

**STEP 2:** Is I J&E in the circumstances of the case to make orders altering the parties interest in their property? **S 79(2)** – can be express, implied or inferred: may consider contributions (**s 79(4)**)

- Consider Family Violence here

**STEP 3:** If yes to step 2 (i.e. discretion enlivened), determine the extent of the contributions **s79(4) (a)(b)(c)**, based on entitlements of the parties expressed as a percentage of the net value of the party's property

- Assets brought in
- Inheritances
- Gifts
- Post separation etc.
- Homemaker/parent
- Conduct

**STEP 4:** Consider any relevant matters in **s 79(4) (e)** (matters referred to in s 75(2)) i.e. is any further adjustment needed as to the other prospective factors **s 79(4)(d)(f)(g)** (may consider such contributions as per *Chapman*)

- **S 75(2)(o)/ 90SF(3)(r)** Consider Misconduct here

**STEP 5:** Court should consider the effect of those findings and determinations and resolve what order is J & E in all the circumstances of the case

**STEP 6:** Maintenance *Clauson*

- Is there a right to maintenance? **S 72 [s 90SF(1)]**
- Is it proper to order maintenance? **S 74 [S 90SE]** only taking into account matters **S 75(2) [S 90SF (3)]**

Case	Illustrative facts
<b>Marriage of Hickey</b> 2003	<ul style="list-style-type: none"> <li>• Facts: <ul style="list-style-type: none"> <li>○</li> </ul> </li> </ul>

#### 4.3.1 identifying and valuing legal and equitable interests in property

Section	Description
<b>S 4(1) FLA</b>	Definition of property <i>'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 to either in possession or reversion.'</i>

Case	Illustrative facts
<b>Marriage of Duff</b> 1977	<ul style="list-style-type: none"> <li>• Facts: <ul style="list-style-type: none"> <li>○ H was director of the company; H and W owned shares in a company and 100 shares were placed in the name of their children</li> </ul> </li> <li>• Issue: Could the assets of the company be regarded as assets under the FLA?</li> <li>• Principle: <ul style="list-style-type: none"> <li>○ Property includes both real and personal property as well as choses in action</li> <li>○ 'Property is that which belongs to a person exclusive of others and can be the subject of bargain and sale. It includes <u>goodwill, trademarks, licences to use a patent, book debts, options to purchase, life policies and the rights under a contract.</u>'</li> </ul> </li> </ul>

#### Financial resource

- No Definition - interpreted to 'cover all financial advantages that either are, or are likely to be, enjoyed by a party
- **Court cannot make an order directly against a financial resource**
- E.g. Discretionary trusts: issue is that it is discretionary and the party is not explicitly entitled

Effect on creditor, ability of the creditor (mindful of debt)	(ha)	(i)
Contribution to financial position of the other	(j)	(j)
Duration of the relationship and effect on earning capacity	(k)	(k)
Need to protect parent role	(l)	(l)
Financial circumstances of cohabitation with another	(m)	(m)
Child support	(n), s 79	(n), s 90SM
Terms of order or declaration made or proposed under Pt VIIIAB	(naa)	(o)
Any other fact or circumstance which justice required to be taken into account	(o)	®
Terms of any Pt VIII financial agreement	(p)	(t)
Terms of order or declaration made or proposed to be made under Pt VII	-	(p)
Terms of Pt VIIAB financial agreement	(q)	(s)

In light of all of these it must be J & E... more emphasis on prospective factors

<i>Case</i>	<i>Illustrative facts</i>
<b>Clauson 1995</b>	<ul style="list-style-type: none"> <li>Facts: <ul style="list-style-type: none"> <li>Relationship of 10 years, Parties had accumulated 1.4 mil assets</li> <li>W had worked throughout the relationship but there was an enormous disparity of income between the two</li> <li>During marriage she had 4 children</li> </ul> </li> <li>Trial judge: W contribution 25 but further adjustment of 15% .. Through S 75(2) factors</li> <li>W appealed: Full court decided adjustment of 15% was below the discretion and awarded her further 10 percent <ul style="list-style-type: none"> <li>Asset pool divided 50/50</li> <li>Court noted that <b>most valuable asset that the party can take out is income earning capacity</b></li> </ul> </li> </ul>
<b>Waters and Jurek 1981</b>	<ul style="list-style-type: none"> <li>Facts: <ul style="list-style-type: none"> <li>Both parties were professionals; had capacity and both parties were working</li> <li>One adult child at time of separation</li> <li>H income was larger than wife's</li> <li>After contribution... trial judge divided assets equally</li> <li>Then trial judge gave the wife another \$50,000 as an adjustment under s 75(2) ... on basis of the husband's additional earnings for one year <ul style="list-style-type: none"> <li>This amount was to allow the wife to start working full time</li> </ul> </li> <li>No division of roles in this case</li> </ul> </li> <li>H Appealed: <ul style="list-style-type: none"> <li>Full court refused to disturb the decision... willing to accept that s 75(2) could be used to award increased share in profit even where the disparity of income wasn't the result of role division in marriage</li> </ul> </li> </ul>
<b>Davida and Davida 2012</b>	<ul style="list-style-type: none"> <li>Facts <ul style="list-style-type: none"> <li>Parties began cohabiting May 1999</li> <li>H brought in asset (home) worth K105</li> <li>Separated 2008- home worth K774</li> <li>Two children 8 and 6 at separation-live with W</li> <li>H TAFE teacher, W -part time</li> <li>Net asset pool K640</li> </ul> </li> <li>H -55% and W 45% <ul style="list-style-type: none"> <li>Is gravity shifting again?</li> </ul> </li> </ul>

