- repay to the client any costs the client has been ordered to pay to another party
- pay the costs of the party, and
- repay another person’s costs found to be incurred or wasted.

Under r 21.07 of the FCCR, the court or a Registrar may make an order for costs against a lawyer if the lawyer, or an employee or agent of the lawyer, has caused costs to be thrown away or incurred by a

party or another person because of undue delay, negligence, improper conduct or other misconduct or default. The order may provide that:

- the costs, or part of the costs, as between the lawyer and party be disallowed
- that the lawyer pay the costs, or part of the costs, incurred by the other person, or
- that the lawyer pay to the party or other person the costs, or part of the costs, that the party has been ordered to pay to the other person.

If a costs order is sought against a lawyer, the lawyer is entitled to procedural fairness (r 19.11 FLR and r 21.07(5) of the FCCR).

In *Z (a Solicitor) & Limousin* (2010) FLC ¶93-433, the Full Court of the Family Court of Australia made it clear that an allegation of improper motive for the conduct of litigation made against a legal practitioner is an extremely serious one which requires clear and cogent proof.

Self-represented litigant — r 19.01

A self-represented party is not entitled to recover costs for work done for a case except for work done by a lawyer. The court may order the self-represented party be entitled to recover some payments (eg out of pocket expenses, fares, parking fees and loss of wages).

Example

In *Casley* v *Casley (Costs)* [2010] FamCAFC 189, O'Ryan J, in entertaining an appeal from the Federal Magistrates Court, had to consider an application for costs by a self-represented litigant. The wife in her submission claimed various expenses including, relevantly, claims for the cost of attending at and preparing for various hearings based on her "casual relief teacher day wage". His Honour referred to r 19.01 and concluded that the note to that rule permitted recovery of "some payments". However, this did not permit a litigant in person to recover an amount for time spent in preparing and conducting their own case (see [35]) relying on the High Court decision in *Cachia* v *Hanes* [1994] 179 CLR 404.

Reference was also made to *Oscar* v *Traynor* [2008] FamCAFC 158 where the Full Court reviewed what expenses were recoverable: court fees, transcript costs, freedom of information costs, register search fees, appeal books binding costs, disbursements incurred by a litigation guardian and incidental expenses such as fax, photocopying,

phone, postage, but not travelling costs, parking costs or meals. In *Casley*, the wife claimed $1,617.40. The costs order allowed her $45.

Others

The FLR contain provisions in connection with the costs of:

- receiver — r 20.47(1)(c), 20.50(3)(b) and 20.52(c)
- case guardian — r 6.13, 6.14
- self-represented litigant — r 19.01, and
- expert witness — r 15.42(d), 15.46, 15.47, 15.52(3), 15.60, 15.64 and 15.67.

Footnotes

38 *Re JJT & Ors*; *Ex parte Victoria Legal Aid* (1998) FLC ¶92-812.

39 *Knight & Anor* v *FP Special Assets Ltd & Ors* (1992) 174 CLR 178.

40 *Minister of Community Welfare* v *BY and LF* (1988) FLC ¶91-973; *B and B*: *Family Law Reform Act 1995 (No 2)* (1997) FLC ¶92-788.

41 *Re P (a child); Separate Representative* (1993) FLC ¶92-376; *McDonald and McDonald* (1994) FLC ¶92-508; *Telfer and Telfer* (1996) FLC ¶92-688; *S* v *S* (1997) FLC ¶92-762; *Re David: costs* (1998) FLC ¶92-809; *Lyris* v *Hatziantoniou* (1999) FLC ¶92-840.

42 *PJ and NW* [2005] FamCA 162.

43 *Lyris* v *Hatziantoniou* (1999) FLC ¶92-840 at p 85,828.

44 *Re JJT & Ors*; *Ex parte Victoria Legal Aid* (1998) FLC ¶92-812.

¶25-090 Distinction between lawyer and client costs and party and party costs

Under r 19.34(1) of the Family Law Rules 2004 (FLR) where one party to litigation is ordered to pay the costs of the other party, the Registrar must not allow costs (including charges and expenses) that in the discretion of the Registrar were not reasonably necessary for the attainment of justice and were not proportionate to the issues in the case. In other words the test which the Registrar must consider is whether the costs were reasonably necessary and whether they were proportionate for the party to prosecute or defend his/her rights in that litigation, either completely or in a part specified by the order.

Ordinarily, party/party costs are calculated in accordance with Sch 3 FLR. The Registrar may also allow a reasonable sum for work properly done that is not specifically provided for in Sch 3 FLR. In this respect, r 19.35(2) FLR sets out the matters to be considered by the Registrar in assessing the amount of the allowance.

Party and party costs represent the loss or expenses incurred by one party to litigation in connection with that litigation, and are in the nature of an indemnity. However, party and party costs are limited to those properly, necessarily or reasonably incurred for the attainment of justice. Those costs necessarily incurred are then to be paid only at a rate that is proportionate to the issues in the case.

Lawyer and client costs, on the other hand, are the proper remuneration payable to the lawyer for the legal work performed by him/her for his/her client, including professional disbursements.

In the Dictionary to the Family Law Rules 2004 (Cth), the following terms are defined:

- “costs” — “an amount paid or to be paid for work done by a lawyer,

and includes expenses", and

- "costs assessment order" — "an order made by a Registrar fixing the total amount payable for costs (see rules 19.31 and 19.32)".

¶25-100 Application for costs against another party

Under r 19.08 of the Family Law Rules 2004 (Cth) (FLR), a party may apply either orally or by way of an Application in a Case for an order that another party pay their costs. The application may be made at any stage during a case or by filing an Application in a Case within 28 days after the order is made. There are similar provisions in the Federal Circuit Court Rules 2001 (see below).

A party applying for orders for costs on an indemnity basis must inform the court if the party is bound to a costs agreement and, if so, the terms of the agreement (see r 19.08(3) and cl 6.08(3) of Sch 6 to the FLR). This is ordinarily achieved by annexing a copy of the costs agreement to an affidavit.

A party may apply for costs within 28 days after the other party files a notice of discontinuance. A party may apply for an extension of time to make the application for costs (r 1.14 of the FLR).

The requirements of natural justice are adhered to, and a party seeking costs must give notice to the other person from whom costs are sought (refer to r 19.11 FLR and the decision of *Carew and Carew*[45] where the court confirmed that a reasonable opportunity to be heard must be afforded).

When determining the time limits for the bringing of an application for costs, the time runs from the making of the order, and not the delivery of the reasons for judgment.[46]

Under r 19.11 FLR, if a party is represented by a lawyer and the party is not present when a costs order is made against the absent party or the lawyer, then the lawyer must give the party written notice of the order with an explanation of the reason for the order.

The court can make an order for costs on its own initiative (r 1.10 of

the FLR). In framing a costs order, the court may set a time for payment of the costs.

Under r 19.19 FLR, when considering party and party costs:

- costs are to be calculated in accordance with the scale detailed in Sch 3 to the FLR if:
  - the court orders costs to be paid and does not fix the amount, or
  - a person is entitled to costs under the FLR.

In addition to the Sch 3 costs that a party can recover from another party a party can, pursuant to r 19.35 FLR, claim a fee calculated on the basis of:

- any other fees paid or payable to the party's lawyer and counsellor to which a fee or allowance applies
- the complexity of the case
- the amount or value of the property or financial resources involved
- the nature and importance to the party concerned
- the difficulty or novelty of the matters raised in the case
- any special skill, knowledge or responsibility required or the demands made of the lawyer by the case
- the conduct of all the parties and time spent on the case, place where, and circumstances in which the work, or any part of it was done
- the quality of the work done, and whether the level of the expertise was appropriate to the nature of the work, and
- the time in which the work was required to be done.

This loading under r 19.35 is usually calculated (in practice) by

applying a sliding scale percentage figure to the fees calculated for the work performed under the scale. It is rare for a “loading” of more than 15% on fees to be awarded by registrars on assessment. The higher percentage loadings are generally reserved for complicated/commercial matters and matters involving difficult legal issues.

- the court may order that the Sch 3 scale does not apply and a party is entitled to costs:
  - of a specified amount
  - as assessed on a lawyer and client basis or an indemnity basis[47]
  - to be calculated in accordance with a method stated in the order, for instance, costs calculated in accordance with Sch 3 plus an additional percentage for complexity
  - for part of the case or part of an amount assessed by reference to the Sch 3 scale
- the factors which the court may consider in departing from costs calculated in accordance with Sch 3 are:
  - the importance, complexity or difficulty of the issues (as distinct from care, skill and consideration)
  - reasonableness of each party’s behaviour in the case
  - rates ordinarily payable to lawyers in comparable cases (it may be necessary to lead evidence of market rates applicable (eg to accredited family law specialists))[48]
  - whether a lawyer’s conduct has been improper or unreasonable
  - the time properly spent on the case
  - expenses properly paid or payable.

Lawyers should be aware that under r 19.03 FLR when an offer to settle is made during a property case the lawyer for each party must disclose to the party the costs incurred (both paid and owing) up to the date of the offer to settle and the estimated future costs to complete the case. Rule 19.04 FLR requires a lawyer for a party to give to the party, immediately before each court event, a written notice disclosing the total costs incurred up to and including that court event and an estimate of the future costs of the party up to and including each future court event. A copy of this notice must also be given at each court event to the other party and the court. In a financial case, the notice must also specify the source of the funds for the costs paid or to be paid unless the court orders otherwise.

It is open to a trial judge to make an order for costs in a manner not sought by either party. In *Doherty and Doherty*,[49] Baker J (with whom Fogarty and Hannon JJ concurred) confirmed the breadth of the discretion of a trial judge in considering the question of costs:

> "Costs, it must be said, are very much at the discretion of the trial Judge. The High Court in *Penfold and Penfold* (1980) FLC ¶90-800 set out clearly the parameters in which an appeal court should interfere with the discretion of a trial judge in relation to issues of costs.
>
> I am satisfied that it was open to the trial Judge to make the order for costs which he made, although it may not have been in the terms which the respondent actually sought, or in the terms which the appellant considered an order may have ultimately been made."

Applications for costs in the Federal Circuit Court

Division 21.2 of the Federal Circuit Court Rules (FCCR) deals with costs. Rule 21.02(1) provides that an application for an order for costs may be made at any stage of the proceedings, within 28 days of the final decree or order or within any further time allowed by the court. The court sets the amount of costs or the method by which the costs are to be calculated, and it may also set the time for payment of the costs, which may be before the proceeding is concluded. The court may refer the costs for taxation by a registrar under Ch 19 and Sch 6

to the Family Law Rules 2004 (FLR).

Rule 21.03 of the FCCR empowers the court to specify the maximum costs which may be recovered on a party and party basis. This may be done by order on the first court date or of its own motion or on the application of a party. The court has power to vary the amount specified. Reserved costs follow the event unless the court otherwise orders (r 21.04). Rule 21.05 provides for costs of a proceeding before transfer to the Federal Circuit Court from another court if the originating court has not made an order for costs.

Footnotes

45 *Carew and Carew* (1979) FLC ¶90-698.

46 *Moore and Moore* (1996) FLC ¶92-670.

47 *Kohan and Kohan* (1993) FLC ¶92-340; *Cassidy* v *Murray* (1995) FLC ¶92-633; *Munday* v *Bowman* (1997) FLC ¶92-784; *Gaudry and Gaudry (No 2)* (2004) FLC ¶93-203.

48 *Weiss* v *Barker Gosling (No 2)* (1994) FLC ¶92-474.

49 *Doherty and Doherty* (1996) FLC ¶92-652 at p 82,684.

¶25-110 After an order for costs is made

This section deals with party/party costs under the FLA and FLR.

A party liable for costs may apply to have the order set aside under r 19.31 or r 19.37(3), or may apply to the court to review the decision under r 19.32.

If it is necessary to enforce the costs assessment order, a summons for the amount of the order should be filed.

Interest on costs — party and party costs

Costs awarded by an order which remain unpaid are subject to interest at the rate prescribed by the FLR, unless the court has made specific orders in relation to interest (s 117B(1) of the *Family Law Act 1975* (Cth)).

The applicable rule is r 19.02 which prescribes that interest is payable at the rate in r 17.03.

Pursuant to r 17.03 of the FLR, the rate of prescribed interest for each 12 months commencing on 1 July each year is:

(a) in respect of the period from 1 January to 30 June in any year — the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and

(b) in respect of the period from 1 July to 31 December in any year — the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

The target cash rate may be found at www.rba.gov.au/statistics/cash-rate/.

The history of the applicable rates of interest under the FLR are set out in a note to r 17.03 in Wolters Kluwer *Australian Family Law Handbook* and Wolters Kluwer *Australian Family Law Act with Regulations and Rules*.

¶25-120 Costs certificates

The *Federal Proceedings (Costs) Act 1981* makes provision for reimbursement in respect of proceedings in federal courts (including the Family Court of Australia) or appeals from these courts if:

- an unsuccessful respondent to an appeal is successful on a question of law[50] (s 6(1))

- a party to an action which is appealed is successful on a question of law and a new trial is ordered (s 8(1))

- proceedings are aborted because a judge involved dies, resigns, or becomes unable to continue with, or to give judgment in the proceedings (s 10(2)), and

- costs are ordered against a respondent who is unable to pay or who cannot be found (s 7), there was no respondent to the proceedings (s 7A) or, in the family law jurisdiction, in accordance with s 117 of the *Family Law Act 1975* (Cth), each party bears his/her own costs (s 9).

Where a person comes within one of the categories listed above, they may apply for a costs certificate. A costs certificate is a certificate stating that, in the opinion of the court, it would be appropriate for the Commonwealth Attorney-General to authorise the payment of the costs of that person.

A person who has been granted a costs certificate may then apply to the Attorney-General for reimbursement of their costs.

An appeal does not lie from a refusal of a court to grant a costs certificate (s 13).

Footnotes

50 *Kudelka and Kudelka* (1986) FLC ¶91-719.

¶25-160 Recovery and assessment of lawyer and client costs

Pursuant to the Family Law Rules

Specific costs matters are addressed in Pt 6.7 of Sch 6 to the FLR which apply to an assessment based on a scale, but do not apply to lawyer and client costs where there is a valid costs agreement.

An overriding principle is that a lawyer must not charge an amount for costs improperly, unreasonably or negligently incurred by the lawyer

(cl 6.13(1)(a) of Sch 6) or for work done for the administration of the lawyer's office (cl 6.13(1)(b) of Sch 6). A registrar must not allow costs that, in the opinion of the registrar, are not proportionate to the issues in the case (cl 6.35(1)(b) of Sch 6).

The lawyer can charge as between the lawyer and client an amount for costs incurred which are otherwise unreasonable if:

- the client provides an authority in writing to the lawyer to do the work for the case or incur the expense[51]
- the lawyer provides a warning to the client advising the client that the costs to be incurred would be unreasonable and unlikely to be recovered on a party and party basis,[52] and
- the lawyer does the work or incurs the expense in accordance with the specific instructions of the client.

In addition to the fees and disbursements that a lawyer may charge pursuant to the Family Court scale of costs, the lawyer may, pursuant to cl 6.36 of Sch 6 to the FLR, charge a fee calculated on the basis of:

- any other fees paid or payable to the lawyer and counsellor to which a fee or allowance applies
- the complexity of the case
- the amount or value of the property or financial resources involved
- the nature and importance to the party concerned
- the difficulty or novelty of the matters raised in the case
- any special skill, knowledge or responsibility required or the demands made of the lawyer by the case
- the conduct of all the parties and time spent on the case, place where, and circumstances in which the work, or any part of it was done

- the quality of the work done, and whether the level of the expertise was appropriate to the nature of the work, and
- the time in which the work was required to be done.

The loading under r 19.35 and cl 6.36 of Sch 6 is usually calculated (in practice) by applying a sliding scale percentage figure to the fees calculated for the work performed under the scale. It is rare for a "loading" of more than 15% on fees to be awarded by registrars on assessment. The higher percentage loadings are generally reserved for complicated/commercial matters and matters involving difficult legal issues.

Legal action cannot be instituted or maintained for the recovery of the costs of proceedings under the *Family Law Act 1975* (Cth) from a client, unless the requirements of cl 6.14 of Sch 6 to the Family Law Rules 2004 (FLR) have been satisfied, including service of an account and the Family Court brochure "Schedule 6 — Costs Notice".

The FLR distinguish between an "account" and an "itemised costs account". If an account payable is not in an itemised form the recipient has the right to request an itemised costs account within 28 days of receipt (see r 19.20 and cl 6.21 of Sch 6 to the FLR). A lawyer must comply with a request within 28 days of the request.

There is no prohibition on a lawyer serving an itemised costs account rather than an account in the first instance.

