

Family Law Property - Problem Solving Template

1 Identify the Existing Legal and Equitable Interests in the property

1.1 The Meaning of 'Property'

Chapter 13 of the *Family Law Rules 2004* and Part 224 of the *Federal Circuit Court Rules 2001* require full and frank disclosure of each party's financial circumstances in s 79/90SM proceedings. If they don't disclose, then the court can exercise its discretion in a manner adverse to that party's interests: ***Weir* [1992] FamCA 69**. In that case, the Full Court found that the husband deliberately did not make full disclosure of his income, and the Court exercised discretion adversely against the husband's interests. Disclosure requirements concern the parties' interests in property and also information about their income, financial resources, trust connections, disposal of property 12 months before separation and the parties' liabilities.

The court has the power to make such orders as it considers appropriate altering the interests of the parties to a marriage/de facto relationship with respect to their property: ***FLA*, s 79(1)/90SM(1)**. Normally, a s 79/90SM order cannot exceed the totality of set assets and/or superannuation entitlements of the parties.

Property that the court can make orders in relation to, means "property to which [the] parties are, or that party is, ... entitled, whether in possession or reversion": ***FLA*, s 4**.

Property dealt with under the *FLA* relates to personal and real property, as well as choses in action: ***In the Marriage of Duff* (1977)**. In this case, the court considered that the meaning of 'property' included shares held by a husband and wife in a proprietary company of which they were the sole shareholders.

In ***Kennon v Spry* (2008) 238 CLR 366**, the High Court held that the assets of the family discretionary trust were the property of the parties to the marriage, due to the husband's power as trustee to appoint the whole of the assets to the wife as beneficiary: at [2008] HCA 56, [81]. The High Court considered that a 'purposive' approach should be taken to defining 'property' that 'advances, rather than contains, the subject, scope and purposes of the [*FLA*]': at [2008] HCA 56, [64].

1.2 Financial Resources

Even though a particular source of wealth does not constitute 'property', it may still be taken into account in s 79/90SM proceedings as a '**financial resource**' of one of the parties via s 79(4)(e)/90SM(4)(e), which includes reference to s 75(2)/90SF(3).