

**FAMILY LAW 2020**  
**EXAM NOTES**

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## FAMILY LAW – MARRIAGE AND DE FACTO (Existence)

### Period of time requirement?

- *Moby v Schuler* [2010]
  - Two specific elements needed consideration: “a couple” and “living together”: “If don’t live together at any time they cannot be seen as being in a de facto relationship...(but) the concept of living together does not import any concept of proportion of time...might live together for no more than half of the time of that relationship ...nothing to suggest it must be even as much as half of time.”
- The courts have applied *Pavey* test – when notice is given

### Child:

- *Ricci & Jones* (2011):
  - Existence of child doesn’t mean that there is a de facto

### Listing as single:

- *Sinclair & Whittaker* [2013]:
  - FullCFC upheld finding that partner who had listed themselves as ‘single’ on gov docs early on in the course of the de facto was not determinative – they had shared bank accs

## 2 Threshold Requirements – s90SB (length of 2 years, child)

Conditions for property settlement for de facto

A court can only make an order under s90SE (maintenance), 90SG (urgent maintenance) or 90SM (altering property interests) if it is satisfied:

- a) Total period(s) of relationship is 2 years; or
- b) There is a child of the de facto – 90RB; or
- c) (i) party who applies for order/declaration made substantial contributions of a kind mentioned in paragraph 90SM(4)(a-c); and  
(ii) failure to make order would result in serious injustice to applicant; or
- d) Relationship is registered – careful with this, must still meet all other requirements.

### A child of the relationship – s 90RB:

- For the purposes of this Part, a child is a child of a de facto relationship if the child is the **child of both of the parties** to the de facto relationship.

### Length of time – period(s):

- Separate periods can be combined *Dahl and Hamblin* (2011): periods between 1994 – 1998 and 2008 and 2009 → were combined
- *Sinclair & Whittaker* [2013]: Considered approach to be taken and standard of proof

## 3 Declarations of De Facto – 90RD

*The existence of a de facto gives the court power to decide other issues – this is important.*

S90RD(1): Family Court can make a declaration as to if a de facto existed or not between the two.

S90RD(2): May also declare the following: (a) the period(s) of de facto; (b) whether there is a child of the de facto; (c) if a party made substantial contributions (under 90SM(4)(a-c)); or (d) relationship is registered.

S90RF: Any party to a s90SE (maintenance), 90SG (urgent maintenance) or 90SM (altering property interests) proceeding can make an application for a 90RD declaration.

### Date / test of separation:

**FAMILY LAW – INJUNCTIONS**  
*Family Law Act*

**Urgent Spousal Maintenance: s77/90SG**

S77: Where it appears to the court that the party is in immediate need of financial assistance, court may order periodic payments it considered reasonable. [Can be made during a marriage; **not** for de factos]

Applicant must establish s72 requirements:

(1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

(a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason; [ie could have been a full time house keeper in marriage; to gain employment, need to gain skills ect]

having regard to any relevant matter referred to in subsection 75(2)

Court must then consider s75(2) factors – but this is urgent, does not need to be detailed.

Important: necessity to establish that the spouse who the order will be made against has the ‘economic capacity’ to support the claimant

What is adequately?

- Does not mean at the level of bare necessity – imports a standard of living which is reasonable in the circumstances
- Full Court in *Chapman and Chapman* (1979) stated:  
‘It must be clearly understood that s 77 applications have particular characteristics about them:
  - they are intended to deal with an urgent situation; they are normally in effect for a short period of time (until an application for interim maintenance can be considered);
  - and they are in the nature of stop-gap orders. That of course does not mean they have to be bread-line orders.
  - What the appropriate quantum is depends on the circumstances of each case and the financial background and the histories of the parties.’
- *Nutting* (1978): ‘by S72 of the Act, the husband is liable to maintain a wife only to the extent that he is incapable of supporting herself adequately. Adequately means reasonable living in the circumstances’
- *Brown* (2007): adequately is a ‘word not to be determined according to fixed/absolute standard. The idea means subsistent level has been rejected. Where possible, both spouses should live at the level previously enjoyed, but may have to be lower if there is not enough financial support.’

[Consider then spousal maintenance under s74(Married)/90SE(1) (de facto) – property settlement]

**Injunctions – Person, Property, use or occupancy of matrimonial home**

S68B injunctions: regarding kids

**1 Protection of the Person**

Married – s114(1) injunction for:

- (a): personal protection of a party;
- (b): restraining a party from entering/remaining in the home or premises the other party resides; restrain from entering a specified area;
- (c): restraining from entering place of work
- (e): protection of matrimonial property – *see below*
- (f): use and occupancy of matrimonial home – *see below*