While the specific requirements of an itemised costs account are set out in cl 6.23 of Sch 6 to the FLR, there are no such specific requirements for an "account".

A person entitled to party and party costs must serve an itemised costs account and a costs notice on the person liable to pay the costs within 28 days after the end of the case (see r 19.21 and cl 6.22 of Sch 6 to the FLR). For a fresh application made after 30 June 2008, the costs notice must be the Family Court brochure "Chapter 19 — Costs Notice". For other matters, the costs notice must be the Family Court brochure "Schedule 6 — Costs Notice".

The following table outlines when the two Family Court costs notice

brochures should be served upon clients and other parties:

Matter	Party and party costs	Lawyer and client costs
Fresh applications made after 30 June 2008 (ie Ch 19 and local Legal Profession Act matters)	Chapter 19 — Costs notice to be served with itemised costs account	Not applicable — local Legal Profession Act currently applies. The Legal Profession Uniform Law has applied to new retainers in NSW and Victoria since 1 July 2015
Other matters (ie Sch 6 matters)	Schedule 6 — Costs notice to be served with itemised costs account	Schedule 6 — Costs notice to be served at time of first instructions or, if not served then, to be served with account and itemised costs account

A person served with an itemised costs account may dispute it by serving on the person entitled to the costs a Notice Disputing Itemised Costs Account within 28 days after the account was served (see r 19.23 and cl 6.24 of Sch 6 to the FLR).

The parties to a costs dispute must make a reasonable and genuine attempt to resolve the dispute. If they are unable to resolve the dispute, either party may seek to have the dispute determined by filing the itemised costs account and the Notice Disputing Itemised Costs Account no later than 42 days after the Notice Disputing Itemised Costs Account was served (see r 19.24 and cl 6.25 of Sch 6). Only those items included in the itemised costs account, or the notice, may be raised at an assessment hearing (cl 6.33(2) of Sch 6).

The matter then proceeds to a settlement conference (for procedural orders), a preliminary conference (where the registrar makes a preliminary assessment of the costs amount) or an assessment conference.

The registrar conducting an assessment hearing must determine the amount (if any) to be deducted from each item disputed and calculate the total amount payable (cl 6.33 of Sch 6).

The onus of proof is on the person entitled to the costs, and that person should bring to the hearing all documents supporting the items claimed (ie invoices and receipts for disbursements, timesheets, diary notes, correspondence, briefs, etc).

The registrar must determine the amount payable for the costs of the assessment if any (cl 6.33(1)(b) of Sch 6), having regard to the matters in s 117(2A) of the *Family Law Act 1975* (Cth).

At the end of the assessment hearing, the registrar must make a costs assessment order and give a copy of the order to each party (cl 6.33 of Sch 6).

Footnotes

51 Ibid.

52 *B & Associates (a firm of solicitors) and Bloomfield* (2003) FLC ¶93-155.

Footnotes

1 Adapted from the detailed chapter in *Australian Family Law and Practice*, originally written by Geoff Wilson and Paul Doolan. Judge Grant Riethmuller and Judge Alexandra Harland are also acknowledged for their contributions in relation to the Federal Circuit Court and de facto proceedings respectively.

Case Table

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

¶20-190;
¶20-207

Q

R

S

T

Paragraph

U

Paragraph

V

W

X

Y

Z

Section Finding List

FAMILY LAW ACT, RULES AND REGULATIONS

Family Law Act 1975

Section	Paragraph
4	¶7-060; ¶12-065; ¶13-190; ¶15-140; ¶19-080; ¶20-090
4(1) — definitions	
— “abuse”	¶5-030; ¶11-185
— “child abuse”	¶11-150; ¶11-200
— “child of a marriage”	¶14-060
— “childbirth maintenance period”	¶6-020
— “de facto financial cause”	¶1-050; ¶14-005; ¶14-010; ¶15-158; ¶19-080; ¶20-290
— “de facto relationship”	¶1-220; ¶20-130; ¶22-040
— “exposed”	¶11-150
— “family violence”	¶6-110; ¶7-000; ¶7-060
— “financial agreement”	¶20-070; ¶20-110
— “independent children's lawyer”	¶6-090
— “major long-term issues”	¶4-050; ¶8-000; ¶8-020
— “matrimonial cause”	¶1-050; ¶13-190; ¶14-005; ¶14-230; ¶15-130; ¶15-140; ¶19-080; ¶20-290

4AB(4)	¶6-110; ¶11-160; ¶11-200
4A	¶15-140
4A(1)	¶15-140; ¶20-290
4A(1)(b)(iii)	¶15-140
4A(2)	¶20-290
4B	¶20-290
5	¶15-140
5(1)	¶15-080
6	¶1-220; ¶3-280
8(1)	¶14-005
10A	¶5-010; ¶24-030
10B	¶5-000; ¶5-010
10C	¶2-030; ¶5-000; ¶5-010; ¶5-030
10C(1)(b)	¶5-010
10D	¶5-010; ¶11-150
10D(1)	¶5-010
10D(2)	¶5-010
10D(3)	¶5-010
10D(4)	¶5-010
10D(5)	¶5-010
10D(6)	¶5-010
10E	¶5-010; ¶23-110
10E(1)	¶5-010
10E(2)	¶5-010; ¶5-030

10E(2)(a)	¶5-010
10E(2)(ab)	¶5-010
10E(4)	¶5-010
10F	¶2-030; ¶5-000; ¶5-030
10G	¶2-030; ¶5-000; ¶5-030
10H	¶5-030
10H(6)	¶5-030
10J	¶5-030
10J(2)	¶5-030
10J(3)	¶5-030
11A	¶7-050; ¶5-040
11B	¶5-000; ¶5-040
11D	¶5-040
11E	¶5-040
11F	¶5-040; ¶7-050
11F(1)	¶7-050
11F(1)(b)	¶7-050
11F(2)	¶7-050
11F(3)	¶7-050
11G	¶7-050
Pt IIIA (12A–12G)	¶5-050
12A	¶5-050
12B	¶2-030; ¶3-010; ¶5-050
12C	¶2-030

12D	¶2-030; ¶3-010
12D(2)	¶2-030
12E	¶2-030; ¶3-010; ¶5-050
12E(1)	¶2-030
12E(2)	¶2-030
12E(4)	¶3-010
12E(5)	¶3-010
12F	¶5-050; ¶24-220
12G	¶5-050
Pt IIIB (13A–13K)	¶5-060
13A	¶5-060
13B	¶3-110
13B(2)	¶3-110
13B(3)	¶3-110
13B(4)	¶3-110
13E(1)	¶5-090
13H	¶5-090; ¶17-260
13J	¶5-090
31	¶1-180
33	¶1-080
33B(6)	¶24-370
38BD	¶5-010
38R(1A)	¶5-010
39	¶3-180

45A	¶11-186; ¶16-010; ¶16-290
Pt VI (48–59)	¶3-000; ¶4-030
48–59	¶24-645
48	¶17-260
48(1)	¶3-020
48(2)	¶3-020; ¶3-030; ¶3-040; ¶3-060; ¶3-070; ¶3-090; ¶3-140
48(3)	¶3-020; ¶3-050; ¶3-130
49	¶17-260
49(2)	¶3-080
50	¶3-130; ¶17-260; ¶22-050
50(1)	¶3-120
51	¶3-220
55	¶3-200
55(2)(b)	¶3-200
55(4)	¶3-200
55A	¶3-200; ¶3-210; ¶5-040; ¶7-050
55A(1)(b)(ii)	¶3-210
55A(2)	¶3-210
55A(3)	¶3-210
57	¶3-200
58	¶3-200
Pt VII (60A–70Q)	¶1-050; ¶2-030; ¶2-080; ¶3-010; ¶3-210; ¶4-000–4-040; ¶4-060; ¶5-030; ¶5-050; ¶5-070; ¶6-000–6-020; ¶6-050; ¶6-110; ¶6-120; ¶7-010; ¶7-030; ¶7-060; ¶8-020;

	¶9-000; ¶9-010; ¶9-060; ¶9-070; ¶9-090; ¶9-180; ¶9-200; ¶9-230; ¶9-250; ¶9-350; ¶11-000; ¶11-150; ¶12-060; ¶15-080; ¶23-070; ¶24-020; ¶24-030; ¶24-405
60B	¶3-210; ¶4-010; ¶4-060; ¶6-120; ¶7-010; ¶11-150; ¶11-180; ¶11-280
60B(1)(a)	¶4-060; ¶7-000
60B(1)(b)	¶7-000; ¶11-150; ¶11-180
60B(2)–(4)	¶4-010
60B(4)	¶11-185
60CA	¶4-040; ¶6-010; ¶8-020; ¶10-070; ¶10-090; ¶11-150
60CC	¶2-080; ¶2-100; ¶4-010; ¶4-060; ¶6-010; ¶8-020; ¶8-030; ¶11-050; ¶11-090; ¶11-140; ¶11-150; ¶11-170; ¶11-180; ¶11-280; ¶22-040
60CC(2)	¶2-080; ¶6-010; ¶6-120; ¶7-000; ¶7-060; ¶11-150; ¶11-185
60CC(2)(a)	¶6-010; ¶11-150
60CC(2)(b)	¶6-010; ¶11-150; ¶11-180
60CC(2A)	¶4-030; ¶6-010; ¶6-110; ¶11-150; ¶11-180; ¶11-185; ¶11-280
60CC(3)	¶2-080; ¶6-010; ¶6-120; ¶7-000; ¶7-060; ¶11-150
60CC(3)(a)	¶6-100; ¶7-080; ¶11-140
60CC(3)(c)	¶4-030; ¶6-010; ¶11-185; ¶11-270
60CC(3)(ca)	¶4-030; ¶11-050
60CC(3)(d)	¶2-080

60CC(3)(f)	¶11-050
60CC(3)(g)	¶11-050
60CC(3)(i)	¶11-050
60CC(3)(j)	¶6-110; ¶11-150
60CC(3)(k)	¶6-010; ¶6-110; ¶7-060; ¶11-150; ¶11-185
60CC(3)(m)	¶2-080; ¶11-050
60CC(4)	¶2-080; ¶4-030; ¶6-010
60CC(4A)	¶2-080
60CC(5)	¶6-010
60CD	¶7-080
60CD(1)	¶6-100
60CD(2)	¶6-100
60CE	¶6-100
60CF	¶11-150
60CF(1)	¶6-110
60CG	¶6-010; ¶11-150
60CG(1)	¶6-110
60CG(2)	¶6-110
60CH	¶7-000; ¶11-150
60CI	¶7-000; ¶11-150
60D	¶2-030; ¶5-030; ¶5-040; ¶6-050; ¶7-000; ¶11-150; ¶11-160; ¶21-090
60D(1)	¶5-010; ¶5-050
60D(1)(a)	¶2-030

	180
60I(9)(a)(i)	¶7-070
60I(9)(b)	¶6-110
60I(9)(d)	¶7-070
60I(10)	¶2-030; ¶6-110; ¶7-070
60J	¶5-020; ¶7-060; ¶11-150; ¶11-180
60J(1)	¶6-110
60J(2)	¶6-110
60J(4)	¶6-110
61B	¶4-020
61C	¶4-030
61C(1)	¶4-020
61C(2)	¶4-020
61D	¶4-020; ¶4-030
61D(1)	¶4-030
61DA	¶4-010; ¶4-030; ¶4-040; ¶4-060; ¶7-000; ¶11-180; ¶11-280
61DA(1)	¶4-040; ¶8-030
61DA(2)	¶2-080; ¶4-030; ¶7-000; ¶11-150; ¶11-180
61DA(3)	¶2-080; ¶4-030; ¶6-115
61DA(4)	¶2-080; ¶4-030; ¶6-115
61DB	¶4-030
62G	¶5-040; ¶6-100; ¶7-050; ¶9-270
62G(3A)	¶6-100; ¶7-080

65DAA(1)(a)	¶4-040
65DAA(1)(b)	¶4-040; ¶8-030
65DAA(1)(c)	¶4-040
65DAA(2)	¶4-040
65DAA(3)	¶4-040; ¶4-060
65DAA(4)	¶4-040
65DAA(5)	¶4-040
65DAB	¶6-060
65DAC	¶4-030; ¶4-040
65DAC(1)	¶4-030
65DAC(2)	¶4-040; ¶8-000
65DAC(3)	¶4-040; ¶8-000
65DAC(4)	¶4-040; ¶8-000
65DAE	¶4-050; ¶8-000
65G	¶6-020; ¶24-300
65H	¶6-000
65J	¶6-000
65K	¶6-000
65L	¶6-020
65LA	¶6-020
65M	¶6-000; ¶10-040
65N	¶10-040
65N(2)	¶6-000
65NA	¶10-040

66N	¶21-240
66P	¶21-220
66Q	¶21-220
66R	¶14-120; ¶20-100
66S	¶21-220
66T	¶21-220
66VA	¶21-230
66W	¶21-220
67B	¶6-020; ¶21-090
67C	¶6-020
67F	¶6-020
67G	¶6-020
Pt VII Div 8 Subdiv C (67J–67Y)	¶6-020
67J	¶6-020
67Q	¶6-020
67VA	¶12-060
67Z	¶11-150
67Z(2)	¶6-020; ¶7-060; ¶11-155
67Z(4)	¶6-090
67ZA	¶6-020; ¶11-150
67ZBA	¶6-020; ¶11-150; ¶11-155
67ZBA(2)	¶6-020; ¶7-060; ¶11-155
67ZBB	¶6-110; ¶11-150; ¶11-155
67ZBB(3)	¶6-110

67ZC	¶6-020; ¶8-020; ¶11-110; ¶11-130; ¶12-060
67ZD	¶9-390
68(2A)	¶6-120; ¶7-060
68B	¶1-200; ¶6-020; ¶8-020; ¶11-110; ¶11-130; ¶11-150; ¶11-186
68B(1)	¶8-020
68B(2)	¶8-020
68(2B)	¶6-120; ¶7-060
68C	¶6-020
68(2C)	¶6-120; ¶7-060; ¶11-186
Pt VII Div 10 (68L–68M)	¶7-050
68L	¶9-160; ¶11-260
68L(2)	¶6-090
68L(3)	¶9-160
68LA	¶6-090
68LA(5)	¶6-090
68LA(5)(b)	¶6-100; ¶7-080
Pt VII Div 11 (68N–68T)	¶6-120; ¶11-150
68N	¶6-120
68P	¶1-200
68P(2)	¶6-120
68P(3)	¶6-120
68Q	¶6-120
68R	¶6-120

68R(1)	¶6-120
68R(3)	¶6-120
68S	¶6-120
68T(1)(a)	¶6-120
68T(1)(b)	¶6-120
68T(1)(c)	¶6-120
69F	¶10-170
Pt VII Div 12 Subdiv D (69P–69U)	¶9-390; ¶12-050
Pt VII Div 12 Subdiv E (69V–69ZD)	¶8-010
69VA	¶8-010; ¶12-050; ¶12-060; ¶12-070
69W	¶8-010; ¶21-020; ¶23-400
69W(3)(a)	¶8-010
69W(3)(b)	¶8-010
69W(3)(c)	¶8-010
69W(4)	¶8-010
69X	¶8-010
69Y	¶8-010
69ZC	¶8-010
69ZK	¶1-190
69ZL	¶6-115; ¶7-050; ¶11-186
Pt VII Div 12A (69ZM–69ZX)	¶7-030–7-060; ¶7-080; ¶11-180; ¶23-070; ¶24-405
69ZM(1)	¶7-030

Pt VII Div 13 (70C–70N)	¶10-160
Pt VII Div 13 Subdiv C (70G–70L)	¶9-350
70G	¶12-065
Pt VII Div 13A (70NAA–70NFJ)	¶6-070; ¶10-000; ¶10-020–10-070; ¶10-150; ¶10-180; ¶10-190
Pt VII Div 13A Subdiv A (70NAA–70NAF)	¶10-030
70NAA	¶10-040
70NAA(2)	¶10-030
70NAB	¶10-040
70NAC	¶6-070; ¶10-040
70NAD	¶10-040
70NAE	¶10-040
70NAE(1)	¶10-040
70NAE(2)(a)	¶10-040
70NAE(2)(b)	¶10-040
70NAE(4)–(7)	¶10-040
70NAF	¶10-050; ¶10-160; ¶10-190
70NAF(3)	¶10-050; ¶10-160
Pt VII Div 13A Subdiv B (70NBA–70NBB)	¶10-030; ¶10-060; ¶10-070; ¶10-120
70NBA	¶10-070; ¶10-080; ¶10-090; ¶10-120; ¶10-190
70NBA(1)	¶10-070

