

Property Scaffold

Private ordering of property (Divide / Consent / BFA)

- **‘Divide and walk away’**
 - Finality subject to s 44(3) and (4) of the FLA
 - s 44(3): 12 month time limit, unless leave.
 - s 44(4): leave possible if:
 - (a) Hardship
 - Courts have taken a generous approach. **Richardson** – 15 years after separation, illness, he had accommodated her until now.
 - No bar that they had virtually no property at time of separation.
 - Hardship test: unless hardship is established, application for leave must be dismissed. If hardship established, still a discretion.
 - Factors to be considered: Length of the delay, adequacy of explanation for the delay, strength of applicant’s case, degree of hardship.
 - (b) For maintenance – Would have been unable to support without benefit (**Richardson**).
- **Consent orders**
 - Acts of judicial power, but by consent.
 - s 79 orders are final, subject to s 79A:
 - Miscarriage by fraud, duress, false evidence, impractical, exceptional circumstances/hardship, if it considers it appropriate.
 - *In the Marriage of Garlick* – wife appeared to be represented, but was not adequately. Consent orders set aside under s 79A.
 - Can be made by a Registrars in chambers as long as both parties have had independent legal advice.
 - *Harris v Caldane* – delegation to registrars fine as long as right of rehearing.

- **Binding Financial Agreement:**
 - Pre (s 90B), During (s 90C), Post (s 90D)
 - Elements – 1. Expressly in writing 2. In contemplation of marriage / under appropriate section 3. Not parties to any other BFA.
 - Only property agreements are enforceable.
 - **Requirements for validity: S 90G (formalities), s 90G(1A) saver**
 - s 90G BFAs are only binding if they are:
 - (a) Signed by all parties,
 - (b) Each spouse had independent legal advice about the effect of the agreement (Australian legal practitioner: **Ruane v Bachman-Ruane**)
 - (c) Signed statement by lawyer/ (ca) Copy of statement
 - **Black v Black** – Certificate said they had been given advice but agreement did not state that the advice had been given. VOID.
 - **Parker** – any changes – need new certificate.
 - **s 90G(1A)** Even if s 90G not complied with, BFA can be binding on the parties if the court is satisfied that it would be unjust and inequitable if the agreement were not.
 - **Hoult** – Certificate, but no letter stating advice. s 90G: advice actually has to be given. Onus is on the person relying on BFA. Certificate = sufficient evidentiary foundation, onus shifts back to person seeking to overturn BFA.
 - **S 90K – Grounds for setting aside**
 - Fraud s 90K(a)
 - Element of deceit **Slatinsek v Slatinsek (1986)**. Parkinson: deception in motivation for getting into marriage – maybe.
 - Void, voidable s 90K(b)
 - Actual undue influence (equitable principle) **Ormes v Beadle** – extracted in circumstance of oppression. **Saint Claire** – vulnerable mental state.
 - Unconscionable conduct – compare in the **Marriage of Spiegel (US)**
 - Change in circumstances s 90K(c)
 - Estoppel – **Duncan and Duncan (1978)**
 - Uncertainty – **Kostres** Been through bankruptcy, business acquired through a trustee,
 - **Even if not valid** can be taken into account: **Marriage of Hannema**

Spousal Maintenance s 72

- Complicated rationale as historically a remedy for loss of consortium – now age of no fault divorce.
- **Clean break principle (s 81 FLA, Lord Scarman *Minton v Minton*)** – duty to end the economic relationship (shouldn't foster entanglement) especially in cases of DV.
 - **Kirby J:** One object of modern family law statutes is to enable parties to a broken relationship to start a new life...**control their destinies**...free from unnecessary interferences from a former spouse or the court (**Kirby J in AMS v AIF**)
- May make order **if and only if:** s 72(1)
 - First party is reasonably able to support the other,
 - Other party unable to support himself or herself **adequately, by reason of**
 - (a) Kids
 - (b) age, physical or mental incapacity
 - (c) any other reason
 - Having regard to s 75(2) factors.
- **Kiesinger and Paget** – Court has wide discretion. Awarded \$2,000 per week. Able to consider e.g. the extent to which party contributed to financial resources of the other: s 75(2)(j). Court will take into account situations where e.g. she has put him through medical school.
 - Conceptual/Constitutional difficulties: **Bracklow v Bracklow [1999]** She got sick, but need not arising out of the marriage partnership.
- **McFarlane (UK)** – \$250k per year (she gave up career as high flying lawyer)
- In **Australia** more likely to make interim orders:
 - **No system of community property**, therefore if husband holds all legal title wife will **struggle prior to s 79 division (even to get credit), therefore propensity to use as a stop-gap**
 - Husband leaves marriage with earning capacity intact
 - Warning, if you get orders this leaves you open to further orders being made in future

