

Applications for divisions of property:

• **Powers of the Court**

- **S 4(1)(ca)** defines 'matrimonial cause' to be proceedings between the parties to a marriage with respect to the property of the parties to the marriage, being proceedings arising out of the marital relationship = **MUST LINK TO MARITAL RELATIONSHIP**
- It doesn't include any requirement that the relationship be breaking up (cf de facto), meaning that orders can be made whilst the relationship is still on foot (**Standford**)
- **Clean Break Principle:** As far as practicable, the court must make orders to finally determine the financial relationship between the parties to avoid further proceedings between them (**s 81**)

• **TIME LIMITS FOR COMMENCEMENT of PROPERTY PROCEEDINGS - When can an application be made?**

- Without permission of the court or consent of the parties, you can't bring proceedings regarding maintenance or property more than 12 months after the date on which the divorce order took effect (**s 44(3)**)
  - **Permission:** to grant leave, the court must be satisfied that hardship would be caused to a party to the relevant marriage or a child (**s 44(4)**)
  - **Consent:** where the parties allege that they consent to a time extension. HOWEVER, the court can dismiss proceedings if it is satisfied that the consent was obtained by fraud, duress etc and that allowing the proceedings to continue would amount to a miscarriage of justice (**s 44(3AA)**)

• **Ousting Jurisdiction:**

- This part does not apply to (**s 71A(1)**):
  - Financial matters to which a financial agreement that is binding to the parties applies; or
    - Financial matters = maintenance of one of the parties, property of those parties, maintenance of children of the marriage (**s 4(1)**)
  - Financial resources to which a financial agreement that is binding on the parties applies.
    - Financial resources = interpreted to mean financial advantages that either are or are likely to be enjoyed by a party

• **What can the Court Order?**

- The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order (**s 79(2)**)
- In property settlement proceedings, the court may make such orders as it considers appropriate: (**s 79(1)**)
  - Altering the interests of the parties to the marriage in the property; or
  - An order for a settlement of property in substitution for an interest in the property.
- Per **s 80(1)**, the Court may do any or all of the following:
  - (a) order payment of a **lump sum**, whether in one amount or by instalments;
  - (b) order payment of a weekly, monthly, yearly or other **periodic** sum;
  - (ba) order that a specified transfer or settlement of **property** be made by way of **maintenance** for a party to a marriage;
  - (c) order that payment of any sum ordered to be paid be wholly or partly **secured** in such manner as the court directs
  - (d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
  - (e) appoint or remove trustees;

- (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;
- (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order
- (i) impose terms and conditions;
- (j) make an order by consent;
- (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; and
- (l) subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part.

## IF VALID BFA, THE PARTIES CANNOT GO FOR PROPERTY ORDERS UNDER PART 8

### Alteration of Property Interests - The Four Step/Five Step Process

- The modern approach to altering property interests post Stanford taking into account Bevan, Chapman and Hearne, is as follows:

#### STEP 1: Identify and value the asset pool (including assets and liabilities)

- Identify the and value the property, legal and equitable assets and liabilities and financial resources of the parties at the date of the hearing (as asset can change value)...according to common law and equitable principles
- **Property definition:** *'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 whether in possession or reversion'* (s 4(1) FLA)

- Duff v Duff (shares) – gave a **very wide definition of property** for the FLA
  - Property means property both real and person and includes choses in action
  - Property is that which belongs to a person exclusive of others, and can be the subject of bargain and sale
  - It includes goodwill, trademarks, licenses to use a patent, book debts, options to purchase, life policies, and the rights under a contract

- Kennon v Spry – If you have a **discretionary trust** and one of the parties is the trustee and appointor and the other is a beneficiary/object – the assets of that trust will be regarded as property of the marriage.

- Even if something isn't 'property', it might still be an **a financial resource:**
  - Not defined in the act, but has been interpreted to mean -> financial advantages that either are or are likely to be enjoyed by a party to the marriage.
  - A court cannot make an order directly against a financial resource of property (Kelly v Kelly)

#### Hall v Hall (example of financial resource)

##### FACTS:

- Wife and husband both came from enormously wealthy families
- Wife made an application for interim spousal maintenance of 10K per month until proceedings were settled
- Husband pointed to a clause in the wife's father's will, that it was his wish as a father that the wife should receive a lump sum payment of 16mill from the business if she was to be divorced and 150K per month until receiving that money.
- But it was a mere wish, and her brothers owned the business and she didn't have anything to do with it
- Therefore wife argued it was a discretionary payment and she had no control over whether she would actually have received the money – up to her brothers who ran the business to decide whether or not to give her the money

##### HELD:

- A financial resource is a source of financial support which a party can *reasonably* expect will be available to them to supply a financial need or deficiency
- Must be more than an expectation of benevolence but do not need to be able to control it
- ASK -> if they asked for it. can they reasonably expect support from that source to be forthcoming?