70NBA(2)	¶10-070
70NBA(1)(b)(i)	¶10-030
70NBB	¶10-070
70NBB(2)	¶10-070
Pt VII Div 13A Subdiv C (70NCA–70NCB)	¶10-030; ¶10-080
70NCA	¶10-080
70NCB	¶10-080; ¶10-100
70NCB(2)	¶10-080
Pt VII Div 13A Subdiv D (70NDA–70NDC)	¶10-030; ¶10-090
70NDA	¶10-090
70NDB	¶10-030; ¶10-030; ¶10-120
70NDB(1)(c)	¶10-090
70NDB(2)	¶10-090
70NDC	¶10-030; ¶10-100
70NDC(1)	¶10-100
70NDC(2)	¶10-100
Pt VII Div 13A Subdiv E (70NEA–70NEG)	¶10-030; ¶10-110; ¶10-130; ¶10-150
70NEA	¶10-110
70NEA(4)	¶10-110
70NEB	¶10-030; ¶10-110; ¶10-120
70NEB(1)(a)	¶10-120
70NEB(1)(b)	¶10-030

70NEB(1)(d)–(f)	¶10-120
70NEB(2)	¶10-120
70NEB(3)	¶10-120
70NEB(5)	¶10-120
70NEC	¶10-120
70NEC(1)	¶10-150
70NEC(2)	¶10-120
70NEC(4)	¶10-120
70NEC(5)	¶10-120; ¶10-170
70NED(a)	¶10-130
70NEF	¶10-130
70NEG	¶10-120; ¶10-130
Pt VII Div 13A Subdiv F (70NFA–70NFJ)	¶10-030; ¶10-070; ¶10-110; ¶10-140; ¶10-150; ¶10-160
70NFA(1)	¶10-140
70NFA(2)	¶10-140
70NFA(3)	¶10-140
70NFA(4)	¶10-140
70NFB	¶10-030; ¶10-160
70NFB(1)(a)	¶10-030; ¶10-160
70NFB(1)(b)	¶10-160
70NFB(1)(c)	¶10-160
70NFB(2)	¶10-030; ¶10-130; ¶10-150; ¶10-160
70NFB(2)(a)	¶10-150
70NFB(2)(c)	¶10-150

70NFB(2)(d)	¶10-150
70NFB(2)(f)	¶10-160
70NFB(2)(g)	¶10-030
70NFB(6)	¶10-160
70NFB(7)	¶10-160
70NFC	¶10-150; ¶10-160
70NFC(1)	¶10-150
70NFC(2)	¶10-150
70NFC(3)	¶10-150
70NFC(4)	¶10-150
70NFC(5)	¶10-150
70NFD	¶10-150
70NFE	¶10-070; ¶10-150
70NFF	¶10-170
70NFF(2)	¶10-170
70NFF(3)	¶10-170
70NFF(4)	¶10-170
70NFG	¶10-160
70NFG(1)	¶10-160
70NFG(2)	¶10-160
70NFG(3)	¶10-160
70NFG(4)	¶10-160
70NFG(5)	¶10-160
70NFG(6)	¶10-160
70NFG(9)	¶10-160

70NFH(2)	¶10-160
Pt VIII (71–90)	¶1-170; ¶5-090; ¶11-050; ¶13-000; ¶13-290; ¶13-490; ¶13-520; ¶14-005; ¶14-075; ¶14-100; ¶14-330; ¶15-154; ¶15-190; ¶17-460; ¶17-490; ¶17-540; ¶20-000; ¶20-010; ¶20-045; ¶20-090; ¶20-190; ¶20-207; ¶22-070; ¶22-160; ¶24-500
71	¶14-005; ¶14-015
71A	¶20-000; ¶20-207
71A(a)	¶20-010
71A(b)	¶20-010
72–77	¶14-210
72	¶2-080; ¶13-047; ¶13-500; ¶14-005; ¶14-025; ¶14-060; ¶14-085; ¶14-110; ¶14-140; ¶15-156; ¶20-070; ¶22-160; ¶25-050
72(1)	¶2-080; ¶14-010; ¶14-015; ¶14-020; ¶14-025; ¶14-030; ¶14-060; ¶14-065; ¶14-085; ¶14-140; ¶14-160; ¶14-190; ¶14-200; ¶14-210
72(1)(a)	¶14-060
72(2)	¶14-010; ¶14-160; ¶15-156
74	¶2-080; ¶13-047; ¶13-500; ¶14-010; ¶14-070; ¶14-075; ¶14-085; ¶14-100; ¶14-340; ¶20-090; ¶22-160; ¶25-050
74(1)	¶14-065
74(2)	¶15-150
74(6)	¶15-150

74(7)	¶15-150
75	¶14-085; ¶19-320
75(1)	¶13-500; ¶14-075
75(2)	¶2-080; ¶13-000; ¶13-040; ¶13-048; ¶13-055; ¶13-060; ¶13-065; ¶13-180; ¶13-200; ¶13-210; ¶13-220; ¶13-250; ¶13-290; ¶13-300; ¶13-320–13-335; ¶13-370; ¶13-420; ¶13-440–13-470; ¶13-490–13-550; ¶14-000; ¶14-010; ¶14-075; ¶14-065; ¶14-100; ¶14-110; ¶14-130; ¶14-140; ¶14-190; ¶14-220; ¶14-260; ¶14-280; ¶14-320–14-340; ¶15-152; ¶15-154; ¶15-156; ¶16-480; ¶16-490; ¶19-085; ¶19-290; ¶19-310; ¶19-320; ¶20-390; ¶21-090; ¶22-070; ¶22-160
75(2)(a)	¶13-335; ¶13-530; ¶14-130–14-150; ¶14-180; ¶14-330; ¶22-160
75(2)(b)	¶13-320; ¶13-335; ¶13-530; ¶14-025; ¶14-050; ¶14-075; ¶14-130–14-180; ¶14-230; ¶14-300; ¶14-330; ¶16-530; ¶20-100; ¶22-160
75(2)(c)	¶13-335; ¶13-530; ¶14-060; ¶14-180; ¶14-200; ¶14-290; ¶22-160
75(2)(d)	¶14-140; ¶14-210; ¶14-220; ¶14-300; ¶21-090; ¶22-160
75(2)(d)(ii)	¶14-210
75(2)(e)	¶13-210; ¶14-200–14-220; ¶22-160
75(2)(f)	¶13-520; ¶14-085; ¶14-230; ¶19-085; ¶19-190; ¶22-160

75(2)(g)	¶13-520; ¶14-020; ¶14-160; ¶14-210; ¶14-240
75(2)(h)	¶14-180; ¶14-250; ¶22-160
75(2)(ha)	¶13-210; ¶13-530; ¶14-260; ¶15-154; ¶22-160
75(2)(j)	¶14-270; ¶22-160
75(2)(k)	¶14-280; ¶22-160
75(2)(l)	¶14-180; ¶14-290; ¶22-160
75(2)(m)	¶13-530; ¶14-220; ¶14-300; ¶22-160
75(2)(n)	¶14-150; ¶14-310; ¶15-154; ¶22-160
75(2)(na)	¶13-530; ¶13-550; ¶14-320; ¶22-160
75(2)(naa)	¶14-310
75(2)(o)	¶13-055; ¶13-200; ¶13-210; ¶13-315; ¶13-320; ¶13-530; ¶14-025; ¶14-280; ¶14-330; ¶15-180; ¶19-190; ¶19-290; ¶19-310; ¶19-320; ¶22-160
75(2)(p)	¶14-340; ¶22-160
75(2)(q)	¶14-340; ¶22-160
75(2)(s)	¶22-160
75(3)	¶14-030; ¶14-085; ¶14-230
77	¶2-080; ¶14-000; ¶14-065; ¶14-190; ¶22-160
77A	¶14-010; ¶14-100; ¶14-120; ¶20-100; ¶22-160
78	¶13-000; ¶13-025; ¶14-100; ¶15-220; ¶16-010; ¶16-360; ¶17-380; ¶20-280; ¶22-070
78(1)	¶22-070

79	¶1-210; ¶13-000; ¶13-015; ¶13-025; ¶13-035; ¶13-037; ¶13-040; ¶13-043; ¶13-047; ¶13-048; ¶13-055; ¶13-060; ¶13-065; ¶13-160; ¶13-170; ¶13-180; ¶13-200–13-230; ¶13-250; ¶13-270; ¶13-320; ¶13-335; ¶13-370; ¶13-390; ¶13-420; ¶13-440; ¶13-445; ¶13-450; ¶13-470; ¶13-480; ¶13-490; ¶13-520; ¶13-550; ¶13-570; ¶14-000; ¶14-010; ¶14-025; ¶14-035; ¶14-050; ¶14-075; ¶14-085; ¶14-110; ¶14-150; ¶14-220; ¶14-270; ¶14-300; ¶14-310; ¶14-340; ¶15-020; ¶15-170; ¶15-080; ¶15-140; ¶15-150; ¶15-152; ¶15-154; ¶15-158; ¶15-190; ¶15-200; ¶15-220; ¶16-010; ¶16-370; ¶16-430; ¶17-370–17-400; ¶18-000–18-020; ¶19-080; ¶19-160; ¶19-190; ¶19-320; ¶20-015; ¶20-040; ¶20-045; ¶20-070–20-100; ¶20-130; ¶20-140; ¶20-190–20-200; ¶20-280; ¶20-380; ¶20-390; ¶20-410; ¶22-070; ¶22-160; ¶22-330; ¶24-180; ¶24-500; ¶25-050
79(1)	¶13-037; ¶13-040; ¶13-055; ¶13-250; ¶13-500; ¶14-160; ¶15-152; ¶15-154
79(1)(a)	¶13-040; ¶13-055; ¶13-065; ¶20-015; ¶20-090
79(1)(b)	¶15-154
79(1A)	¶18-000
79(1C)(a)	¶15-154
79(2)	¶13-030; ¶13-040; ¶13-048; ¶13-200; ¶13-550; ¶16-420; ¶19-085; ¶19-140; ¶19-320

79(4)	¶13-037; ¶13-040; ¶13-048; ¶13-055; ¶13-200; ¶13-250; ¶13-280; ¶13-300; ¶13-390; ¶13-410; ¶13-442; ¶14-075; ¶15-158; ¶19-085; ¶19-310; ¶19-320; ¶22-010
79(4)(a)–(g)	¶13-250
79(4)(a)	¶13-040; ¶13-250; ¶13-260; ¶13-400; ¶13-410; ¶14-270; ¶19-085; ¶22-070
79(4)(b)	¶13-040; ¶13-250; ¶13-400; ¶13-410; ¶14-270
79(4)(c)	¶13-040; ¶13-180; ¶13-250; ¶13-260; ¶13-420
79(4)(d)–(g)	¶13-040; ¶13-490; ¶13-550
79(4)(d)	¶13-040; ¶14-100
79(4)(e)	¶13-048; ¶13-210; ¶13-500; ¶14-075; ¶14-340; ¶19-320
79(4)(f)	¶14-310
79(5)	¶13-035; ¶13-160; ¶13-320; ¶13-370; ¶19-190
79(5)(a)	¶13-320
79(6)	¶24-500
79(7)	¶13-035
79(8)	¶13-015; ¶13-030; ¶13-048; ¶13-530
79(9)	¶24-395
79(10)	¶16-320; ¶22-070; ¶24-180
79(10A)	¶15-140; ¶15-150
79(11)	¶15-140; ¶15-152; ¶15-150; ¶15-152

79(12)	¶15-140; ¶15-152
79(14)	¶15-150
79(15)	¶15-150
79(16)	¶15-150
79A	¶13-000; ¶13-020; ¶13-047; ¶13-055; ¶15-080; ¶15-120; ¶15-130; ¶15-150; ¶15-154; ¶15-210; ¶17-370; ¶18-000; ¶18-010; ¶18-020; ¶18-030; ¶20-280; ¶20-310; ¶20-390; ¶20-410; ¶21-300; ¶22-070
79A(1)	¶13-020; ¶18-000–18-030; ¶22-070
79A(1)(a)	¶18-020; ¶20-090; ¶20-280; ¶20-310
79A(1)(b)	¶18-020; ¶19-060; ¶20-410
79A(1)(c)	¶18-020; ¶20-430
79A(1)(d)	¶18-000; ¶18-020; ¶20-280; ¶20-450; ¶20-460
79A(1A)	¶18-000; ¶18-010; ¶20-390
79A(1AA)	¶18-000; ¶18-020
79A(1B)–(2)	¶18-000
79A(1C)	¶18-000
79A(4)–(7)	¶18-000
79A(5)	¶15-150
79B–79J	¶22-070
80	¶14-210; ¶15-190; ¶16-330; ¶22-070; ¶24-500
80(1)	¶14-005; ¶14-075; ¶14-110; ¶16-550
80(1)(a)	¶14-110

80(1)(c)	¶14-075; ¶14-090
80(1)(e)	¶16-530; ¶16-550
80(1)(f)	¶15-190
80(1)(h)	¶13-047; ¶13-055; ¶14-000; ¶14-065; ¶24-500; ¶25-050
80(1)(k)	¶24-500
80(2)	¶14-100; ¶14-110
81	¶13-000; ¶13-040; ¶14-000; ¶14-100; ¶14-110; ¶18-020; ¶19-000; ¶22-070
82	¶14-085; ¶15-105; ¶22-160
82(1)	¶14-090; ¶20-130
82(2)	¶14-090; ¶20-130
82(3)	¶14-090
82(4)	¶14-090; ¶14-170; ¶14-300
82(6)–(8)	¶14-090
83	¶14-085; ¶14-100; ¶14-330; ¶22-160
83(1)	¶14-085
83(1)(a)–(c)	¶14-085
83(1)(c)	¶14-090
83(1A)	¶15-156
83(2)	¶14-085
83(2)(a)(ii)	¶14-085
83(2)(b)	¶14-085
83(4)	¶14-085
83(5)	¶14-085

90AE	¶15-200; ¶16-360; ¶16-530
90AE(1)	¶15-200
90AE(1)(a)	¶16-390
90AE(1)(b)	¶15-200; ¶16-390
90AE(1)(c)	¶16-390
90AE(1)(d)	¶13-060; ¶16-440
90AE(2)	¶15-200; ¶16-380
90AE(2)(a)	¶16-380
90AE(3)	¶15-154; ¶15-200; ¶16-380; ¶16-430
90AE(3)(a)	¶15-200
90AE(3)(b)	¶13-210
90AE(3)(c)	¶15-200
90AE(3)(d)	¶15-200
90AE(4)	¶15-154; ¶15-200
90AF	¶15-200; ¶16-360; ¶16-530
90AF(3)	¶16-430
90AJ	¶15-200; ¶25-080
Pt VIIIA (90A–90Q)	¶13-210; ¶13-490; ¶13-540; ¶15-140; ¶15-190; ¶17-260; ¶17-490; ¶17-540; ¶18-100; ¶19-210; ¶20-000–20-020; ¶20-070; ¶20-090; ¶20-110; ¶20-130; ¶20-140; ¶20-160; ¶20-170; ¶20-180; ¶20-240; ¶20-290; ¶20-330; ¶20-355; ¶20-390; ¶20-400; ¶22-160; ¶22-240
90A	¶22-240
90B	¶17-470; ¶17-530; ¶18-100; ¶20-010;

	¶20-015; ¶20-020–20-050; ¶20-090–20-140; ¶20-170; ¶20-190; ¶20-195; ¶20-207; ¶20-220; ¶20-230; ¶20-237; ¶20-330; ¶20-365; ¶20-370; ¶20-375; ¶22-240
90B(1)(a)	¶20-020
90B(1)(aa)	¶20-020
90B(1)(b)	¶20-020; ¶20-030
90B(2)	¶20-020; ¶20-130
90B(2)(a)	¶20-010
90B(2)(b)	¶20-010; ¶20-100
90B(3)	¶20-010; ¶20-020; ¶20-130
90B(4)	¶20-230; ¶20-250; ¶20-270
90C	¶17-470; ¶17-530; ¶18-100; ¶20-010; ¶20-015; ¶20-020–20-060; ¶20-090–20-120; ¶20-190; ¶20-200; ¶20-207; ¶20-230; ¶20-237; ¶20-375; ¶20-370; ¶22-240
90C(1)(a)	¶20-010; ¶20-020
90C(1)(aa)	¶20-020
90C(1)(b)	¶20-020; ¶20-030
90C(2)	¶20-020; ¶20-130
90C(2)(a)	¶20-010
90C(2)(b)	¶20-010; ¶20-100
90C(3)	¶20-010; ¶20-020; ¶20-130
90C(4)	¶20-230; ¶20-250; ¶20-270
90D	¶17-470; ¶17-530; ¶18-100; ¶20-010;

