

5. Property Settlement

Property settlement under the FLA involves an alteration of property interests following breakdown of marriage (*s 79*) or de facto relationship (*s 90SM*). The court applies a structured 4-step analysis. The overarching requirement is that any order must be 'just and equitable' (*s 79(2)* / *s 90SM(3)*). There is no automatic 50/50 entitlement.

RED FLAG -- EXAM TRIGGERS

- Question asks how property should be divided -- go straight to the 4-step process
- Spouse has gone bankrupt -- trustee in bankruptcy becomes involved; *s 79(12)-(13)* FLA
- Question involves a financial agreement (Part VIIIAA) -- check whether it is binding
- One party is not the legal owner of an asset but claims an interest -- equitable principles
- Tax debts or third-party creditors are part of the asset pool -- *s 75(2)(ha)* FLA
- Superannuation -- separate regime under Part VIIIB FLA; cannot simply be split as cash

THE 4-STEP PROPERTY SETTLEMENT PROCESS (*Stanford v Stanford (2012)* HCA)

SCRIPT: 4-STEP PROPERTY SETTLEMENT SCRIPT (*s 79* FLA / *s 90SM* FLA)

Step 1: Identify and value the property of the parties -- the 'asset pool'. Include: all property legally owned by either party (real estate, superannuation, business interests, investments), liabilities (mortgages, debts), financial resources (trusts, inheritance likely to be received). Value at current market value, generally at date of hearing.

- > Include third-party debts owed to creditors (*s 75(2)(ha)*) consideration at Step 3)
- > Superannuation: included in asset pool but subject to special splitting regime (Part VIIIB)
- > COUNTER-ARGUMENT: Respondent may argue certain assets are excluded because they are held on trust for a third party, or that a liability should not be included as it arose from wrongful conduct

WRITE: The asset pool for distribution includes *[list assets with approximate values]* and liabilities of *[list debts]*, giving a net pool of approximately *[\$ amount]*. *[Superannuation interests of [Party A] (\$X) and [Party B] (\$X) are also included / subject to Part VIIIB FLA.]*

Step 2: Assess the contributions of the parties (*s 79(4)(a)-(c)*). Both financial and non-financial contributions are relevant. Contributions are assessed at commencement of relationship, throughout, and after separation. Neither type of contribution is inherently more valuable.

- > Financial contributions: wages, inheritance, gifts, initial capital
- > Non-financial contributions: homemaking, child-rearing, supporting the other party's career
- > Post-separation contributions: mortgage payments, maintaining property, caring for children alone

- > Initial contributions: where one party brought substantially more property into the marriage -- 'contributions from the outset' -- relevant, especially for short marriages
- > Special skills/efforts (*Ferraro v Ferraro*): exceptional business acumen by one party may be recognised if it generated disproportionate wealth
- > COUNTER-ARGUMENT: The homemaker/parent may argue their non-financial contributions over [X years] are equivalent to the other party's financial contributions; or that their management of the household enabled the other party to pursue wealth-generating activities

WRITE: Assessing contributions under (s 79(4) FLA), [Party A] made [financial / non-financial / initial capital] contributions including [list], while [Party B] made [homemaking / child-rearing / financial] contributions including [list]. On balance, contributions are assessed as [X%/Y% split -- e.g., 60/40 in favour of Party A] because [reasoning based on duration, type and extent of contributions].

Step 3: Assess the future needs factors (s 75(2) FLA -- for marriage; s 90SF(3) for de facto). Adjust the contributions-based percentage to account for future circumstances. Key factors: (a) age and health; (b) income and earning capacity; (c) property and financial resources; (d) care of children; (ha) effect on creditors.

- > Greatest weight in practice: income disparity between parties; care of children; health limitations
- > s 75(2)(ha): if one party has significant tax debts or creditors, court must consider ability of creditor to recover -- cannot be ignored but not automatically determinative
- > COUNTER-ARGUMENT: High-earning spouse may argue the adjustment should be modest because the other party has capacity to re-enter the workforce or that childcare arrangements will be shared

WRITE: Adjusting for future needs under (s 75(2) FLA), [Party A / Party B] requires an adjustment because [they will have primary care of [child] / their earning capacity is significantly lower due to [health/career sacrifice] / they are [X years] older with reduced working life]. An additional adjustment of [X%] in favour of [Party] is appropriate, giving a final split of [%/%].