Case	Illustrative facts
<b>Aldridge &amp; Keaton</b> 2009	<ul style="list-style-type: none"> <li>Issue: Appropriateness of a parenting order for a person with no biological connection?</li> <li><b>What does it mean to be concerned with the ‘care, welfare and or development of a child?’</b></li> <li><u>Two step approach:</u> <ol style="list-style-type: none"> <li>Is that person concerned with the care, welfare or development of the child? (<b>KAM V MJR:JIG</b>)</li> <li>If so, what order should be made in the best interests of the child?</li> </ol> </li> <li>Held (full court): <ul style="list-style-type: none"> <li>Yes in the best interest of the child to have contact with the mother's former partner</li> <li>Full court confirmed that <b>S 65C</b> does not prescribe a hierarchy of applicants just because you are biological parent doesn't mean you are to be given preference</li> </ul> </li> </ul>
<b>Wilson &amp; Roberts</b> 2010	<ul style="list-style-type: none"> <li></li> </ul>

### 5.3 Parenting orders and Children's time

*The weight to be attached to the objects when making a parenting order (although the best interest of children is paramount)*

- S 60B** discloses the objects and **S 60B (2)** the principles

Case	Illustrative facts
<b>Goode and Goode</b> 2006	<ul style="list-style-type: none"> <li>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</li> </ul>
<b>Maldera &amp; Orbel</b> 2014	<ul style="list-style-type: none"> <li>Facts: <ul style="list-style-type: none"> <li><b>In 2009 orders made for maternal grandmother to look after child</b>; having sole parental responsibility for the child</li> <li><b>In 2013 F applies for varying order</b>; According to the father his situation had changed dramatically since 2009; then he had his own life to think about but now was well settled; new wife 3 children and was in the position to have the boy live with him</li> </ul> </li> <li>TJ: ordered child to live with the father <ul style="list-style-type: none"> <li>'If I make the orders the father seeks I will be better meeting the objects and principles in s.60B.' <ul style="list-style-type: none"> <li>'each child has a right to meaningful relationship to both parents'</li> </ul> </li> <li>'There would be real benefits to [the child] in circumstances where his mother has let him down in knowing that he has a father who cares enough about him to take him into his home and provide for him through thick and thin in the difficult times and the easy times, and in my view the maternal grandmother and the step-grandfather being there for [child] cannot really substitute for that.'</li> </ul> </li> <li>Appeal FC: <ul style="list-style-type: none"> <li>'It follows that <b>we do not agree</b> that the current s 60B can be used to change the ordinary and clear meaning of s 60CC ['Best Interests of child' ]or that where the s 60CC deliberations do not enable the court to determine whether or not a parenting order is in a child's best interests, s 60B may be decisive.'</li> <li>Confirm –no hierarchy of applicants</li> <li>Matter must be decided in S 60CC all that s 60B does is to provide context</li> <li><b>READ</b></li> </ul> </li> </ul>

### 5.4 Determining the best interests of the Child: legislative pathway

**SCVG and KLD  
2010**

- Facts:
  - In 2010 hearing were made for parties to have joint parental responsibility, children to live with mother and spend substantial and significant time with father
  - Initiated proceedings again wanting time to be divided equally
  - The was arrested.... For multiple offenses
  - W wanted no contact with H
- **Issue:** If there is a previous order for ESPR is the Court obliged to *first* consider section **65DAA** i.e. equal/substantial or significant time and *not* section **60CC** the best interests of the child?
- Held:
  - Full court: clarified importance of best interest of the child criteria in parenting arrangements
  - Not in best interest child
  - Where there was orders for ESPR where there is application for equal time you need to consider where shares parental responsibility is appropriate
    - The consideration can be express (as usual) or implied (as it was in this case)