	¶20-020–20-040; ¶20-060; ¶20-090; ¶20-110; ¶20-207; ¶20-375; ¶22-240
90D(1)(a)	¶20-010; ¶20-020
90D(1)(aa)	¶20-020
90D(1)(b)	¶20-020; ¶20-030
90D(2)	¶20-010; ¶20-020
90D(2)(a)	¶20-010; ¶20-207
90D(2)(b)	¶20-010; ¶20-100
90D(3)	¶20-010; ¶20-020; ¶20-130
90D(4)	¶20-040; ¶20-250; ¶20-270
90DA	¶19-210; ¶20-030; ¶22-240
90DA(1)	¶20-010; ¶20-020; ¶20-130
90DA(1)(a)	¶20-020
90DA(1A)	¶20-130
90DA(2)	¶19-210
90DA(3)	¶19-210
90DA(4)	¶19-210
90DA(5)	¶19-210
90DB	¶22-240
90E	¶14-010; ¶14-120; ¶20-015; ¶20-100; ¶20-110; ¶22-240
90F	¶20-015; ¶20-040; ¶20-100; ¶22-240
90F(1)	¶20-130
90F(1A)	¶20-030
90G	¶14-005; ¶15-140; ¶17-260; ¶19-170;

	¶20-020; ¶20-090; ¶20-160; ¶20-180; ¶20-185; ¶20-195; ¶20-207; ¶20-355; ¶21-120
90G(1)	¶20-015; ¶20-020; ¶20-030; ¶20-050; ¶20-100; ¶20-160; ¶20-180; ¶20-185; ¶20-207; ¶20-220; ¶20-230; ¶20-250; ¶20-280; ¶20-375; ¶22-240
90G(1)(iii)	¶20-190
90G(1)(iv)	¶20-190
90G(1)(a)	¶19-170; ¶20-020
90G(1)(b)	¶19-170; ¶20-020; ¶20-030; ¶20-160; ¶20-180; ¶20-190; ¶20-195; ¶20-280; ¶20-355
90G(1)(b)(i)	¶20-190
90G(1)(b)(ii)	¶20-190
90G(1)(c)	¶19-170; ¶20-020; ¶20-180; ¶20-190; ¶20-230; ¶20-280
90G(1)(ca)	¶19-170; ¶20-020; ¶20-190; ¶20-280
90G(1)(d)	¶19-170; ¶20-020
90G(1A)	¶20-015; ¶20-020; ¶20-090; ¶20-160; ¶20-180; ¶20-185; ¶20-190; ¶20-230; ¶20-357; ¶20-370
90G(1A)(c)	¶20-190; ¶20-370; ¶20-375
90G(1B)	¶20-190
90G(1C)	¶20-020
90G(2)	¶20-370; ¶20-375
90H	¶20-030; ¶20-100; ¶20-130; ¶22-240; ¶20-357

90J	¶20-010; ¶20-050; ¶20-220; ¶20-230; ¶20-250; ¶20-390; ¶22-240
90J(1)	¶20-020; ¶20-130
90J(1)(b)	¶20-250
90J(2)	¶20-030; ¶20-160; ¶20-180; ¶20-185; ¶20-195; ¶20-260
90J(2)(a)–(ca)	¶20-260
90J(2)(b)	¶20-190
90J(2)(c)	¶20-190
90J(2)(ca)	¶20-190
90J(2A)	¶20-180; ¶20-185; ¶20-370
90J(2A)(c)	¶20-190
90J(3)	¶20-240
90K	¶15-140; ¶19-185; ¶20-195; ¶20-200; ¶20-220; ¶20-310; ¶22-240
90K(1)	¶15-130; ¶15-140; ¶18-020; ¶19-170; ¶19-185; ¶20-090; ¶20-180; ¶20-230; ¶20-280; ¶20-300; ¶20-360
90K(1)(a)	¶19-185; ¶20-280; ¶20-310–20-340; ¶20-460
90K(1)(a)(ii)	¶15-140
90K(1)(aa)	¶13-530; ¶15-140; ¶19-185; ¶20-280; ¶20-290; ¶20-310
90K(1)(aa)(i)	¶15-140
90K(1)(aa)(ii)	¶15-140
90K(1)(ab)	¶19-185

90K(1)(b)	¶19-185; ¶20-130; ¶20-180; ¶20-220; ¶20-280; ¶20-290; ¶20-310–20-330; ¶20-350; ¶20-357; ¶20-360; ¶20-375; ¶20-380; ¶20-420
90K(1)(c)	¶19-185; ¶20-040; ¶20-280; ¶20-375; ¶20-400; ¶20-410; ¶20-420; ¶20-440
90K(1)(d)	¶18-020; ¶19-185; ¶20-040; ¶20-045; ¶20-130; ¶20-280; ¶20-340; ¶20-450; ¶20-460
90K(1)(e)	¶19-185; ¶20-180; ¶20-280; ¶20-330; ¶20-357; ¶20-360; ¶20-375
90K(1)(f)	¶19-170; ¶19-185; ¶20-280
90K(1)(g)	¶19-170; ¶19-185; ¶20-040
90K(2)	¶20-450
90K(3)	¶15-130; ¶15-140
90KA	¶18-100; ¶20-020; ¶20-090; ¶20-190; ¶20-207; ¶20-330; ¶20-370–20-380; ¶20-420; ¶22-240
90KA(a)	¶20-320
90KA(c)	¶20-370
90L	¶17-460; ¶20-140
Pt VIIIAB (90RA–90WA)	¶1-030; ¶1-130; ¶11-050; ¶13-000; ¶13-290; ¶13-490; ¶13-540; ¶14-005; ¶14-075; ¶14-120; ¶14-300; ¶14-310; ¶14-340; ¶15-170; ¶15-200; ¶17-260; ¶17-490; ¶17-530; ¶17-540; ¶18-100; ¶19-060; ¶19-170; ¶19-210; ¶19-185; ¶20-000–20-020; ¶20-060; ¶20-070; ¶20-090; ¶20-130; ¶20-140; ¶20-170; ¶20-180; ¶20-195; ¶20-230; ¶20-240; ¶20-

	250; ¶20-290; ¶20-330; ¶20-370; ¶20-390–20-410; ¶22-010; ¶22-020; ¶22-050; ¶22-060; ¶22-070; ¶22-160; ¶22-240; ¶24-290; ¶24-500; ¶25-050
90RB	¶14-060
90RC(1)(c)	¶22-330
90RD	¶22-030; ¶22-040; ¶22-065
90RD(1)	¶22-065
90RD(2)	¶22-050; ¶22-065
90RE	¶22-065
90RG	¶1-130; ¶22-060
90RH	¶22-065
90RH(2)	¶22-065
90RH(3)	¶22-065
Pt VIIIAB Div 2 (90SA–90ST)	¶20-000; ¶20-045; ¶20-250; ¶20-330; ¶20-410
90SA	¶22-240
90SA(1)	¶20-000; ¶20-010
90SB	¶14-015; ¶22-050; ¶22-065
90SB(a)	¶22-050
90SD	¶1-130; ¶14-015; ¶22-060
90SD(1)	¶1-130; ¶22-060
90SE	¶2-080; ¶13-500; ¶14-015; ¶15-156; ¶20-170; ¶22-050; ¶22-065; ¶22-160
90SE(1)	¶14-100; ¶14-005; ¶14-010; ¶14-070; ¶14-100; ¶20-090
90SE(2)	¶15-150; ¶15-156

90SF(3)(d)(ii)	¶14-210
90SF(3)(e)	¶14-200–14-220; ¶22-160
90SF(3)(f)	¶13-520; ¶14-230; ¶22-160
90SF(3)(g)	¶13-520; ¶14-020; ¶14-160; ¶14-210; ¶14-240; ¶22-160
90SF(3)(h)	¶14-250; ¶22-160
90SF(3)(i)	¶13-530; ¶14-260; ¶15-154; ¶22-160
90SF(3)(j)	¶14-270; ¶22-160
90SF(3)(k)	¶14-280; ¶14-340; ¶22-160
90SF(3)(l)	¶14-290; ¶22-160
90SF(3)(m)	¶13-530; ¶14-220; ¶14-300; ¶22-160
90SF(3)(n)	¶14-150; ¶14-310; ¶22-160
90SF(3)(o)	¶13-320; ¶22-160
90SF(3)(p)	¶14-310
90SF(3)(q)	¶13-550; ¶14-320
90SF(3)(r)	¶13-200; ¶13-530; ¶14-280; ¶14-330; ¶22-160
90SF(3)(s)	¶14-340; ¶22-160
90SF(3)(t)	¶14-340; ¶22-160
90SF(4)	¶13-048; ¶14-030; ¶14-230
90SF(4)(d)	¶14-100
90SG	¶2-080; ¶14-070; ¶22-050; ¶22-065; ¶22-160
90SH	¶14-000; ¶14-010; ¶14-120; ¶20-100; ¶22-160

	¶20-040; ¶20-045; ¶20-070–20-100; ¶20-130; ¶20-140; ¶20-170; ¶20-280; ¶22-050; ¶22-065; ¶22-070; ¶22-160; ¶22-330
90SM(1)	¶13-040; ¶13-250; ¶13-500; ¶14-160; ¶15-152; ¶15-154
90SM(1)(b)	¶15-154
90SM(1)(e)	¶20-380
90SM(3)	¶13-040; ¶13-048; ¶13-200; ¶22-010
90SM(4)	¶1-130; ¶13-048; ¶13-250; ¶13-300; ¶13-390; ¶13-410; ¶14-075; ¶19-320; ¶22-060; ¶22-065
90SM(4)(a)–(g)	¶13-040; ¶13-250
90SM(4)(a)	¶1-130; ¶13-040; ¶13-260; ¶13-400; ¶13-410; ¶14-270; ¶22-050; ¶22-060; ¶22-070
90SM(4)(b)	¶1-130; ¶13-040; ¶13-400; ¶13-410; ¶14-270; ¶22-050; ¶22-060
90SM(4)(c)	¶1-130; ¶13-040; ¶13-260; ¶13-420; ¶22-050; ¶22-060
90SM(4)(d)–(g)	¶13-490
90SM(4)(d)	¶13-550
90SM(4)(e)	¶13-500; ¶14-075; ¶14-340
90SM(4)(f)	¶13-550; ¶14-310
90SM(4)(g)	¶13-550
90SM(5)	¶13-035; ¶13-320
90SM(5)(a)	¶13-320
90SM(7)	¶13-035

90SM(8)	¶13-030; ¶13-048; ¶13-530
90SM(10)	¶22-070
90SM(11)	¶15-150
90SM(14)	¶15-152
90SM(15)	¶15-150
90SM(16)	¶15-150
90SN	¶13-000; ¶13-020; ¶15-080; ¶15-120; ¶15-150; ¶17-370; ¶18-000–18-020; ¶20-280; ¶20-380; ¶22-070
90SN(1)	¶18-000; ¶18-010; ¶18-020; ¶20-090; ¶20-310; ¶22-070
90SN(1)(a)	¶18-020; ¶20-090
90SN(1)(b)	¶18-020
90SN(1)(c)	¶18-020
90SN(1)(d)	¶18-000; ¶18-020
90SN(1)(e)	¶18-020
90SN(2)	¶18-000; ¶18-010
90SN(3)	¶20-450
90SN(4)	¶18-000
90SN(5)	¶18-000
90SN(5)(a)	¶18-000
90SN(6)	¶18-000
90SN(7)	¶18-000
90SO	¶22-070
90SP	¶22-070

90SQ	¶22-070
90SR	¶22-070
90SS	¶15-190; ¶22-070; ¶24-500
90SS(1)	¶14-075; ¶14-090; ¶14-110
90SS(1)(d)	¶14-075; ¶14-090
90SS(1)(h)	¶14-000; ¶14-065
90SS(2)	¶14-100
90SS(3)	¶14-110
90SS(6)–(11)	¶22-070
90ST	¶13-000; ¶13-040; ¶14-100; ¶14-110; ¶18-020; ¶22-070
90TA	¶15-200; ¶16-360; ¶16-370
90TA(3)	¶15-200
Pt VIIIAB Div 4 (90UA–90UN)	¶18-100; ¶20-140
90UA	¶1-130; ¶20-210; ¶22-060; ¶22-240
90UB	¶17-470; ¶17-530; ¶18-100; ¶20-010; ¶20-020; ¶20-040; ¶20-050; ¶20-090–20-120; ¶20-170; ¶22-240
90UB(1)	¶20-020; ¶20-030
90UB(1)(a)	¶20-020
90UB(1)(b)	¶20-020
90UB(1)(c)	¶20-030
90UB(2)	¶20-010; ¶20-020; ¶20-130
90UB(2)(b)	¶20-100
90UB(3)	¶20-010; ¶20-020; ¶20-130

90UB(4)	¶20-230; ¶20-250; ¶20-270
90UC	¶17-470; ¶17-530; ¶18-100; ¶20-010; ¶20-020; ¶20-040; ¶20-050; ¶20-090–20-120; ¶20-170; ¶22-240
90UC(1)	¶20-020; ¶20-030
90UC(1)(a)	¶20-020
90UC(1)(b)	¶20-020
90UC(1)(c)	¶20-030
90UC(2)	¶20-010; ¶20-020; ¶20-130
90UC(2)(b)	¶20-100
90UC(3)	¶20-010; ¶20-020; ¶20-130

	¶20-220; ¶20-230; ¶20-250; ¶20-280; ¶20-360; ¶22-240
90UJ(1)(a)	¶20-020
90UJ(1)(b)	¶20-180; ¶20-020; ¶20-160; ¶20-280
90UJ(1)(c)	¶20-180; ¶20-020; ¶20-280
90UJ(1)(ca)	¶20-020; ¶20-280
90UJ(1A)	¶20-020; ¶20-090; ¶20-160; ¶20-180; ¶20-185; ¶20-230; ¶20-370
90UJ(1A)(c)	¶20-190
90UJ(1C)	¶20-020
90UJ(2)(b)–(ca)	¶20-260
90UJ(3)	¶19-185; ¶20-170; ¶20-230; ¶20-250; ¶22-240
90UJ(4)	¶20-370
90UK	¶20-100; ¶20-130; ¶22-240
90UL	¶20-010; ¶20-050; ¶20-220; ¶20-230; ¶20-250; ¶20-390; ¶22-240
90UL(1)	¶20-020; ¶20-180; ¶20-190
90UL(1)(b)	¶20-180; ¶20-190; ¶20-250
90UL(1)(c)	¶20-180; ¶20-190
90UL(1)(ca)	¶20-190
90UL(2)	¶20-030; ¶20-160; ¶20-185; ¶20-195; ¶20-260
90UL(2)(b)	¶20-190
90UL(2)(c)	¶20-190
90UL(2)(ca)	¶20-190

90UL(2A)	¶20-180; ¶20-185; ¶20-370
90UL(2A)(c)	¶20-190
90UL(2B)	¶20-190
90UL(3)	¶20-240
90UM	¶15-140; ¶19-185; ¶20-025; ¶20-195; ¶20-220; ¶20-280; ¶22-240; ¶20-360
90UM(1)	¶15-130; ¶15-140; ¶19-170; ¶20-090; ¶20-180; ¶20-230; ¶20-280; ¶20-300; ¶20-355; ¶20-360; ¶20-370
90UM(1)(a)	¶20-280; ¶20-310; ¶20-320; ¶20-330; ¶20-340; ¶20-460
90UM(1)(b)	¶15-140; ¶20-290; ¶20-310
90UM(1)(c)	¶20-310
90UM(1)(d)	¶20-040
90UM(1)(e)	¶20-130; ¶20-180; ¶20-220; ¶20-280; ¶20-320; ¶20-330; ¶20-350; ¶20-360; ¶20-380; ¶20-420
90UM(1)(f)	¶20-040; ¶20-130; ¶20-280; ¶20-400–20-420; ¶20-440
90UM(1)(g)	¶20-040; ¶20-045; ¶20-340; ¶20-450; ¶20-460
90UM(1)(h)	¶20-180; ¶20-280; ¶20-330; ¶20-360
90UM(1)(i)	¶19-170
90UM(1)(j)	¶19-170; ¶20-040
90UM(1)(k)	¶22-240
90UM(4)	¶20-280; ¶20-450
90UM(5)	¶22-240

90UM(6)	¶15-130; ¶15-140
90UN	¶18-100; ¶20-020; ¶20-190; ¶20-370; ¶22-240
90UN(a)	¶20-320; ¶20-330
Pt VIIIAB Div 5 (90VA–90VD)	¶22-070
90VA–90VD	¶22-070
90WA	¶17-460; ¶20-140
Pt VIIIB (90MA–90MZH)	¶13-520; ¶17-090; ¶17-350; ¶17-490; ¶19-000; ¶19-060; ¶19-080; ¶19-090; ¶19-110; ¶19-120; ¶19-150; ¶19-170; ¶19-210; ¶19-300; ¶20-240; ¶20-280; ¶22-010; ¶22-330; ¶24-510
Pt VIIIB Div 4 (90MV–90MZC)	¶22-240
90MA	¶22-330
90MC	¶13-060; ¶14-170; ¶14-230; ¶19-080; ¶22-330
90MC(1)	¶13-190
90MC(2)	¶13-190
90MD	¶19-010; ¶19-020; ¶19-090; ¶19-110; ¶19-320; ¶22-330
90MDA	¶19-260
90ME	¶19-010
90ME(1)	¶19-100
90ME(1)(a)	¶19-100
90ME(1)(b)	¶19-100
90ME(1)(c)	¶19-100