- Consider if there is superannuation as is now treated as property (s 90MC) – if so look below

## STEP 2: The Just and Equitable Requirement

- As per s 79(2) of the FLA, it must be J and E in all circumstances to alter the parties interest in their property.
  - If 'yes', then the court may continue on to consider the factors set out in s 79(4) and 75(2)
  - If 'no', then the court should not continue making an order (as occurred in Stanford)
- The HC in Stanford outlines some circumstances in which it would be 'just and equitable' to make an order. These include:
  - There is no longer common use of the property by the parties
  - The express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the marriage;  
or
  - Where 1 party's unmet needs cannot be answered by a maintenance order

### Stanford v Stanford:

#### **FACTS:**

- Wife (89) and husband (87) married in 1971, each had children from previous marriages but no children together
- Parties had lived in the matrimonial home which was registered in husband's name. This property was purchased by husband and his ex-wife, then was transferred to his sole name upon their divorce.
- In 1995, husband made a will, leaving the house to his children subject to a life tenancy in favour of the wife
- Husband knew the wife was leaving her entire estate to her children but didn't discuss it with her
- The wife was admitted in to full time residential care because of her health, therefore physical separation was forced upon the parties.

#### **HELD:**

- Husband continued to provide for the wife, and gave 40K for her use while in the home and visited her 3 times a week in the facility
- The mere fact of physical separation doesn't mean the marriage is at an end, so this was an intact marriage
- Wife by her case guardians (daughters) applied for orders for property settlement because the daughters argued they needed the money to keep her in care and the husband argued that he would provide for her (gave her money and both ahd pensions) and he wanted remain in the home.

**2 ISSUES:** Can an order be made for property settlement when the marriage is intact + Meaning of 'J and E' in context of an intact marriage?

#### **HELD:**

- An order can be made for property settlement where the marriage is intact – no requirement that marriage be broken down.
- However, under s 4(1), a de facto relationship must have broken down, so can't make property settlement orders for intact de facto.
- Wife's reasonable needs could be met through spousal maintenance. Hence, as the wife's needs were met (when she was alive) by the receipt of aged care package and trust fund set up by the husband and if that was not sufficient, she could have applied for maintenance from the husband, there was no need for a property settlement
- But the wife died before final orders could be made, so now maintenance was not the appropriate remedy.
- Court ordered the husband could live in the house until he died, then the property would be sold and proceeds divided between all the children
- Husband appealed to HCA, considered s 79(8) where a party has died – court must consider whether it 'would have been' J and E to make an order and 'whether it is still' just and equitable'.
- HCA found the Full Court was going to award spousal maintenance instead of property settlement, therefore as it would not have been J and E while she was alive for orders for property settlement, it therefore couldn't be just an equitable now.

### Bevan v Bevan:

#### **FACTS:**

- Parties divorced, Husband said that wife could deal with all Australian assets and left, repeating this statement considerably
- Wife regarded money as her own and used it as her own
- Parties divorced after 18 years and Husband commenced property proceedings just after

**ISSUE:** Whether it was J & E to make an order for property settlement?

#### **HELD (HC):**

- Informal arrangement was that husband would not make an application for property settlement and this should be taken into account in deciding whether it would be J and E to make orders altering existing interests.
- Did not make a decision – look to Bevan (2)

## Bevan v Bevan (2)

### HELD:

- The extent of the representations made by the husband, and the husband's substantial delay in instituting proceedings are such that it would not be J & E to make any order interfering with existing interests in property.
- Time – 18 years after when she had established her life – worked with money e.g. re-invested it
- Circumstances – stating on multiple occasions that he wouldn't commence property proceedings

## Chapman v Chapman

**ISSUE:** whether you 'must' take into account s 79(4) factors when determining s 79(2) as per Bevan?

### HELD:

- Looking to various judgments, there is no such requirement – not mandatory
- J and E is so central it permeates through the entire process

## Hearne v Hearne

- Appeal: The trial judge hadn't expressly made a finding that it was J and E to make an order altering interests in property. On appeal, the court said the satisfaction of s 79(2) can be inferred.

### HELD:

- No express statement requirement – can be express or implied from the totality of the trial judge's judgment

## STEP 3: If Yes: determine the extent of their contributions (s 79(4))

- **Presumptions:**

- When determining contributions, there is no presumption that calculations should start with each party receiving 50% of the assets (Mallet – *presumption of 50/50 is unauthorised by legislation (s 79)*)
- HC has discretion to choose to adopt a global approach or asset by asset approach when determining contributions (Norbis – *either is fine, there isn't a particular one that must be used*)
  - Where long marriage with changing financial fortunes or hard to identify assets or whether there has been non-financial homemaker contributions = global might be better (Mason and Deane J in Mallet)
  - Asset based is better if one party received an inheritance after separation

- **Financial Contributions (s 79(4)(a)):**

- Court can consider direct or indirect financial contributions made to the marriage or a child of the marriage to the acquisition, conservation or improvement of any property of the parties to the marriage.