Definition of Property

- In property settlement proceedings the court has power to make orders with respect to the **property** of the parties to the marriage or **either of them** s 79(1).
 - All of the property of the parties is available for distribution;
 - Only the property of the parties is available for distribution.
 - Even if not property **may be a financial resource** – can be taken into account under s 75(2)(b) of the Act.
- **Wide meaning given** – covers every possible interest a person may have (in reversion and remainder) (*Duff and Duff*). Can include e.g. expectancy under will of mother.
 - Key issue is **alienation** – whether you can transfer it.
 - Can be property even if the interest is difficult to value or incapable of assignment (**Marriage of Best**)
 - Can have property rights by estoppel (*Carvill v Carvill*)
 - **s 78(2) allows you to bring a claim for a declaration of ownership** – can join the wife's parents to proceedings if necessary.
- **Superannuation** – May be treated as property.
 - **Coghlan** – however, it is dealt with separately after the main property division
- **Kennon v. Spry**
 - **Meaning peculiar to FLA** – lexicon (*Yanner v Eaton*).
 - French CJ (most salient): Trustee (Spry's) **power to appoint** coupled with wife's **right to due consideration**, when taken together should be regarded as the relevant property.
- **Outside** wide definition of property:
 - **Right to sue for personal injury** is not property (**Zorbas**)
 - **Right to be considered under a discretionary trust** is not property.

Four Stage Approach (Hickey; Stanford)

1. **Value the 'pool'** – Identify and value the property, liabilities and financial resources of the parties at the date of the hearing.
2. **Assess contributions** – s 79(4) (a) “financial”, (b) “non financial” and (c) “home-maker”
3. **Assess s 75(2) factors (s 79(4)(e))** – ‘Future needs’ as outlined in s 79(4)(e) especially, but also s 79(4)(d) “earning capacity”, (f) “orders effecting children” and (g) “child support”.
4. **Determine if it is ‘just and equitable’ to alter the interests** – s 79(2), *Stanford*.

Step 1. Value the Pool of Assets

1. Value is assessed **at the date of trial** and any differences in value will require **court to determine** not just split the difference (**Lenahan**)
 - **Auction v. Private sale** (if there is a contest about value)
 - If the asset is going to be sold – take **auction value** and deduct realisation costs (agent fees and CGT – only if going to be sold).
 - If the asset is not going to be sold – take **private sale value**.
 - **Shaw** (1989) In these cases, an expert will estimate both.
 - Note capital gains tax liability – no capital gains on transfers between ex-spouses. So, certain assets may be more valuable to lower earning spouse.
 - Value of **business** – as a going concern unless just an asset owning enterprise (**Mallet**)
2. **Deduct** liabilities from the total value of the pool (unless they are unlikely to be called in – i.e. family loans / debt forgiveness)
3. **Losses and Waste:**
 - Financial losses **should be shared** – ‘rollercoaster principle’ (**Kowaliw**) unless one:
 - Embarked on a course of conduct designed to reduce assets
 - Acted recklessly, negligently or wantonly with the marital assets.
 - Gambling – illness rather than fault?
 - Premature distribution (**Townsend**)
 - The correct approach is to **deal with the party’s receipt as a notional asset** which is treated as forming part of the pool of assets – and make distribution accordingly. “Add back”.
 - E.g. They’ve got \$600,000, he’s spent \$100,000, so treat pool as \$700,000. \$350,000 each. But he’s already spent \$100k of his. So 350/250.