90ME(1)(d)	¶19-100
90ME(1)(e)	¶19-100
Pt VIIIB Div 2 (90MH–90MR)	¶20-000
90MH	¶19-170; ¶19-185; ¶20-060; ¶22-330
90MH(1)	¶20-010; ¶20-040
90MHA	¶22-330
90MHA(1)	¶20-040
90MI	¶19-010; ¶19-170
90MI(1)	¶20-040
90MI(1)(b)	¶20-040
90MI(b)	¶19-180
90MJ	¶19-010; ¶19-180
90MJ(1)	¶20-015
90MJ(1)(a)	¶20-040
90MJ(1)(b)	¶19-200
90MJ(1)(c)	¶19-180
90MJ(1)(c)(ii)	¶19-180
90MK	¶19-010
90ML(1)(a)	¶19-190
90ML(1)(b)	¶19-190
90ML(1)(c)	¶19-190
90ML(1)(d)	¶19-190
90ML(4)	¶19-190
90ML(5)	¶19-190

90MM	¶19-190; ¶19-240
90MN	¶19-190; ¶19-185
90MN(1)	¶19-070; ¶19-200
90MN(1)(a)	¶19-200
90MN(1)(b)	¶19-170; ¶19-200
90MN(3)(a)	¶19-200
90MN(3)(b)	¶19-200
90MN(3)(c)	¶19-200
90MN(3)(d)	¶19-200
90MN(4)	¶19-070
90MP	¶19-210; ¶20-020
90MP(6)	¶19-210
90MP(10)–(12)	¶22-330
90MQ	¶19-210; ¶20-020
90MQ(3)	¶19-210
90MS	¶19-150; ¶19-320
90MS(1)	¶19-080
90MT	¶19-150; ¶19-160; ¶19-320; ¶20-040
90MT(1)	¶19-160
90MT(1)(b)	¶19-320
90MT(2)	¶19-140; ¶19-190; ¶19-320
90MT(2)(a)	¶19-320
90MU	¶19-190
90MU(2)	¶19-190

90MZA	¶19-290
90MZB	¶19-120; ¶19-240; ¶19-320
90MZB(5)	¶19-120
90MZB(6)	¶19-120
90MZD	¶19-260
90MZD(1)	¶19-260
90MZD(2)	¶19-260
90MZG	¶19-210
90XC	¶13-060; ¶19-080
90XC(1)	¶13-190
90XC(2)	¶13-190
90XD	¶19-010; ¶19-020; ¶19-090; ¶19-110; ¶19-320
90XDA	¶19-260
90XE	¶19-010
90XE(1)	¶19-100
90XE(1)(a)–(e)	¶19-100
90XH	¶19-170; ¶19-185; ¶20-010; ¶20-060
90XH(1)	¶20-010; ¶20-040
90XHA(1)	¶20-040
90XI	¶19-010; ¶19-170
90XI(b)	¶19-180
90XI(1)(b)	¶20-040
90XJ	¶19-010; ¶19-180; ¶19-180

90XJ(1)	¶20-015
90XJ(1)(a)	¶20-040
90XJ(1)(b)	¶19-200
90XJ(1)(c)	¶19-180
90XJ(1)(c)(ii)	¶19-180
90XK	¶19-010
90XL(1)(a)	¶19-190
90XL(1)(b)	¶19-190
90XL(1)(c)	¶19-190
90XL(1)(d)	¶19-190
90XL(4)	¶19-190
90XL(5)	¶19-190
90XM	¶19-190; ¶19-240
90XN	¶19-185; ¶19-190
90XN(1)	¶19-070; ¶19-200
90XN(1)(a)	¶19-200
90XN(1)(b)	¶19-170; ¶19-200
90XN(3)(a)	¶19-200
90XN(3)(b)	¶19-200
90XN(3)(c)	¶19-200
90XN(3)(d)	¶19-200
90XN(4)	¶19-070
90XP	¶19-210; ¶20-020; ¶20-030
90XP(1)	¶19-210

93	¶3-000; ¶3-200
95	¶20-130
Pt XI (97–102N)	¶23-000
100B	¶23-070
100B(2)	¶23-070
100B(3)	¶23-070
102A	¶11-150
102A(1)	¶23-070
102A(2)	¶23-070
102A(3)	¶23-070
102A(3)(a)	¶23-070
102A(3)(b)	¶23-070
102A(3)(c)	¶23-070
102A(3)(e)	¶23-070
102A(5)	¶23-070
Pt XI Div 2 (102C–102L)	¶7-050
102F	¶7-050
Pt XIII (105–109B)	¶18-040
102NA	¶11-150; ¶11-186
102NB	¶11-150; ¶11-186
102QB	¶24-320
102QB(1)	¶24-320
102QB(4)	¶24-320
102QB(5)	¶24-320
102QE	¶24-320

102QE(3)	¶24-320
102QE(4)	¶24-320
102QG	¶24-320
105	¶21-300
105(1)	¶18-040; ¶18-050
105(2)	¶18-040
105(3)	¶18-040
106	¶17-390
106A	¶18-040; ¶18-050; ¶18-080
106B	¶15-130; ¶16-020; ¶16-360; ¶16-380; ¶16-530; ¶17-390
106B(3)	¶17-390
107	¶18-040
109	¶12-050
109A	¶18-040
109B	¶18-040
Pt XIIIAA (110–112)	¶1-050; ¶9-290
111B	¶9-090
111B(4)	¶9-090
Pt XIIIA (112AA–112AO)	¶10-020; ¶18-040
112AA	¶10-020
112AC	¶10-040
112AC(3)	¶10-040
112AD	¶10-020; ¶10-040
112AG(5)	¶10-160

Pt XIIIB (112AP)	¶10-160; ¶18-040
112AP	¶23-210
112AP(2)	¶10-160; ¶23-210
113	¶3-320
114	¶11-110; ¶11-130; ¶11-150; ¶11-186; ¶15-200; ¶16-020; ¶16-330; ¶16-370; ¶17-370; ¶19-190; ¶25-050
114(2A)	¶20-240
114(3)	¶8-020
114AA	¶11-186
114AB	¶1-200
117	¶7-070; ¶9-290; ¶10-080; ¶10-100; ¶10-120; ¶10-190; ¶11-185; ¶18-020; ¶25-000; ¶25-050; ¶25-080; ¶25-120
117(4A)	¶7-000
117(1)	¶15-200; ¶25-000; ¶25-030; ¶25-040; ¶25-060
117(2)	¶23-280; ¶25-000; ¶25-030; ¶25-040; ¶25-060; ¶25-080
117(2)(aa)	¶21-090
117(2A)	¶13-047; ¶25-000; ¶25-030; ¶25-040; ¶25-060–25-080; ¶25-160
117(2A)(c)	¶25-040
117(2A)(d)	¶25-040
117(2A)(f)	¶25-040
117(2A)(g)	¶25-040
117(3)	¶25-080

Family Law Reform Act 1995

Family Law Rules 2004

Rule	Paragraph
Ch 1 (1.02–1.22)	¶10-200; ¶23-060; ¶25-080
1.03(1)	¶23-060
1.03(2)	¶23-060
1.04	¶2-080; ¶23-060; ¶24-040; ¶24-130; ¶24-310
1.05	¶5-030; ¶8-020; ¶23-060; ¶24-020; ¶24-600
1.05(1)	¶23-060
1.05(2)	¶5-020
1.05(2)(a)–(h)	¶23-060; ¶24-020
1.06	¶24-310
1.06(a)–(j)	¶23-060
1.07	¶23-060; ¶24-040; ¶24-310
1.08	¶24-040; ¶24-310
1.10	¶25-100
1.12	¶23-120
1.14	¶13-020; ¶25-100
1.21	¶24-050
Ch 2 (2.01–2.07)	¶2-080; ¶8-020; ¶24-060
2.02	¶2-080; ¶23-130; ¶24-080
2.03	¶3-190
Pt 2.3 (2.04–2.07)	¶24-100
2.04D	¶6-020; ¶6-110; ¶24-100

2.05	¶24-100
Ch 3 (3.01–3.13)	¶24-060
3.01	¶3-190
Ch 4 (4.01–4.37)	¶2-080; ¶14-085; ¶16-320; ¶23-130; ¶24-060; ¶24-110; ¶24-240; ¶24-300; ¶24-380
4.01	¶23-130
4.01(1)(a)	¶24-090
4.01(1)(b)	¶24-090
4.02	¶2-000; ¶2-080; ¶23-130; ¶24-070
4.04	¶24-110
4.06	¶24-110
4.07	¶24-110
Div 4.2.3 (4.08–4.12)	¶6-020
4.09	¶24-090
4.09(1)	¶6-020
4.09(2)	¶6-020
4.10	¶6-020; ¶24-110
4.11	¶24-110
4.12	¶24-110
4.14	¶24-110
4.15	¶24-110
4.16	¶24-090; ¶24-110; ¶24-300
4.17(1)	¶24-110
4.18(1)	¶24-110

Div 4.2.5 (4.18–4.26)	¶24-110
4.19–4.22	¶24-110
4.23(1)	¶24-110
4.25(1)	¶24-110
4.26	¶24-110
4.29	¶24-110
4.30	¶24-090; ¶24-110
4.31	¶24-110
Ch 5 (5.01–5.19)	¶2-080; ¶23-070; ¶24-060; ¶24-120
5.01(1)–(4)	¶24-120
5.01(5)	¶23-120; ¶24-070
5.01(6)	¶23-120; ¶24-070
5.01A	¶24-120
5.02	¶2-080; ¶10-210
5.02(1)	¶23-120; ¶23-240
5.02(2)	¶2-080; ¶23-120; ¶24-120
5.03	¶24-120
5.05(1)	¶24-120
5.06	¶24-120; ¶24-410
5.07	¶24-410
5.07(1)	¶24-120
5.08	¶2-080; ¶24-130
5.08(a)	¶2-080
5.09	¶2-080; ¶24-140

5.09(b)	¶23-120
5.10	¶2-080; ¶23-120; ¶24-140
5.10(2)	¶2-080
5.11(1)	¶23-120
5.11(2)	¶23-120
5.12	¶24-150
5.13	¶24-150
5.15–5.17	¶24-160
5.18	¶24-170
6.02	¶15-200
6.02(1)	¶24-180
Pt 6.2	¶16-320
6.03	¶24-180
6.04	¶24-180
6.06	¶24-180
6.07	¶24-180
6.08	¶24-190
6.09	¶24-190
6.10	¶24-120
6.10(2)	¶24-190
6.11	¶24-190
6.13	¶24-190; ¶24-300; ¶25-080
6.14	¶25-080
6.15	¶24-200

6.17(1)	¶24-210
6.18	¶24-210
6.19	¶24-210
6.20	¶24-210
Ch 7 (7.01A–7.20)	¶2-080; ¶3-190
7.03	¶3-330; ¶24-220
7.04	¶16-320
7.04(1)(a)	¶24-220
7.04(2)	¶24-220
7.05	¶24-220
7.06	¶3-330; ¶24-220
7.07	¶3-330; ¶24-220
7.07(3)(a)	¶3-190
7.07(3)(b)	¶3-190
7.08–7.12	¶24-220
7.08	¶3-330
7.16	¶24-090; ¶24-220
7.17	¶24-090; ¶24-220
7.18	¶3-190
7.18(2)	¶24-220
7.20	¶24-220
8.01	¶24-230
8.02	¶24-230
8.02(2)(b)	¶25-080

8.04	¶24-230
8.05	¶24-230
Ch 9 (9.01–9.08)	¶24-240
9.02–9.04	¶24-240
9.04A	¶24-240
9.05	¶23-120
9.06	¶24-240
9.06(1)	¶23-120
9.06(2)	¶23-120
9.07	¶2-080; ¶23-120; ¶24-140; ¶24-240
9.08	¶24-240
9.08(3)	¶23-120
Ch 10 (10.01–10.18)	¶24-250
10.01	¶24-260
10.02	¶24-260
10.02(4)	¶24-260
10.03(3)	¶24-260
10.04	¶24-260
10.04(3)	¶24-260
10.05	¶24-260
Div 10.1.2 (10.06–10.07)	¶24-260
10.06	¶24-260
10.07	¶24-260
10.11	¶24-270
10.11(2)	¶24-270

10.11(4)	¶25-040
10.11(5)	¶24-270
10.12	¶24-280
10.13	¶17-390; ¶24-290
10.14	¶24-290
10.15	¶24-300
10.15A	¶11-155
10.16	¶24-300; ¶24-510
10.16(2)	¶19-260
10.17	¶24-300
10.18	¶24-300
11.01	¶23-240; ¶24-310
11.02	¶23-120; ¶24-310
11.02(1)	¶24-310
11.02(2)(e)	¶25-040
11.03	¶24-310
11.03(2)	¶24-310
11.05	¶24-320
11.06	¶24-330
Div 11.2.1 (11.07–11.09)	¶23-370
11.07	¶24-340
11.07(1)	¶23-370
11.07(2)	¶23-370
11.07(3)	¶23-370

11.07(4)	¶23-370
11.08	¶24-340
11.08(1)	¶23-380
11.08(2)	¶23-380
11.08(3)	¶23-380; ¶25-040
11.09	¶24-340
11.09(1)	¶23-380
11.09(2)	¶23-380; ¶25-040
11.12–11.14	¶24-350
11.17	¶24-370
11.18	¶24-370
11.18(1)	¶24-370
11.20	¶16-300
Ch 12 (12.01–12.14)	¶24-380
12.01	¶24-380
12.02	¶24-390; ¶24-395
12.02(g)	¶23-250
12.03–12.04	¶24-390
12.05(2)	¶23-250
12.06	¶24-390
12.06(1)	¶24-390
12.07	¶24-395
12.08	¶24-400
12.09	¶24-400

12.10A	¶24-400
12.11	¶24-410
12.13	¶24-410
Ch 13 (13.01–13.30)	¶20-330
13.01	¶15-154; ¶24-430
13.01(1)	¶24-420
Div 13.1.2 (13.02–13.06)	¶15-154; ¶15-180; ¶24-430
13.01	¶15-180
13.02	¶24-430
13.02(2)	¶15-180
13.04	¶20-330; ¶24-430
13.04(1)	¶20-330
13.04(1)(f)	¶13-170; ¶16-530
13.04(1)(g)	¶16-530; ¶24-430
13.04(2)	¶24-430
13.05	¶24-430
13.05(1)	¶14-300
13.06	¶24-430
Div 13.1.2(2) (13.07–13.18)	¶15-180
13.07	¶15-180; ¶24-420
13.08	¶24-440
13.10	¶24-440
13.11	¶24-440; ¶25-040
13.12	¶23-020; ¶24-440

13.13	¶23-020; ¶24-440
13.14	¶23-020; ¶24-440; ¶25-040
13.15	¶24-440
13.15(2)	¶24-440
13.17	¶24-450
13.18	¶23-020; ¶24-450
Div 13.2.3 (13.19–13.24)	¶24-460
13.19	¶24-460
13.20	¶24-460
13.21	¶24-460
13.22	¶23-020; ¶24-460; ¶25-020
13.22(1)	¶24-460
13.22(4)	¶24-460
13.23	¶24-460
13.25–13.28	¶24-470
Pt 13.3	¶24-470
Ch 14 (14.01–14.07)	¶24-500
14.01	¶24-500; ¶24-635; ¶25-080
14.03	¶24-500
14.04	¶24-500; ¶24-635
14.05	¶24-500
14.06	¶24-510; ¶24-635
14.06(1)	¶19-260
Ch 15 (15.01–15.77)	¶23-000
15.01	¶23-300

15.02	¶23-070
15.02(2)(a)	¶23-070
15.02(2)(b)	¶23-070
15.04	¶7-050; ¶23-070
Pt 15.2 (15.05–15.15)	¶2-070; ¶23-080
15.05	¶24-405
15.06	¶23-080
15.08	¶2-080; ¶8-020; ¶23-080
15.08(a)	¶23-080
15.08(2)	¶2-080; ¶23-080
15.08(2)(a)	¶2-080; ¶23-080
15.08(2)(b)	¶2-080; ¶23-080
15.08(3)	¶2-080; ¶23-080
15.09	¶2-080
15.09(1)	¶23-080
15.09(2)	¶2-080; ¶23-080
15.09(3)	¶2-080; ¶23-080
15.10	¶2-080; ¶23-080
15.10(2)	¶2-080
15.13	¶2-080; ¶2-100; ¶23-130
15.13(1)	¶2-100
15.13(2)	¶23-130
15.14	¶23-080; ¶23-130