Direct Financial Contributions	Indirect Financial Contributions
Bringing land or property into the marriage	One party uses their income to cover household expenses so the other party can use his income to pay off the mortgage
Deposit on a home	One party using their position in a bank to obtain a mortgage at a very low interest rate
Paying purchase price/mortgage repayments	One party's parents provide free accommodation (rent free) (can be a contribution by a third party as well)
Cost of repairs/extensions to the home	
Gifts from relative (e.g. land)	
An inheritance/lottery win/damages award	

- **Gifts by relatives:**

- A contribution by a parent of a party to a marriage should be taken to be a contribution made by or on behalf of the party who is a child of the parent *unless there is evidence that establishes that it was not the intention of the parent to benefit only his or her child but both parties* (Kessey)

### **Kessey:**

**FACTS:** 21 year marriage, wife's mother paid for extensive building renovations to the matrimonial home.

**ISSUE:** can this be regarded as a financial contribution by the wife?

### **HELD:**

- Trial judge held the contribution should be regarded as a contribution on behalf of the wife
- Husband argued that in the absence of intention of the gift to the wife individually, the gift should be held to be made to both of them
- Full Court held it should be taken to be a contribution of the child of the parent, unless the parent intended to benefit not only their child
- The parent child relationship shows a prima facie intention to benefit the child

### ○ **Inheritances:**

- You cannot quarantine an inheritance (**Figgins**)
- The fact that it is inheritance carries little weight if the claimant's financial needs cannot be met without recourse to the property (**Figgins**)

### **Figgins and Figgins:**

#### **FACTS:**

- 3 year marriage, 10 year relationship, 6 year old child (age relevant for future needs)
- At commencement of relationship, both earned meagre salaries and didn't have any assets of significance. Husband worked in his father's shoe business but did not have a managerial role.
- Shortly after they were married, the husband's father and step mother died -> he received 28mill in the company
- Husband became confident in his ability to run the business, bought out his sisters share in the company and took control of it
- When they separated, they sold the investment property for 50K. Husband had repartnered, wife hadn't
- At time of hearing, husband's assets were valued at 22 mill and income of 600K a year.
- Wife's business wasn't going well and she became insolvent, so the entire 22 mill was the husband's inheritance money.
- Trial judge awarded the wife 1.1 mill with no spousal maintenance, saying that reasonable living for the wife included accommodation for her and the child and a vehicle, wife appealed.

#### **HELD:**

- Full court held that inheritance is one of the circumstances of the case and should be classified as a contribution of one of the parties
- However, the judge should still decide how important the inheritance is in the particular case when taking it into account, how they inherited it (i.e if it just falls into their lap), how much they inherited, when it was acquired etc
- Must look at also future prospects of the claiming party; the fact it was inherited carries little weight if the claimants persons financial needs cannot be met without recourse to the property. Hence, cannot quarantine an inheritance if the other party needs it.

### ○ **Assets brought into the Marriage/Initial Contributions:**

- Issues usually relate to long marriages rather than small (short is easy to work out an assets stay as is – initial contributions erode over time)
- If parties have substantial assets, they tend to entire into BFAs, so that they quarantine off assets that they bring into the marriage
- Initial contributions play an important party where there isn't a BFA
- Used to be that the longer the relationship, the smaller the emphasis placed on initial contributions. However, this was slightly altered by **Pierce**:
  - ASK -> But for the [husband's/wife's] initial contribution in this case, would they never have been able to acquire [the matrimonial home or whatever]
  - What is the impact of their initial contributions? (**Pierce**)

### **Pierce v Pierce:**

#### **FACTS:**

- 10 year relationship, husband and wife had net assets of 320K, main asset was a house worth 260K
- At the start of the relationship, the husband contributed 226
- Trial judge recognised that the husband had made initial contributions, but the trial judge recognised that they play little weight as they had diminished over time.
- Husband appealed stating trial judge failed to attach significant weight to initial financial contributions

#### **HELD:**

- Full court agreed -> shouldn't regard the significant of the initial contributions as liable to diminish (no erosion)
- The better approach is to give weigh to the initial contribution but which may be susceptible to change in light of the totality of both of the parties various contributions to property and the impact they have had
- It isn't so much a matter of erosion of contributions, but rather what weight is to be attached in the circumstances to the initial contributions (weight against all other contributions given by H and W)
- Here, but for the husbands initial contributions, they would never have been able to acquire the matrimonial home
- Asset pool should be divided 70% to the husband and 30% to the wife on the basis of the contributions.
- Gave the husband a further 5% for s 75(2) factors 9greater post-separation contributions because he cared for the child)
- Therefore, husband ultimately had 75% and wife had 25%