

FAMILY LAW EXAM NOTES

A. PRIVATE ORDERING

1. Informal agreements

- Parties agree informally between themselves on financial matters with or without professional legal assistance

2. Binding Financial Agreements:

- a) Determine whether “financial agreement” is binding and enforceable as between the parties; and
 - i. the agreement is in writing;
 - ii. parties must not be party to another financial agreement covering the same matters
 - iii. the agreement stated to be made under relevant FLA section
 - iv. agreement relates how property/resources are to be dealt with upon breakdown
 - v. or deals with maintenance (whether marriage broke down or not)
- When a financial agreement meets all the formal requirements in ss90B,C,D AND is binding and enforceable between the parties under contract/ equity AND not set aside under one of the statutory grounds – **s90K** and to set aside **s 90KA**
- b) Examine whether it is binding for the purpose of excluding the jurisdiction of the Court **ss 90B, C & D**
 - The requirements to exclude the jurisdiction of the court are set out in **s90G** FLA.
 - **S90G** means that for financial agreements to be binding they must be:
 - Signed by all parties
 - Who had independent legal advice before signing about effect; advantage to party (AT TIME OF ADVICE) and if prudent (AT TIME) and FAIR.
 - SEE **s90G(1A)-(1C)** – court can declare an agreement binding on the parties even if the requirements of s90G(1) are not met. The court has a discretion - if it would be “unjust and inequitable” if the agreement were not binding.
 - If binding will exclude the jurisdiction of the court to make orders in relation to property which is the subject of the agreement
 - Cannot contract out of child support

Non-disclosure is a ground to set aside a financial agreement: s90K: Circumstances in which court may set aside a financial agreement or termination agreement:

“(1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:

a) the agreement was obtained by fraud (including non-disclosure of a material matter)…”

3. Consent orders (pgs 483- 485 BT)

- Where parties have a private agreement and wish to formalize their property settlement by consent order or binding financial agreement
- They are orders of the Court made under s 79/90SM, can cover parenting and property with one order
- They are enforceable in same way as any other Court orders and can only be set aside by appeal or via s 79A/90SN
- Setting aside consent orders → grounds under s 79A(1)
 - a) exercise of discretion: Even if a ground under s79A(1) is established, the court has an overarching discretion whether or not to vary or set aside the order. Just because a miscarriage of justice is established, does not mean that orders will automatically be set aside. *Gebert (1990)*
 - o Where non-disclosure/suppression of evidence s 79A, a finding of miscarriage of justice will only be found if it resulted in a miscarriage of justice *Lane v Lane [2016]* where wife’s consent was not a fully informed consent can result in setting aside of consent order *Pearce v Pearce [2016]*
 - b) Consent: A court may with the consent of all parties vary or set aside an order and make another order in substitution (s79A(1A)).

B. TIME LIMITS

- s 44 no proceedings can be instituted 12 months after divorce or 2 years after the end of a de facto relationship **except if**:
 - 4(a) hardship would result (hardship test is pretty broad *Richardson*) or
 - 4(b) applicant for spousal maintenance would have been unable to support self without an ITPAB 12 months after divorce (can be separated for years prior to divorce)

C. DUTY OF DISCLOSURE

1. What the duty of disclosure is:

- Chapter 13 of the *Family Law Rules 2004* and Part 24 of the *Federal Circuit Court Rules 2001* require full and frank disclosure of each party's financial circumstances (including property, income, trusts, disposals etc) in s 79/90SM proceedings in a timely manner *Family Law Rules 2004* r 13.01(1)
- Rule 13.01(2) states that the duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.
- Parties must also provide new information as circumstances change or more documents come into possession.
- The documents must be in the name, possession or under the control of the party disclosing the document and must be relevant to an issue in case
- If refused → subpoena can be sought

2. Documents which in practice are required:

- a) Particulars of any real estate owned by the party or in which a party has an interest.
- b) Three most recent tax returns and notices of assessment.
- c) Pay slips or records of earning for the last three months.
- d) All bank account statements for all accounts (including but not limited to savings accounts, every day/ transaction accounts, credit cards, personal loans, mortgages, loans) in the party's name (whether held solely or jointly with another person), or in which a party has an interest (be it legal or equitable) for the past twelve months.
- e) Copies of any financial statements including Balance Sheet and Profit and Loss Statements of any company of which the party is a Director or Shareholder for the last 3 financial years.
- f) Particulars of any trusts of which the party is the Appointor, Trustee or beneficiary, including copy of trust deed.
- g) Particulars of any property disposed of by Sale, Transfer, Assignment or Gift for the past twelve months.
- h) The statements of any Superannuation Interest held by the party for the three most recent financial years.
- i) Any share statements.
- j) Registration certificates of any motor vehicles owned either individually or jointly.
- k) An estimate of the value of any contents and any other items of Property, Tools, Machinery or any other asset or liability held.