15.14(2)	¶23-130
15.14(3)	¶23-080; ¶23-130
15.14(4)	¶23-130
15.15	¶23-130
15.17	¶23-140; ¶23-150
15.17(5)	¶23-150
15.17(6)	¶23-150
15.18	¶23-160
15.20	¶23-170
15.21	¶24-140
15.22	¶23-170; ¶23-190
15.23	¶23-170; ¶23-210; ¶25-080
15.23(1)	¶23-170
15.24(1)	¶23-170
15.24(2)	¶23-170
15.28(1)	¶23-080; ¶23-170
15.28(1)(a)	¶23-170
15.28(1)(b)	¶23-170
15.28(2)	¶25-080
15.29	¶2-080; ¶23-180
15.29(1)	¶23-180
15.29(2)	¶23-180
15.29(3)	¶23-180
15.29(4)	¶23-180

15.30	¶23-190; ¶23-200
15.31	¶23-200
15.31(1)	¶23-200
15.31(2)	¶23-200
15.32	¶23-200
15.34(1)	¶23-160
15.34(2)	¶23-160
15.34(3)	¶23-160
15.35	¶23-200
15.35(2)	¶23-200
15.35(3)	¶23-200
15.35(4)	¶23-200
15.36	¶23-210; ¶25-080
Pt 15.5 (15.41–15.70)	¶23-220; ¶23-240; ¶24-020
15.41(1)	¶23-220
15.41(2)	¶23-220
15.42	¶23-220
15.42(d)	¶25-080
15.44(1)	¶23-230
15.44(2)	¶23-230
15.45(1)	¶23-230
15.45(2)	¶23-230
15.45(3)	¶23-230
15.46	¶23-230; ¶25-080

15.47	¶23-230; ¶25-080
15.47(1)	¶23-230; ¶23-400
15.47(2)	¶23-230
15.48	¶23-230
15.48(3)	¶23-230
15.49(1)	¶23-230
15.49(2)	¶23-230
15.50(1)	¶23-230
15.50(2)	¶23-230
15.51(1)	¶23-240
15.51(2)	¶23-240
15.52(1)	¶23-240
15.52(2)	¶23-240
15.52(3)	¶25-080
15.52(4)	¶23-240
Div 15.5.4 (15.53–15.58)	¶23-250; ¶23-280; ¶23-300
15.53	¶23-250
15.54	¶23-250
15.54(1)	¶23-250
15.54(2)	¶23-250
15.55	¶7-050; ¶23-020; ¶23-220; ¶23-250; ¶24-390
15.55(1)	¶23-250
15.55(2)	¶23-250

15.55(3)	¶23-250
15.55(4)	¶23-250
15.56	¶23-250
15.57	¶23-250
15.58	¶23-240; ¶23-250
Div 15.5.5 (15.59–15.64)	¶23-250; ¶23-280; ¶23-300
15.59(1)	¶23-260
15.59(2)	¶23-260
15.59(3)	¶23-260
15.59(4)	¶23-260
15.59(5)	¶23-250; ¶23-260; ¶23-280
15.60	¶23-230; ¶23-270; ¶25-080
15.60(1)	¶23-270
15.60(2)	¶23-270
15.60(3)	¶23-270
15.60(4)	¶23-270
15.61(1)	¶23-280
15.61(2)	¶23-280
15.62	¶23-260; ¶23-280
15.62(1)	¶23-280
15.62(2)	¶23-280; ¶23-290
15.63	¶23-260; ¶23-280
15.64	¶23-280; ¶25-080
Div 15.5.6 (15.64A–	¶23-250; ¶23-270; ¶23-280; ¶23-300

15.67A)	
15.64B	¶23-290
15.65	¶23-290
15.65(1)	¶23-290
15.65(2)	¶23-290
15.65(3)	¶23-290
15.66	¶23-280
15.66(1)	¶23-290
15.66(2)	¶23-290
15.66(3)	¶23-290
15.66(4)	¶23-290
15.67	¶25-080
15.67(1)	¶23-290
15.67(2)	¶23-290
Div 15.5.7 (15.68–15.70)	¶23-300
15.69	¶23-300
15.69(2)	¶23-300
15.69(3)	¶23-300
15.69(4)	¶23-300
15.69(5)	¶23-300
15.70	¶23-300
15.76	¶24-480
Ch 16 (16.01–16.14)	¶24-380

Pt 16.3	¶24-405
16.02–16.07	¶24-400
16.05(3)	¶24-400
16.08(3)	¶24-405
16.09	¶24-405
16.10	¶24-405
16.08(1)(c)	¶24-405
16.08(3)	¶24-405
Pt 16.4	¶24-405
Ch 16A (16A.01–16A.10)	¶24-010; ¶24-380; ¶24-390; ¶24-405
16A.10	¶24-405
17.01(1)	¶24-550
17.01(2)	¶24-550
17.02	¶24-550
17.02A	¶24-550
17.03	¶25-110; ¶24-550
18.04	¶8-020
18.05	¶8-020; ¶18-080
18.06	¶8-020; ¶18-080
18.08	¶13-020
Ch 19 (19.01–19.56)	¶25-000; ¶25-080; ¶25-100
19.01	¶25-080
19.02	¶25-110
19.03(1)	¶25-000

19.04	¶25-000; ¶25-100
Pt 19.3 (19.05–19.07)	¶25-060
19.05	¶25-060
19.05(1)	¶25-060
19.05(2)	¶25-060
19.08	¶25-100
19.08(3)	¶25-070; ¶25-100
19.10	¶25-080
19.11	¶25-080; ¶25-100
19.19	¶25-100
19.20	¶25-160
19.21	¶25-160
19.23	¶25-160
19.24	¶25-160
19.31	¶25-090; ¶25-110
19.32	¶25-090; ¶25-110
19.34	¶25-070
19.34(1)	¶25-090
19.35	¶25-100; ¶25-120; ¶25-160
19.35(2)	¶25-090
19.37(3)	¶25-110
Ch 20 (20.01–20.60)	¶18-060; ¶18-080; ¶18-100
20.01	¶18-060
20.04	¶18-040

20.05	¶18-060; ¶18-090
20.05(a)	¶20-370
20.06	¶18-070; ¶18-080; ¶18-090
20.07	¶18-060; ¶18-090
20.10–20.12	¶18-090
20.10	¶18-080
20.14	¶18-080; ¶18-090
20.16–20.30	¶18-080
20.16	¶18-080
20.16(3)	¶18-080
20.23	¶18-080
20.32–20.37	¶18-080
20.39–20.41	¶18-080
20.42–20.47	¶18-090
20.47(1)(c)	¶25-080
20.49–20.51	¶18-090
20.50(3)(b)	¶25-080
20.52(c)	¶25-080
20.53–20.56	¶18-080
20.56	¶18-080
Ch 21 (21.01–21.20)	¶10-200
Pt 21.1 (21.01–21.08)	¶10-210
21.01	¶10-200; ¶10-210
21.01(a)	¶10-210

21.01(b)	¶10-210
21.01(d)	¶10-210
21.01(1)	¶25-060
21.01(2)	¶25-060
21.02	¶10-200
21.02(1)	¶10-210
21.02(2)	¶10-210
21.02(3)	¶10-210
21.3	¶10-220
21.06	¶10-210
21.11	¶10-210
21.12	¶10-210
21.13–21.15	¶10-220
21.15	¶10-210
21.15(2)	¶10-210
21.15(2)(c)	¶10-210
Ch 22 (22.01–22.53)	¶24-110
23.03	¶6-080
Ch 24 (24.01–24.14)	¶2-080
24.01	¶23-080
24.01(1)	¶10-210; ¶23-270
24.01(4)	¶8-020
24.07	¶24-090
Ch 25 (25.01–25.06)	¶16-300; ¶16-310

25.02	¶16-310
25.03	¶16-310
25.04	¶3-190
25.05	¶16-320
Ch 26 (26.01–26.31)	¶15-180; ¶25-000
26.04	¶15-180
26.07(2)	¶15-180
Sch 1	¶5-020; ¶5-030; ¶8-020; ¶15-180; ¶24-010; ¶24-020
Sch 1 Pt 1	¶24-020
Sch 1 Pt 2	¶8-020; ¶24-020
Sch 2 Form 4	¶24-100
Sch 3	¶24-600; ¶24-610; ¶25-000; ¶25-070; ¶25-090; ¶25-100
Sch 4 Pt 1	¶23-170
Sch 4 Pt 2	¶23-170
Sch 5	¶23-300
Sch 6	¶25-000; ¶25-100; ¶25-160
Sch 6 Pt 6.7	¶25-160
Sch 6 cl 6.08	¶25-100
Sch 6 cl 6.08(3)	¶25-100
Sch 6 cl 6.13(1)(a)	¶25-160
Sch 6 cl 6.13(1)(b)	¶25-160
Sch 6 cl 6.21	¶25-160
Sch 6 cl 6.22	¶25-160

Sch 6 cl 6.23	¶25-160
Sch 6 cl 6.24	¶25-160
Sch 6 cl 6.25	¶25-160
Sch 6 cl 6.33	¶25-160
Sch 6 cl 6.33(1)(b)	¶25-160
Sch 6 cl 6.33(2)	¶25-160
Sch 6 cl 6.35(1)(b)	¶25-160
Sch 6 cl 6.36	¶25-160
Generally	¶23-030; ¶24-000; ¶24-490

Family Law Regulations 1984

Regulation	**Paragraph**
Pt II (4–21)	¶8-010
12A	¶14-230
Pt IIA (21A–21N)	¶8-010
21N	¶8-010
Pt III–IV (22–56)	¶21-000
23	¶12-065
36	¶21-350
38(1)	¶21-350
Pt 5 Div 1 (62-65)	¶5-010
67C	¶5-090
Sch 1	¶19-050
Sch 1A	¶12-065
Generally	¶18-040; ¶24-000

OTHER LEGISLATION

A New Tax System (Goods and Services Tax) Act 1999

Section	Paragraph
Div 129 (129.1–129.90)	¶17-450
Div 130 (130.1–130.5)	¶17-450
Div 138 (138.1–138.20)	¶17-450

Acts Interpretation Act 1901

Section	Paragraph
28A(1)	¶21-190
29(1)	¶21-190
36	¶3-040

Administrative Decisions (Judicial Review) Act 1977

Section	Paragraph
9	¶16-290

Adoption Act 1994 (WA)

Section	Paragraph
4(1) — definitions	
— “birth parent”	¶12-070
— “parent”	¶12-070

Artificial Conception Act 1985 (WA)

Section	Paragraph
5–7	¶12-070
7(1)	¶12-070

18	¶15-080
35	¶15-130; ¶15-140
35(1)(a)	¶15-140
35A	¶15-010; ¶15-030
40(1)(g)	¶15-090; ¶15-105
40(1)(o)	¶15-140
40(3)(b)	¶15-105
40(3)(f)	¶15-105
43	¶15-070
52(4)	¶15-090
52(5)	¶15-090
55	¶15-070
58	¶15-080; ¶15-140
58(1)(b)	¶15-080
58(3)	¶15-140; ¶15-152; ¶15-220
60	¶15-080; ¶15-140
60(2)	¶15-080; ¶15-140
60(3)	¶15-140
60(4)	¶15-080; ¶15-105; ¶15-140
73	¶15-070
74	¶15-070
77A	¶15-180
77C	¶15-180
81	¶15-154; ¶15-180
82	¶15-105

82(1)	¶15-105
82(1A)	¶15-105
109	¶15-105; ¶15-154; ¶15-200
109(1)	¶15-105
109(1)(a)	¶15-154
109(1A)	¶15-105
Pt VI Div 3 (115–128N)	¶15-140
115	¶15-090; ¶15-140
116	¶15-080
116(1)	¶15-080
116(2)	¶15-080; ¶15-110
120	¶15-020; ¶15-120; ¶15-140; ¶15-170
120(1)	¶15-120
120(3)	¶15-120
120(3A)	¶15-120
121	¶15-120; ¶15-140; ¶15-160; ¶15-170
121(2)	¶15-120
121(4A)	¶15-120
122	¶15-120
123(6)	¶15-140
127(1)	¶15-140
128A–128N	¶15-120
128B	¶15-110
128B(2)	¶15-120

128B(3)	¶15-120
128C	¶15-110
128C(2)	¶15-120
128C(3)	¶15-120
Pt VI Div 4 (129–139)	¶15-120
129	¶15-154
129AA	¶15-140
Pt VI Div 4A (139A–139H)	¶15-120
139A	¶15-120
139CA	¶15-170
139D	¶15-080
139DA	¶15-080; ¶15-120
139E	¶15-080
139EA	¶15-080; ¶15-120
Pt VI Div 4B (139J–139ZW)	¶18-080
139N	¶15-100
139P	¶15-080
152	¶15-140
153	¶15-140
153(2)(c)	¶15-105
153(2A)	¶15-105
153B(1)	¶15-030
178	¶15-140
Pt IX (185–186Q)	¶15-070

Pt X (187–232)	¶15-070; ¶15-150; ¶15-170
Pt XI (244–252C)	¶15-070
Sch 2	¶15-070; ¶15-140
Generally	¶1-000; ¶1-170; ¶1-270; ¶15-000; ¶17-470

Bankruptcy and Family Law Legislation Amendment Act 2005

Section	Paragraph
Sch 2	¶15-130
Generally	¶1-170; ¶1-240; ¶15-000; ¶15-080; ¶15-120; ¶15-150; ¶15-210; ¶15-220

Bankruptcy Legislation Amendment (Anti-Avoidance) Act 2006

Section	Paragraph
Generally	¶15-160; ¶15-170

Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007

Section	Paragraph
Generally	¶1-170; ¶15-110

Child Support (Adoption of Laws) Act 1990 (WA)

Section	Paragraph
Generally	¶21-320

Child Support (Adoption of Laws) Amendment Act 2007 (WA)

Section	Paragraph
Generally	¶21-320

Child Support (Assessment) Act 1989

Section	Paragraph
3	¶21-020; ¶21-140
4	¶21-020; ¶21-140
4(2)(d)	¶21-160
5	¶21-020–21-040; ¶21-090; ¶21-240
5(1)	¶21-070
7A	¶21-040
7B	¶21-020
12	¶21-070
12(2AA)	¶21-070; ¶21-130
12(4)(a)(i)	¶21-070; ¶21-210
12(6)	¶21-040
19–25A	¶21-020
27	¶21-020
29	¶21-020; ¶21-090
30(1)	¶21-190
30(2)	¶21-190
30A	¶21-330
31	¶21-020
34B(1)	¶21-130
Pt 5 (35A–79)	¶21-020; ¶21-040
35–40	¶21-050
41	¶21-040; ¶21-050

43	¶21-040
43(1)	¶21-040
45	¶21-040
46	¶21-040
Pt 5 Div 4 (48–54L)	¶21-040
48	¶21-040
49	¶21-040
49(1)(b)(i)	¶21-040
50	¶21-040
50(1)(b)	¶21-040
51	¶21-040
51(1)(d)	¶21-040
51(2)	¶21-040
51(3)	¶21-040
51(4)	¶21-040
51(5)	¶21-040
52	¶21-040
53	¶21-040
53(1)	¶21-040
53(1)(c)	¶21-040
53(2)	¶21-040
53(3)	¶21-040
53(4)	¶21-040
53A	¶21-040

53A(1)	¶21-040
53A(1)(b)(ii)	¶21-040
53A(1)(b)(iii)	¶21-040
53A(1)(b)(iv)	¶21-040
53A(2)	¶21-040
53A(3)	¶21-040
53A(4)	¶21-040
53B	¶21-040
54(1)	¶21-190
54(2)	¶21-190
54B	¶21-040
54B(1A)	¶21-040
54C	¶21-040
54C(2)	¶21-040
54F	¶21-040
54F(1)	¶21-040
54F(2)	¶21-040
54FA	¶21-040
54FA(2)	¶21-040
54FA(3)(b)(i)	¶21-070
54FA(4)	¶21-040
54G	¶21-040
54H	¶21-040
54H(1)	¶21-040