**FAMILY LAW – PARENTING ORDERS**

Goods and chattels: vehicles and tools	Yes		<i>M &amp; M (2006)</i> : judge ignored the jewellery as there was no evidence of its value. Jewellery will be taken into account as property if it is worth valuing.
Savings and bank accounts	Yes		
Debts/money owed	Yes		<i>Cunningham (2005)</i> : Business acc was in credit for \$114k As long as it is legally enforceable. Capable of assignment.
Borrowing capacity		Yes	Walters (1986): 'there is no authority of which I am aware, which asserts that this court in exercising this power under S79 has power to make an order for the payment of a lump sum when there is neither property available from which a sum could be raised - either by sale, mortgage, or otherwise. Nor any fund existing from which it can be paid, not the capacity either.'  Common for a party to retain home and use that to borrow money to pay other side. Must have a capacity to borrow; failing which, the court may not order the party to retain the matrimonial home
Option to purchase property	Yes		<i>Rickaby &amp; Rickaby (1995)</i>
Tax Loss		Yes – FB in future	Negative income – tax loss credit for future income
Stocks	Yes		
Partnerships -assignable	Yes		<i>Best &amp; Best (1993)</i>
Partnerships – not		Yes	<i>Best &amp; Best (1993)</i> – interest in partnership property
License for business	Yes		FLA defines transferable licenses and permits as property
Lotto wins	Yes		Property even though bought alone Zyk(1995): winning ticket is a windfall. 'Contribution by both parties; 'both parties are in receipt of the income: the purchaser of the ticket would be regarded from joint funds, as any other purchases from that context. Income of the working member is treated as a joint fund in same way of the domestic duties.'
Superannuation	Yes		Separate under 4(1) and 90MC
Third party/Company assets – control		Yes	As long as the party has practical control over them <i>In the Marriage of Kelly (No 2) (1981)</i> : Companies assets and trust – husband FR. He had full control over them. Reserved on which the husband could draw. Full Court upheld trial judge.
Third party/Company assets – no control		No	<i>Yates and Yates (No 1) (1982)</i> : <ul style="list-style-type: none"> <li>Husband did not have control over company assets. Children held shares. 'The court will take into account financial resource where relevant only to the extent that the other party may be given a greater percentage of the other property available for distribution'</li> </ul>
Long service leave	Yes		<i>Zisha &amp; Zisha [2013]</i>
Future long service leave		Yes	<i>Gould v Gould (1995)</i>
Chose in action arising from proprietary estoppel	Yes		Assignable and property <i>Carvill v Carvill (1984)</i>

## FAMILY LAW – PARENTING ORDERS

Factors under s75(2) to be taken into account:

- (a) Age and state of health of each parties
  - It is self-evident that a party's age and state of health can have a significant effect on their future needs and resources.
  - If a party suffers from ill-health the extent and likely duration (short or long-term) must be assessed to the extent that it affects their ability to earn an income.
  - Does the party's ill-health affect their ability to care for any relevant children.
  - If a party is approaching retirement age is it likely they will retire or keep working.
  
- (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each them for appropriate gainful employment.
  - START: Is there a significant disparity between the current income of each of the parties and their future earning capacity? (see *Horsley and Horsley* (1991) FLC 92-205; *Waters v Jurek* (1995) FLC 92-635)
    - If a disparity exists, it seems clear that after separation the party with the lower income will be unlikely to maintain their standard of living
  - If a party is not currently working are they capable of obtaining employment.
  - Has the relationship between the parties due to its length, parenting responsibilities or domestic violence affected the earning capacity of a party.
  - Has the matrimony of the parties caused one party not being employed – ie mother stays home
    - This may impact their ability to obtain employment
  - What training or upgrade in qualifications does a party require to make them more able to achieve their full potential in the work force.
    - If they haven't been working because of being married
    - This may determine if a small additional property allocation will be made to enable parties to upgrade their skills or potentially a larger one to upgrade when there is a lengthier time to be spend upgrading
  - Does the party have access to a financial resource that has an income producing stream (ie. Inalienable partnership, overseas superannuation)?
  - Is an expectation of an inheritance sufficiently likely to vest in the near future.
  - Is there any income or prospect of income being derived from a discretionary trust?
  
- whether either party has the care or control of a child of the marriage has not attained the age of 18 years.
  - The number and ages of the children and the circumstances of each party's day-to-day care of the children.
  - If one party has control of the children – this will impact their employability and day to day expenses
  - **Important in determining what the financial resources of the parties should be** and ensure the parties can maintain themselves after the settlement is made
  - This matter does not only reflect the direct cost of the child but also the less tangible. It includes the loss of career prospects, lack of employment mobility, and the restriction on lifestyle and general independence. (*Clauson and Clauson* (1995) FLC 92 -595).
  
- (d) commitments of each of the parties that are necessary to enable the party to support:
  - (i) himself or herself.  
This involves an examination of what are the parties necessary living expenses and other appropriate commitments.
  - (ii) a child or another person that the party has a duty to maintain  
A party's obligation to support a new family or one previous to the marriage involved in this matter. This may be children, step-children or former spouses or subsequent ones.