3. Documents which require full and frank disclosure: Rule 13.04

- a) the party's earnings

- b) any vested or contingent interest in property;
- c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;
- d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity (eg income of a company which is fully or partially owned or controlled by a party)
- e) the party's financial resources;
- f) In relation to a trust of which the party is the appointor or trustee, or eligible beneficiary as to capital or income, over which the party has any direct or indirect power or **control** or of which the party has the direct or indirect power to remove or appoint a trustee;
- g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party or an entity they control that may affect, defeat or deplete a claim
 - i. in the 12 months immediately before the separation of the parties; or
 - ii. since the final separation of the parties; and liabilities and contingent liabilities

4. Orders for disclosure

Rule 13.22 of the Rules empower a party to apply for an order for disclosure. It relevantly provides:

“(1) A party may seek an order that:

- (a) another party comply with a request for a list of documents in accordance with rule 13.20;
- (b) another party disclose a specified document, or class of documents, by providing to the other party a copy of the document, or each document in the class, for inspection by the other party;
- (c) another party produce a document for inspection;
- (d) a party file an affidavit stating:
 - i. that a specified document, or class of documents, does not exist or has never existed; or
 - ii. the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of that party; or
- (e) the party be partly or fully relieved of the duty of disclosure.

(2) A party making an application under sub rule (1) must satisfy the court that the order is necessary for disposing of the case or an issue or reducing costs.

5. Consequences of Non-disclosure: **Set out in rule 13.14:**

“If a party does not disclose a document as required under these Rules:

- (a) the party:
 - (i) must not offer the document, or present evidence of its contents, at a hearing or trial without the other party's consent or the court's permission;

- (ii) may be guilty of contempt for not disclosing the document; and
 - (iii) may be ordered to pay costs; and
- (b) the court may stay or dismiss all or part of the party's case.”

- If party doesn't disclose/ lies then court can exercise its discretion in a manner adverse to that party's interest – *Weir (1993)*
- Failure to comply with such duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of court.

What if property settlement orders have been made and non-disclosure is subsequently discovered?

Section 79A sets out the grounds on which an Application may be made to set aside an Order:

“Where, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, 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;*

...

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.”

D. MEANING OF PROPERTY – Legal & Equitable interests of parties

- Court is limited to making orders in respect of the property of the parties
- **s 4(1)** property = is property to which the parties are entitled whether in possession or reversion
- *Marriage of Duff* = property extended to real and personal property, and choses in action.
- *Kennon v Spry; Spry v Kennon (2008)* – include assets in discretionary family trust, due to husband's power as trustee to appoint whole of assets to wife who was a beneficiary
- **Not included** = future income unless it can be capitalised (that is a lump sum value attached to it for the purposes of property division) and treated as property - eg: royalty streams in *Pope (2012)* a financial resource may be rent, and include income capacity *In the Marriage of Kelly*

E. STANFORD

Are they married or in a de facto relationship?

Married:

- Must wait for 12 months before can get a divorce, the time will begin from date of separation can argue marriage has broken down irretrievably **s 48**, must have communicated his intentions to separate
- Once divorce has been obtained can get property orders straightaway *Stanford*
- Identify possibility of settlement possibility informal agreement, binding and financial agreement or consent orders

S 90SB	<p><u>De Facto Threshold requirement:</u></p> <p>A Court may make an order under s 90SE, 90SG, 90SM or 90SL in relation to a de facto relationship only if the court is satisfied: that</p> <ol style="list-style-type: none">a) The period or total of the periods of the de facto relationship is at least 2 years or;b) There is a child of the de facto relationship; orc) That:<ol style="list-style-type: none">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); andii. a failure to make the order or declaration would result in serious injustice to the applicant; ord) that the relationship is or was registered under a prescribed law of a State or Territory.
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STEP 1: Court needs to determine the legal and equitable titles to the property. Also determine the financial resources

Consider:

- Although there is no evidence that the parties are divorced, it is clear that from about ____ the parties have accepted that the marital relationship between them has ceased. It is appropriate to make orders resolving the property issues between the parties. It is just and equitable in all the circumstances to bring the parties' financial relationship to an end.

- Discuss who has equitable/legal title
- Including superannuation
- Whether there has been full & frank disclosure
- Should some transactions be set aside
- Discuss whether inheritance should be included
- If gift is a gift or a loan

STEP 2: Court MUST separately ask: **is it just and equitable to make an order?** **s79(2)/90SM** (The Court must not begin “from the assumption that one other party has the right to an interest in marital property”).

- Usually it always will be readily satisfied that by the choice of one or both parties they are no longer living together and no longer use of common property **Stanford HCA; Bevan**
- Unless they live separate lives

Cases where it was held it wasn't:

- **Stanford** p.282 of TM
- **Bevan (2013)** p. 285 TM / p.503 text
- **Watson and Ling (2013)** p.295 TM
- **Chancellor & McCoy (2016)** → de facto
 - 27 yr old relationship, couple acquired all property in own names and remained responsible for own debts, neither party provider for other in their death; Held it would not be just and equitable for there to be an order altering property because of the way the parties conducted their financial affairs meant that neither party would or could have acquired an interest in the property owned by the other
- **Fielding & Nichol (2014)** → de facto
 - 12 yr relationship
 - W said H not entitled to equal division of assets because W had primarily owned separated property throughout relationship
 - Court agreed with W: H had insisted had kept finances separate and W had agreed; assets were all separate and mainly in same form as when acquired; neither party made provision for other in event of death; H had done work on W's property but had also lived there rent free