54H(2)	¶21-040
54HA	¶21-040
54HA(2)	¶21-040
54HA(4)	¶21-040
55B	¶21-040
55C	¶21-040
55G	¶21-040
55HA(5)(a)	¶21-040
56	¶21-060
56(2A)	¶21-060
56(2A)(a)–(c)	¶21-060
56(2B)	¶21-060
57(7)	¶21-060
58	¶21-060
58A(1)(b)(i)	¶21-060
58A(2)	¶21-060
58A(3)	¶21-060
58(A)(3A)	¶21-060
58A(3A)	¶21-060
58A(3B)	¶21-060
58A(3B)(b)	¶21-060
58A(3C)	¶21-060
58A(3D)	¶21-060
58A(3D)(d)(i)–(ii)	¶21-060
58A(3E)	¶21-060

58(3E)	¶21-060
58(3F)	¶21-060
60	¶21-070
63A	¶21-070
63AA	¶21-070
63B	¶21-070
64AF	¶21-070
64AH	¶21-190
65A	¶21-030
63AA	¶21-070
66	¶21-030
66A	¶21-030
66A(1)(b)(ii)	¶21-030
66J(2)(a)(ii)	¶21-090
67A	¶21-120
74	¶21-130
74A	¶21-070
Pt 6 (80A–96)	¶21-120; ¶21-130
80C	¶21-120
80C(2)(c)	¶21-120
80D	¶21-130
80D(1)(d)	¶21-130
80D(2A)	¶21-130
80D(3)(d)	¶21-130

80E	¶21-120
80E(2)	¶21-120
80E(3)	¶21-120
80E(4)	¶21-120
80G	¶21-130
80G(1)(d)	¶21-190
80G(1B)	¶21-130
80G(2)(e)	¶21-130
80G(2)(f)	¶21-130
Pt 6 Div 2 (81–87)	¶20-110
81(2)	¶21-120
82	¶21-120
83	¶21-120
84	¶21-120
85	¶21-120
86	¶21-130
86(2)	¶21-130
86A	¶21-130
86A(2)	¶21-130
86A(3)	¶21-130
92	¶21-190
93(1A)	¶21-130
93(1)(g)	¶21-130
93(1)(h)	¶21-130

93(2)	¶21-130
95	¶21-210
95(2)	¶21-120; ¶21-210
95(3)	¶21-210
98	¶21-210
Pt 6A (98A–98V)	¶21-080; ¶21-190; ¶21-210
98E	¶21-210
Pt 6A Div 3 (98K–98RA)	¶21-080
98R	¶21-210
98S(3B)	¶21-080
98S(1)(i)	¶21-040
98S(3B)	¶21-210
98U	¶21-190
106A	¶21-020; ¶21-210
107	¶21-020; ¶21-210
111	¶24-110
112	¶21-080; ¶21-210
112(4)	¶21-210
112(5)	¶21-210
112(7)	¶21-080
Pt 7 Div 4 (113B–120)	¶21-120; ¶21-160
116	¶24-110
116(1)(a)	¶21-210
116(1)(c)	¶21-210

117	¶21-010; ¶21-060; ¶21-080–21-100; ¶21-150; ¶21-160
117(2)	¶14-210
117(2)(a)	¶21-090
117(2)(a)(ii)	¶21-090
117(2)(a)(iii)	¶21-090
117(2)(a)(iv)	¶21-090
117(2)(b)(i)	¶21-090
117(2)(b)(ia)	¶21-090
117(2)(b)(ib)	¶21-090
117(2)(b)(ii)	¶21-090
117(2)(c)(i)	¶21-090
117(2)(c)(ii)	¶21-090
117(2B)	¶21-090
117(3A)	¶21-090
117(3B)	¶21-090
117(4)	¶21-100
117(4)(g)	¶21-090
117(5)	¶21-110
117(7A)	¶21-090
117(7B)	¶21-090
118	¶21-210
118(1)(i)	¶21-040
Pt 7 Div 5 (121–131)	¶21-150
123–129	¶21-210

123	¶21-140; ¶21-150; ¶24-110
123(2)	¶21-160
123(3)	¶21-160
124	¶21-140; ¶21-150; ¶21-160
124(1)(b)(i)	¶21-160
124(2)	¶21-160
125	¶21-150
125(2)	¶21-150
125(3)	¶21-150
129	¶24-110
131	¶21-120
131(5)	¶21-120; ¶21-210
135	¶21-130
136	¶21-130; ¶21-210; ¶24-110
136(1)	¶21-120
136(2)(d)	¶20-450
136(2A)	¶21-120
139	¶21-210; ¶24-110
141	¶21-170
141(1)(a)–(m)	¶21-170
142	¶21-120; ¶21-210
142(1)	¶21-210
142(1B)	¶21-120; ¶21-210
142(1C)	¶21-120; ¶21-210

143	¶21-020; ¶21-210; ¶21-270; ¶24-110
143(1)	¶21-020
143(1)(a)	¶21-270
143(1)(a)(ii)	¶21-020
143(1)(b)	¶21-020; ¶21-270
143(3A)	¶21-020
143(3A)(b)	¶21-020
143(3B)	¶21-020
151	¶21-070; ¶21-210
151(1A)	¶21-130
151B	¶21-020
151C(2)(b)(ia)	¶21-020
150F	¶21-020
150F(1)	¶21-070
150F(2)	¶21-070
151D(1)	¶21-240
153A	¶21-030
160	¶21-070
161	¶21-070
162A	¶21-070
Sch 1	¶21-040
Generally	¶1-000; ¶1-150; ¶4-000; ¶6-040; ¶13-250; ¶13-490; ¶14-320; ¶21-000; ¶21-220; ¶24-300

Child Support Legislation Amendment (Reform of the Child Support

Scheme) Initial Measures Act 2006

Section	Paragraph
Generally	¶21-010

Child Support Legislation Amendment (Reform of the Child Support Scheme — New Formula and Other Measures) Act 2006

Section	Paragraph
Generally	¶21-010; ¶21-320

Child Support Reform (New Formula and Other Measures) Regulations 2007

Regulation	Paragraph
Generally	¶21-010

Child Support (Registration and Collection) Act 1988

Section	Paragraph
4(1)	¶21-260; ¶21-295
16A	¶21-280; ¶21-300
17–19	¶21-270; ¶21-280
17–18A	¶21-000
17A(1)(c)	¶21-270
18A	¶21-350
25	¶21-270
26	¶21-270
28	¶21-270
28A	¶21-270; ¶21-350

30	¶21-260; ¶21-280
36(4)	¶21-350
38	¶21-270
38B	¶21-270
39	¶21-270
39A	¶21-270
Pt IV (43–65AA)	¶21-290
43	¶21-260; ¶21-290
43(1)	¶21-200; ¶21-290
43(2)	¶21-290

43(3)	¶21-290
44	¶21-290
44(1)–(7)	¶21-290
45	¶21-260
46	¶21-290
50	¶15-105
50(1)	¶15-105
50(2)	¶15-105
50(3)	¶15-105
54(1)	¶21-190
54(2)	¶21-190
57	¶21-290
64AF	¶21-260
66	¶21-270
67	¶21-260
68	¶21-190
69A	¶21-120
69B	¶21-260; ¶21-280; ¶21-295
69B(1)	¶21-295
69B(2)	¶21-295
69B(2)(i)–(ii)	¶21-295
69B(3)	¶21-260; ¶21-280
69B(4)	¶21-295
70	¶21-270

70(1)(a)	¶21-270
70(1)(b)	¶21-270
71	¶21-190
71(1)	¶21-280
71A	¶21-190; ¶21-280
71A(1)	¶21-280
71AA	¶21-280; ¶21-295
71AA(1)	¶21-280
71AA(1)(a)	¶21-280
71AB	¶21-280; ¶21-295
71AB(1)	¶21-280
71AB(2)	¶21-280
72AC	¶21-280
72AD	¶21-280
71C	¶21-190; ¶21-280
71C(3)	¶21-280
71D	¶21-280
72	¶20-070; ¶21-290
72A(1)	¶21-290
72AA–72B	¶21-290
72AA	¶21-030
72AB	¶21-030
72C	¶21-300
72D	¶21-290
72Q	¶21-290

76	¶21-280
79	¶20-070; ¶21-295
79A–79C	¶21-210
79A	¶18-020
Pt VII (79D–87AA)	¶21-190
80	¶21-200
80(1)	¶21-190
81	¶21-190
82	¶21-190
84	¶21-190
89	¶21-200
89(1)	¶21-190
90(1)	¶21-200
92	¶21-200
95C	¶21-200
95G	¶21-200
95H(1)	¶21-200
95H(2)	¶21-200
95K	¶21-200
95N(2)	¶21-200
95P	¶21-200
96A	¶21-200
96B	¶21-200
104	¶21-210

106A	¶21-270
107	¶21-270
108	¶21-200
111	¶21-210
111C	¶21-210
111F	¶21-300
111G	¶21-300
112	¶21-210
113	¶21-300; ¶21-350
113(1)	¶21-260
113A	¶21-300
113A(3)	¶21-300
116	¶21-260
143	¶21-295
Generally	¶1-000; ¶1-150; ¶1-240; ¶1-270; ¶21-010; ¶21-020; ¶21-320; ¶24-110; ¶24-300

Child Support (Registration and Collection) Regulations 1988

Regulation	**Paragraph**
5D	¶21-280
Sch 2	¶21-340

Civil Law and Justice Legislation Amendment Act 2018

Section	**Paragraph**
Generally	¶15-000; ¶15-140; ¶11-186

Civil Liability Act 2002 (NSW)

Section	Paragraph
5B(2)	¶7-060

Commonwealth Powers (Family Law — Children) Act 1986 (NSW)

Section	Paragraph
Generally	¶1-030

Company Law Review Act 1998

Section	Paragraph
Generally	¶16-010; ¶16-120

Competition and Consumer Act 2010 (formerly Trade Practices Act 1974)

Section	Paragraph
Generally	¶20-025

Constitution

Section	Paragraph
51	¶1-020
51(ii)	¶1-020
51(xvii)	¶1-020
51(xxi)	¶1-020
51(xxii)	¶1-020
51(xxiv)	¶1-020
51(xxvii)	¶1-020

51(xxix)	¶1-020
51(xxxvii)	¶1-030
51(xxxix)	¶1-020
Ch III	¶1-240; ¶9-160; ¶9-190
71	¶1-020; ¶1-090
76	¶1-070
77	¶1-020; ¶1-070
109	¶1-020; ¶1-200
122	¶1-020; ¶1-180; ¶1-190
Generally	¶1-000

Contracts Review Act 1980

Section	Paragraph
Generally	¶20-025

Corporations Act 2001

Section	Paragraph
9	¶16-060
45A(2)	¶16-190
45A(3)	¶16-190
109X	¶16-320; ¶24-220
112–114	¶16-040
124	¶16-030
128	¶16-030
129	¶16-030

1337H	¶16-300
1337J	¶16-300
1337L	¶16-300
1337M	¶16-300
139(1)	¶16-220
180–191	¶16-110
198F	¶16-230
Pt 2D.3 Div 1 (201A–201U)	¶16-130
Pt 2D.3 Div 3 (203A–203F)	¶16-140
232	¶16-350
234	¶16-350
236–242	¶16-350
247A	¶16-210
248A–248G	¶16-250
251A	¶16-250
251AA	¶16-250
251B	¶16-220
Ch 2H (254A–254Y)	¶16-150
290(1)	¶16-230
290(2)	¶16-230
486	¶16-220
588FDA	¶16-380
588G	¶16-080

588H	¶16-080
1070A	¶16-150
1337C	¶16-290
1337C(2)	¶16-290
1337G	¶16-310
1337J	¶16-300
1337L	¶16-300
1337M	¶16-300
1337P	¶16-320
1337P(2)	¶16-320
1337U	¶16-320
Generally	¶1-100; ¶1-110; ¶15-000; ¶15-140; ¶15-180; ¶16-010; ¶16-020; ¶16-340; ¶16-520

The Crimes Act 1900 (NSW)

Section	Paragraph
Generally	¶2-080

Crimes Act 1914

Section	Paragraph
4AA(1)	¶9-380; ¶10-150

Crimes (Sentencing) Act 2005 (ACT)

Section	Paragraph
Pt 6.1 (85–92)	¶10-150

Crimes (Sentencing Procedures) Act 1999 (NSW)

Section	Paragraph
8	¶10-150

Domestic Partners Property Act 1996 (SA)

Section	Paragraph
Generally	¶17-490

Domestic Relationships Act 1994 (ACT)

Section	Paragraph
74B(3)	¶17-530

Duties Act 1997 (NSW)

Section	Paragraph
68	¶17-470
68(1A)	¶17-470
68(2)	¶17-470
68(4)	¶17-470
68(4AA)	¶17-470

Duties Act 1999 (ACT)

Section	Paragraph
232F	¶17-530
232FG	¶17-530

Duties Act 2000 (Vic)

Section	Paragraph
44(1)–(6)	¶17-500

Duties Act 1999 (ACT)

Section	Paragraph
74B	¶17-530

Duties Act 2001 (Qld)

Section	Paragraph
420–424	¶17-480

Duties Act 2001 (Tas)

Section	Paragraph
56	¶17-520
56A	¶17-520
57	¶17-520

Duties Act 2008 (WA)

Section	Paragraph
131(1)	¶17-510
131(2)	¶17-510
132	¶17-510

Evidence Act 1995

Section	Paragraph
8(2)	¶9-260
26	¶23-070
30	¶23-070
32	¶23-030
33	¶23-030
36	¶23-070

Pt 2.1 Div 4 (37–39)	¶23-070
Pt 2.1 Div 5 (40–46)	¶23-070
41	¶23-070
Pt 2.2	¶23-070
Pt 2.3	¶23-070
55(1)	¶2-080; ¶23-010
55(2)	¶23-010
56	¶23-010
56(2)	¶2-080; ¶23-010
Pt 3.2–3.8	¶23-070
59	¶23-090
Pt 3.10 Div 1	¶23-030
69ZV	¶2-080
75	¶23-090
78	¶2-080
81	¶23-330; ¶23-340; ¶23-350
81(1)	¶23-330
81(2)	¶23-330
81(2)(a)	¶23-330
81(2)(b)	¶23-330
82	¶23-340
83	¶23-350
83(1)	¶23-350
83(2)	¶23-350
83(4)	¶23-350

84	¶23-310
87	¶23-360
87(2)	¶23-360
88	¶23-320
118–120	¶23-020
118	¶23-030
119	¶23-030
120	¶23-030
121–125	¶23-040
122(2)	¶23-030
122(3)	¶23-030
122(3)(a)	¶23-030
122(3)(b)	¶23-030
122(5)	¶23-030
122(6)	¶23-030
125	¶23-030
126	¶23-040
128	¶12-060; ¶23-050
128(1)	¶23-050
128(2)	¶23-050
128(4)	¶23-050
128(5)	¶23-050
128(6)	¶23-050
128(7)	¶23-050

131	¶23-100
131(1)	¶2-080
131(1)(a)	¶23-100
131(2)	¶2-080; ¶23-100
131(2)(a)	¶23-100
131(2)(d)	¶23-100
131(2)(e)	¶23-100
131(2)(g)	¶23-100
131(2)(h)	¶23-100
135	¶2-080
138	¶2-080
140	¶11-220; ¶23-050
141	¶10-160
142	¶23-050
142(2)(a)	¶23-050
142(2)(b)	¶23-050
144	¶11-290
160	¶21-190
190(4)	¶7-080
Generally	¶23-000

Fair Trading Act (Vic) 1999

Section	Paragraph
Generally	¶20-025

Families, Community Services and Indigenous Affairs Legislation

Amendment (Child Support Reform Consolidation and Other Measures) Act 2007

Section	Paragraph
Generally	¶21-010; ¶21-320

Family Court Act 1997 (WA)

Section	Paragraph
5(1)	¶12-070
124	¶21-240
205Z(2)	¶22-050
Generally	¶1-220; ¶1-230; ¶17-260; ¶20-210; ¶22-010; ¶22-070

Family Court of Australia (Additional Jurisdiction and Exercise of Power) Act 1988

Section	Paragraph
Generally	¶1-000; ¶1-100

Family Law Amendment Act 1983

Section	Paragraph
Generally	¶1-210

Family Law Amendment Act 2003

Section	Paragraph
Generally	¶15-190; ¶16-360

Family Law Amendment Act 2006

Section	Paragraph
Generally	¶24-380

Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008

Section	Paragraph
Generally	¶14-300; ¶14-340; ¶20-010; ¶22-000; ¶22-020

Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018

Section	Paragraph
Generally	¶11-186

Family Law Amendments (Family Violence and Other Measures) Act 2018

Section	Paragraph
Generally	¶6-115; ¶6-120; ¶7-050; ¶7-060; ¶11-186

Family Law Amendment (Shared Parental Responsibility) Act 2006

Section	Paragraph
Generally	¶1-190; ¶2-080; ¶4-000; ¶4-010; ¶4-030; ¶5-000; ¶6-000; ¶6-030; ¶6-050; ¶7-000; ¶7-010; ¶7-020; ¶7-040; ¶7-070; ¶8-000; ¶8-030; ¶10-030; ¶10-040; ¶10-090; ¶11-180; ¶21-080