Importance of the views of the child

- **S 60CC(3)(a)**: *any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views; should be considered when determining the best interest of the child*
- **Ways views can be expressed; S 60CD**
  - In a report given by a Family consultant under **S 62G**
  - Childs best interest being independently represented by a lawyer **S 68L**
  - Other appropriate means : judge's interview; experts

Case	Illustrative facts
<b><u>R and R Children's wishes</u> 2010</b>	<ul style="list-style-type: none"> <li>• <b>Must be given careful consideration</b></li> <li>• <b>No a mere factor but must be given <u>further significance</u></b></li> <li>• <b>Look at each case individually</b></li> <li>• <b>The <u>Validity of the wishes</u> must be looked at against the facts of the case</b> (situation where one parent manipulates child... but that is not their true wish)</li> </ul>
<b><u>Maldera &amp; Orbel</u> 2014</b>	<ul style="list-style-type: none"> <li>• Facts:               <ul style="list-style-type: none"> <li>○ Look above; dispute against Grandma and Father</li> <li>○ Child's view:                   <ul style="list-style-type: none"> <li>▪ Did not wish to express any preference as to his future living arrangements;</li> <li>▪ Had no major concerns in either household; and</li> <li>▪ He would be fine with either proposal</li> </ul> </li> </ul> </li> <li>• Issue: A <b>S 11F</b> memorandum was given instead of a <b>S 62G</b> report (shorter)</li> <li>• Held:               <ul style="list-style-type: none"> <li>○ Full report should have been filled; TJ attached too much weight to memorandum</li> <li>○ The memorandum was insufficient to rely on and you must go back to the <b>best interests of the child</b></li> <li>○ TJ failed to consider effect of child being taken away from Grandmother</li> </ul> </li> </ul>

<b>Re Jamie (special medical procedure) 2011</b>	<ul style="list-style-type: none"> <li>Facts: <ul style="list-style-type: none"> <li>10-year old child, sought an application from the family court to start puberty blockers</li> <li>this was urgent because she was about to go into puberty</li> </ul> </li> <li>Dessau J: <ul style="list-style-type: none"> <li>Decided to give her consent</li> <li>Didn't make any orders as to stage 2 treatment</li> </ul> </li> <li>Issue on appeal: whether the first stage was a medical procedure to be beyond the bounds of parental responsibility</li> <li>Held: <ul style="list-style-type: none"> <li>Stage 1 is not a special medical procedure hence do not need approval of court unless dispute about the procedure</li> <li>Stage 2 is <b>special medical procedure</b> court authorization required unless the child is Gillick competent BUT court has to determine this</li> </ul> </li> </ul>
<b>Case stated before the Family court</b>	<ul style="list-style-type: none"> <li>ISSUE: 'Whether court approval should continue to be required prior to the administration of stage 2 hormonal treatment'?</li> <li>Held (Full court): <ul style="list-style-type: none"> <li>No, this is something parents can give consent to themselves</li> <li>Because science has changed so much it can be considered as a non-therapeutic treatment</li> </ul> </li> </ul>

OTHER EXAMPLES: where consent of the court is needed

- GWW & CMW (1997)** - harvesting of bone marrow.
- Re Inaya (Special Medical Procedure) (2007)** - harvesting bone marrow
  - Baby cousins and parents where so close court needed to give consent
- Director Clinical Services & Kiszko (2016)**-treatment brain tumour

Case	Illustrative facts
<b>Director Clinical Services &amp; Kiszko 2016</b>	<ul style="list-style-type: none"> <li>Facts: <ul style="list-style-type: none"> <li>Oshin had a terminal brain tumour</li> <li>Doctors wanted to treat: while there is life there is hope</li> <li>Parents refused to give permission they didn't want to treat him at all</li> <li>Because the parents wouldn't treat doctor's went to court for the court to exercise welfare jurisdiction</li> </ul> </li> <li>Held: <ul style="list-style-type: none"> <li><i>Must be some clear justification for court interfering with parental responsibility - in absence of a consensus of medical opinion, the state should not intervene</i></li> <li>But this was a case where all medical opinion wanted to treat</li> <li>They treated... then came back to court wanting to treat again... court said no</li> </ul> </li> </ul>

### 5.5.2 Problematic Area 2: Relocation of Children

The issue with relocation is how to balance **S 60B (1)(a)** Children having the benefit of a meaningful relationship with both their parent's and primary considerations **S 60CC (2)** vs The Right to Freedom of Movement

Relocation of a child's residence-general principles'

- As per Kirby paras [141-151] in **AIF v AMS: AMS v AIF (1999)**
  - Look at each case on its own facts
  - No single factor is decisive
  - Children's rights whilst paramount cannot be viewed in the abstract
  - Freedom of movement
  - Increased emphasis on children's rights but beware feminization of poverty
  - Staying within Australia more relaxed than overseas