Step 4: Is it just and equitable to make the order? (s 79(2) FLA -- Stanford v Stanford (2012) HCA). The court must specifically address whether any alteration is just and equitable. It is not automatic even if contributions and needs are assessed. A court may decline to alter interests if the existing arrangement is already just and equitable.

- > Stanford v Stanford: High Court held just and equitable requirement is not satisfied simply by identifying relevant contributions/needs -- the court must independently consider whether it is appropriate to alter property interests at all
- > COUNTER-ARGUMENT: Where one party argues no order should be made, respond by pointing to specific injustice that would result from leaving existing ownership unchanged (e.g., one party contributed significantly to a jointly owned asset)

WRITE: It [is / is not] just and equitable to make a property settlement order because [the existing distribution of legal title does not reflect the parties' contributions and needs / both parties made equal

contributions to jointly owned property and no adjustment is warranted (Stanford v Stanford)). The proposed orders -- *[brief description]* -- represent a just and equitable outcome.

NOTE -- Superannuation (Part VIII B FLA)

Superannuation is property for the purposes of the FLA (*s 4(1)* definition) but is treated separately because it is usually not immediately accessible.

The court can make a 'splitting order' directing a specified percentage or amount of one party's superannuation fund to be paid to the other party's fund (Part VIII B).

The superannuation trustee must be given procedural fairness -- a proposed splitting order that simply says 'equalise superannuation' is not enforceable (*Charistead v Charistead principle*).

Flagging orders: a flag may be placed on superannuation to prevent a payment split until a future date (e.g., when the member reaches preservation age).

Property Settlement -- Key Cases

Case	Principle	Watch Out / Application
Stanford v Stanford (2012) HCA	Just and equitable requirement in s 79(2) must be independently considered -- not automatically satisfied by contributions/needs analysis	Always address just and equitable in Step 4; never assume it follows from Steps 2-3
Ferraro v Ferraro (1992)	Exceptional business acumen by one party can justify a greater contribution-based entitlement where it generated disproportionate wealth	Must show skill was exceptional, not merely competent business performance
Charistead v Charistead [2022] FedCFamC1A 160	Full Court on conflict of interest for lawyers; dollar-for-dollar costs orders; litigation funding orders. Correct test: whether fair-minded, reasonably informed person might conclude proper administration of justice requires restraint	Litigation funding orders cannot benefit a commercial litigation funder (<i>Porter v Dyer test</i>)
Bosanac v Commissioner of Taxation (2022) HCA	High Court rejected call to abolish presumption of advancement -- remains relevant in family/property law context	Where property in name of one party but paid for by other, consider presumption of resulting trust vs advancement

Bertrand & Bertrand
[2021] FedCFamC1F 70

Tax debts under s 75(2)(ha) FLA -- court must consider creditors but cannot give them automatic priority; balance competing interests

Wife not bound by compromise between husband and ATO she was not party to

6. Parenting Orders and the Best Interests of the Child

Part VII of the FLA governs arrangements for children following separation. The paramount consideration in ALL parenting decisions is the best interests of the child (*s 60CA FLA*). Following the Family Law Amendment Act 2023 (Cth), the framework was significantly simplified: the old two-tier structure (primary/additional considerations) was replaced with a single list of six considerations in s 60CC (from 6 May 2024).