Family Law (Child Abduction Convention) Regulations 1986

Regulation	Paragraph
2	¶9-050

2(1)	¶9-010; ¶9-060
2(1C)	¶9-070
2A	¶9-320; ¶9-340
3	¶9-070
3(2)	¶9-180
4	¶9-070
4(1)	¶9-090
4(1)(a)	¶9-100
4(1)(b)	¶9-090
4(2)	¶9-070; ¶9-090
4(3)	¶9-090
5(1)	¶9-300
5(1)(c)	¶9-300
6(1)	¶9-210
7	¶9-300
11	¶9-050; ¶9-330
11(1)	¶9-050
11(3)	¶9-050; ¶9-110
11(4)	¶9-050; ¶9-110; ¶9-320
13	¶9-110; ¶9-330
13(1)	¶9-320
13(3)	¶9-110
13(4)	¶9-110
Pt 3 (14–22)	¶9-110

14	¶9-000; ¶9-050; ¶9-070; ¶9-110; ¶9-180; ¶9-260
14(1)	¶9-110
14(1)(a)	¶9-020
14(1)(a)(i)–(v)	¶9-050
14(1)(a)(vi)	¶9-050; ¶9-110
14(2)	¶9-050; ¶9-110
14(3)	¶9-110
14(4)	¶9-050
15	¶9-180
15(1)(a)	¶9-110
15(1)(b)	¶9-110
15(1)(c)	¶9-110
16	¶9-030; ¶9-180
16(1)	¶9-030; ¶9-080; ¶9-180; ¶9-200; ¶9-220
16(1)(b)	¶9-180
16(1)(c)	¶9-120
16(1A)	¶9-030; ¶9-070; ¶9-080
16(2)	¶9-030; ¶9-080; ¶9-120; ¶9-180; ¶9-200
16(2)(b)	¶9-180
16(2)(c)	¶9-120
16(3)	¶9-030; ¶9-080; ¶9-120; ¶9-150; ¶9-160; ¶9-170; ¶9-200; ¶9-250; ¶9-255
16(3)(a)(i)	¶9-120; ¶9-130
16(3)(a)(ii)	¶9-120; ¶9-140

16(3)(b)	¶9-120; ¶9-150
16(3)(c)	¶9-120; ¶9-160
16(3)(c)(ii)	¶9-160
16(3)(d)	¶9-120; ¶9-170
16(4)	¶9-120
16(5)	¶9-180
17(1)	¶9-110
17(2)	¶9-200
18	¶9-230
18(1)(a)	¶9-110; ¶9-220
18(1)(b)	¶9-110; ¶9-220
18(1)(c)	¶9-020; ¶9-110
18(2)	¶9-020; ¶9-110
19	¶9-210; ¶9-230
19A	¶9-230
21	¶9-290
26	¶9-270
27	¶9-110
29	¶9-260; ¶9-330
29(1)	¶9-260
29(1)(a)	¶9-260
29(3)	¶9-260
29(5)	¶9-260
30(1)	¶9-290

30(2)	¶9-290
Sch 3 Form 2	¶9-110
Sch 3 Form 2A	¶9-110
Sch 3 Form 2B	¶9-110
Generally	¶9-000; ¶9-010; ¶9-040; ¶9-240; ¶9-350

Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011

Section	Paragraph
Generally	¶1-200; ¶11-185

Family Law Legislation Amendment (Superannuation) Act 2001

Section	Paragraph
5	¶19-060
Generally	¶19-000; ¶19-060; ¶19-080

Family Law (Superannuation) Regulations 2001

Regulation	Paragraph
3	¶19-010
5	¶19-320
5(1A)	¶19-010
6	¶19-190
8	¶19-010
9A	¶19-010
10A	¶19-010; ¶19-110
11	¶19-010; ¶19-110; ¶20-040

12–14	¶19-110
Div 2.2 (14–14Q)	¶19-110
22(2)(b)	¶19-140
38	¶19-140
Pt 6 (45A-45D)	¶19-250
45A	¶19-250
45B	¶19-250
45D	¶19-160
45D(3)	¶19-250
45D(4)	¶19-250
59	¶19-240
59(2)(a)	¶19-240
59(2)(b)	¶19-240
59(2)(e)	¶19-240
Sch 1 Form 1–4	¶19-120; ¶19-130; ¶19-300

Family Provision Act 1982 (NSW)

Section	Paragraph
31	¶20-130

Federal Circuit Court of Australia Act 1999

Section	Paragraph
45	¶24-635
45(1)	¶24-635
51	¶24-625

Federal Court (Corporations) Rules 2000

Rule	Paragraph
2.2	¶16-320
2.4	¶16-320
2.5	¶16-320
2.6	¶16-320
2.7	¶16-320
2.9	¶16-320
2.11	¶16-320
Sch 2	¶16-310

Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009

Section	Paragraph
Generally	¶20-020; ¶20-185; ¶20-370

Federal Magistrates Court Act 1999

Section	Paragraph
Generally	¶1-240

Federal Circuit Court Rules 2001

Rule	Paragraph
1.03(1)	¶23-390
1.03(2)	¶23-390
1.03(4)	¶23-390

1.05	¶23-390
1.05(2)	¶23-390
1.06(1)	¶23-390
1.06(2)	¶23-390
2.01	¶23-390
2.01(2)	¶23-390
2.02	¶23-390
2.04(1)	¶23-390
2.04(1B)	¶7-060
2.04(2)	¶23-390
2.04(3)	¶23-390
4.05	¶2-000; ¶3-190; ¶7-060
5.01	¶2-000
5.03	¶2-000
5.03(1)	¶2-000
Pt 6 (6.01–6.19)	¶3-190; ¶23-410
6.06(1)	¶23-410
6.06(2)	¶23-410
Div 6.4 (6.14–6.16)	¶3-190
6.15	¶3-190
6.18	¶23-410
7.18	¶3-190
8.02(4)	¶15-010
13.04A	¶11-155
14.05(1)	¶23-020

14.05(2)	¶23-020
Pt 15 (15.01–15.31)	¶2-070; ¶23-000
15.06A	¶23-400
15.07	¶23-400; ¶24-615
15.08	¶23-400
15.08(2)	¶23-400
15.09	¶23-400
15.10(1)	¶23-400
15.10(2)	¶23-400
15.10(3)	¶23-400
15.10(4)	¶23-400
15A.11(1)	¶23-420
15A.11(2)	¶23-420
15A.11(3)	¶23-420
15A.11(4)	¶23-420
15A.11(5)	¶23-420
15.12	¶23-400
Div 15.4 (15.25–15.29A)	¶2-070; ¶2-090; ¶23-470
15.25	¶2-090; ¶23-470
15.26	¶2-090
15.26(1)	¶23-470
15.26(2)	¶2-090; ¶23-470
15.26(3)	¶2-090
15.27	¶2-090; ¶23-470

15.27(1)(a)	¶2-090; ¶23-470
15.27(1)(b)	¶2-090; ¶23-470
15.27(1)(c)	¶2-090; ¶23-470
15.28	¶23-470
15.28(1)	¶2-090; ¶23-470
15.28(2)	¶2-090; ¶23-470
15.28(3)	¶2-090; ¶23-470
15.28(4)	¶2-090
15.28(5)	¶2-090; ¶23-470
15.29	¶2-080
15.29(1)	¶23-470
15.29(2)	¶23-470
15.30	¶23-480
15.31	¶23-480
15.31(1)–(4)	¶23-480
15.47(1)	¶23-400
15A.02(1)	¶23-410
15A.02(3)	¶23-410
15A.02(4)	¶23-410
15A.02(5)	¶23-410
15A.04(1)–(3)	¶23-410
15A.05(1)	¶23-410
15A.06(1)	¶23-410
15A.06(2)	¶23-410
15A.07(1)	¶23-410

15A.07(2)	¶23-410
15A.08	¶23-410
15A.09	¶23-410
15A.10	¶23-420
15A.11	¶23-420
15A.11(1)–(5)	¶23-420
15A.12(2)	¶23-430
15A.12(3)	¶23-430
15A.13(2)	¶23-440
15A.14	¶23-440
15A.16(1)	¶23-450
15A.17(1)	¶23-460
15A.17(2)	¶23-460
20.01	¶13-020
Pt 21 (21.01–21.16)	¶25-000
21.02(1)	¶25-100
21.03–21.05	¶25-100
21.07	¶25-080
21.07(5)	¶25-080
21.09(3)	¶25-000
Div 21.1 (21.01)	¶25-060
Div 21.2 (21.02–21.08)	¶25-100
22A	¶11-155
22A.02	¶6-020; ¶6-110; ¶7-060

Federal Proceedings (Costs) Act 1981

Foreign Element Regulations 2005

Regulation	Paragraph
Generally	¶12-080

Impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

Section	Paragraph
Generally	¶11-280

Income Tax Assessment Act 1936

Section	Paragraph
44	¶17-400
Pt III Div 6AA (102AAA–102AAZG)	¶17-050; ¶17-440
102AE(2)(b)(viii)	¶17-440
102AE(6)	¶17-440
102AE(7)	¶17-440
102AG(2)(c)	¶17-440
102AG(2)(c)(viii)	¶17-440
102AG(2A)	¶17-440
102AG(3)	¶17-440
102AG(4)	¶17-440
102AG(8)	¶17-440
102AGA	¶17-440
Pt III Div 7A (109B–109ZE)	¶17-360; ¶17-400
109RC	¶17-400
Pt IVA (177A–177G)	¶17-230

Generally	¶16-520; ¶17-420; ¶17-430; ¶19-020

Income Tax Assessment Act 1997

Section	Paragraph
8-1	¶17-340
25-5	¶17-340
26-40	¶17-040
40-340	¶17-290
51-50	¶17-030
102-5	¶17-200
102-15	¶17-200
102-20	¶17-110
102-25(1)	¶17-120
102-25(3)	¶17-120
103-30	¶17-170
104-5	¶17-110
104-10	¶17-130
104-10(2)	¶17-370
104-25(1)	¶17-130
104-35(1)	¶17-130
104-230	¶17-230; ¶17-300
108-5	¶17-080
108-10(2)	¶17-210
Subdiv 108-D (108-50–108-85)	¶17-100
110-25	¶17-170

110-45	¶17-170
110-55	¶17-170
112-20	¶17-180
112-30	¶17-190
115-30(1)	¶17-260
115-115	¶17-150
115-115(2)	¶17-150
116-20	¶17-170
116-20(5)	¶17-170
116-30	¶17-180
116-40	¶17-170
116-45	¶17-170
116-50(1)	¶17-170
118-5(a)	¶17-090
118-10	¶17-210
118-10(3)	¶17-210
118-15	¶17-210
118-20	¶17-060
118-24	¶17-090
118-25	¶17-090; ¶17-290
118-75(1)	¶17-330
Subdiv 118-B (118-100–118-265)	¶17-140
118-145	¶17-270
118-170	¶17-270

118-178	¶17-270
118-180	¶17-310
118-192	¶17-270
118-300	¶17-350
118-300(1)	¶17-090
118-305	¶17-090; ¶17-350
118-310	¶17-350
118-313	¶17-090
Div 121 (121-10–121-35)	¶17-240
121-35	¶17-240
126-1	¶17-380
126-5	¶17-270–17-320; ¶17-400
126-5(1)	¶17-260
126-5(2)	¶17-260
126-5(3A)	¶17-260
126-5(5)	¶17-260
126-5(6)	¶17-260
126-5(7)	¶17-280
126-15	¶17-290; ¶17-310; ¶17-320; ¶17-340
126-25	¶17-260
126-140(2B)	¶19-290
Div 149 (149-10–149-170)	¶17-230; ¶17-300; ¶17-400
Div 152 (152-1–152-430)	¶17-290
152-10	¶17-160

Listening Devices Act 1991 (TAS)

Section	Paragraph
Generally	¶2-080

Listening Devices Act 1992 (ACT)

Section	Paragraph
Generally	¶2-080

Marriage Act 1961

Section	Paragraph
5	¶3-010
11	¶3-310
23	¶3-220
23(3)	¶3-260
23(5)	¶3-260
23B	¶3-220
23B(1)(a)	¶3-230
23B(1)(b)	¶3-230
23B(1)(c)	¶3-230
23B(1)(d)	¶3-230
23B(1)(e)	¶3-230
23B(2)	¶3-230
Pt VA (88A–88G)	¶3-280
88D(2)(d)	¶3-290
88G(1)	¶3-270

91	¶3-330
Generally	¶1-000; ¶1-020; ¶1-140; ¶1-230–1-250; ¶1-270; ¶4-000

Marriage Amendment (Definition and Religious Freedoms) Act 2017

Section	Paragraph
Generally	¶1-140

Married Persons Property Act 1986 (ACT)

Section	Paragraph
Generally	¶17-530

Matrimonial Causes Act 1959

Section	Paragraph
Generally	¶1-020

Migration Act 1958

Section	Paragraph
Generally	¶1-120

Penalties and Sentencing Act 1992 (Qld)

Section	Paragraph
Pt 5 Div 2 (100–108)	¶10-150

Personal Property Securities Act 2009

Section	Paragraph
Generally	¶15-065; ¶16-010; ¶16-285; ¶16-395

Personal Property Securities (Corporations and Other Amendments) Act 2010

Section	Paragraph
Generally	¶15-065; ¶16-285; ¶16-395

Prohibition of Human Cloning for Reproduction Act 2002

Section	Paragraph
21	¶12-080

Prohibition of Human Cloning for Reproduction Act 2008

Section	Paragraph
17	¶12-020

Property Law Act 1974 (Qld)

Section	Paragraph
Pt 19 (255–344)	¶17-480
266	¶17-480

Property (Relationships) Act 1984 (NSW)

Section	Paragraph
44	¶17-470
47	¶17-470
Generally	¶20-025

Sentencing Act 1988 (SA)

Section	Paragraph
Pt 4 (45–51)	¶10-150

Sentencing Act 1995 (WA)

Section	Paragraph

Pt 9 (61–67)	¶10-150

Sentencing Act 1995 (NT)

Section	Paragraph
Pt 3 Div 4 (33A–39)	¶10-150

Sentencing Act 1997 (Tas)

Section	Paragraph
Pt 4 (28–36A)	¶10-150

Small Superannuation Accounts Act 1995

Section	Paragraph
Generally	¶19-010; ¶19-090

Social Security Act 1991

Section	Paragraph
1064	¶18-080
Pt 2.3 (94–146Q)	¶21-040
Pt 2.4 (146V–192)	¶21-040
Pt 2.5 (197–246)	¶21-040
Generally	¶21-030

Stamp Duties Act 1923 (SA)

Section	Paragraph
71CA	¶17-490
71CA(3)	¶17-490
71CB	¶17-490

Stamp Duty Act 2007

Status of Children Act 1974 (Vic)

Status of Children Act 1987 (Qld)

Succession Act 2006 (NSW)

Superannuation Industry (Supervision) Act 1993

Superannuation Industry (Supervision) Regulations 1994

Regulation	Paragraph
6.01(5)	¶19-110
6.19A(1)	¶19-110
Pt 7A (7A.01–7A.22)	¶19-180; ¶19-280; ¶19-320
7A.11	¶19-250
7A.11(6)	¶19-250
Sch 1	¶19-250; ¶19-280
Generally	¶19-010

Surrogacy Act 2010 (Qld)

Section	Paragraph
Generally	¶21-050

Surveillance Devices Act 1998 (WA)

Section	Paragraph
Generally	¶2-080

Surveillance Devices Act 1999 (Vic)

Section	Paragraph
Generally	¶2-080

Surveillance Devices Act 2007 (NSW)

Section	Paragraph
Generally	¶2-080

Surveillance Devices Act 2007 (NT)

Section	Paragraph
Generally	¶2-080

Surveillance Devices Act 2016 (SA)

Section	Paragraph
Generally	¶2-080

Tax Laws Amendment (2007 Measures No 3) Act 2007

Section	Paragraph
Generally	¶17-400

Taxation Administration Act 1953

Section	Paragraph
Sch 1 Div 353	¶17-020
388–55	¶21-060

Veterans' Entitlements Act 1986

Section	Paragraph
5GA(5)	¶21-040

Workers Compensation Act 1958 (Vic)

Section	Paragraph
Generally	¶21-160

Index

A

Applications

B

C

Children's cases, enforcement and non-compliance

D

E

F

Financial assistance

Financial cases, disclosure

G

H

I

J

K

L

Jurisdiction

M

Maintenance agreements

N

O

P

Q

R

S

Superannuation benefits

T

U

V

W