RED FLAG -- EXAM TRIGGERS

- Question involves arrangements for children -- s 60CA is always the starting point
- Allegations of family violence or child abuse -- elevated weight under s 60CC(2)(a)-(b)
- Request for equal shared parental responsibility -- presumption REMOVED by 2024 amendments
- Child objects to proposed arrangement -- relevance of child's views in s 60CC(2)(f)
- ICL appointed or sought -- obligations under s 68LA including duty to meet child (post-2024)
- Unacceptable risk of harm -- apply *Isles v Nelissen* standard (not balance of probabilities for future risk)

BEST INTERESTS FRAMEWORK -- POST-2024 (s 60CC FLA as amended)

KEY 2024 AMENDMENTS -- Family Law Amendment Act 2023 (Cth)

Removal of the presumption of equal shared parental responsibility (*s 61DA*) -- no longer applies from 6 May 2024

Removal of the obligation to consider equal time / substantial and significant time (*s 65DAA*) -- removed

New s 60CC: simplified single list of 6 non-hierarchical considerations for best interests

ICL must now meet with child and give child opportunity to express views (*new s 68LA duties*), unless child is under 5 or exceptional circumstances exist

New 'objects' provision: (a) ensuring children's best interests including safety; (b) giving effect to the UN Convention on the Rights of the Child (CRC)

The 6 Best Interests Considerations (s 60CC(2) FLA -- post-2024)

Consideration (s 60CC(2))

Key Points / Cases

(a) Safety from family violence, abuse, neglect -- highest practical weight	FLA s 4AB definition of family violence is broad. Where safety is at risk, all other factors are secondary in practice. Court must weigh benefit of parental relationship against risk of harm
(b) Child's best interests in being protected from harm	Related to (a) -- includes not just direct harm but exposure to family violence, high conflict, neglect
(c) The developmental, psychological, emotional and cultural needs of the child	Relevant to stability, schooling, cultural identity, mental health support
(d) Capacity of each parent (and other relevant persons) to provide for child's needs	Examines parenting ability, not past conduct per se, but conduct relevant to capacity
(e) Benefit to child of having relationship with each parent and other significant persons	Replaces old 'meaningful relationship' -- grandparents and other significant persons explicitly included
(f) Anything else relevant to the circumstances	Catch-all -- child's views; maturity; wishes; other relationships; sibling considerations

SCRIPT: PARENTING ORDERS -- ANALYSIS SCRIPT

Step 1: Identify what parenting orders are sought. Parenting orders may include: (a) who the child lives with (formerly 'residence'); (b) time the child spends with each parent; (c) parental responsibility (decision-making authority); (d) communication between child and parent; (e) any other aspect of the child's care/welfare.

WRITE: *[Applicant/Party A] seeks orders that [child] [live with / spend time with / have parental responsibility shared with / have communication with] [Party B] on the following basis: [brief summary of orders sought].*

Step 2: Has the applicant satisfied the pre-filing FDR obligation? Under s 60I FLA, a parenting application must be accompanied by a certificate from a Family Dispute Resolution Practitioner (FDRP) unless an exemption applies.

- > IF exemption applies (*s 60I(9)*): family violence; child abuse; urgency; incapacity; contravention of an existing order -- applicant may file without FDR certificate
- > IF no exemption and no certificate: application may be stayed or dismissed
- > COUNTER-ARGUMENT: Applicant may assert urgency exemption -- court will scrutinise whether urgency is genuine

WRITE: *[Applicant] [has / has not] obtained an FDR certificate under (s 60I FLA). [If no certificate: An exemption applies under (s 60I(9)(a)) because [family violence / child abuse / urgency -- specify].] [If*

certificate issued: The certificate indicates [both parties attended and did not agree / one party refused to attend / FDR inappropriate due to violence].

Step 3: Apply the s 60CC best interests considerations to the proposed arrangements. The court weighs all six factors without hierarchy. In practice, safety (factors (a) and (b)) will dominate where family violence or abuse is alleged.

- > START with (a) safety: if family violence established -- apply Lighthouse Evatt List procedures; supervised time or suspension may follow
- > APPLY (d) parenting capacity: look at demonstrated ability to meet child's daily needs, attendance at school, medical care, emotional support
- > APPLY (e) relationship benefit: what actual benefit does the relationship with each parent provide? Not merely symbolic
- > APPLY (f) child's views: mature child's views carry increasing weight with age; cannot compel child to express views (*s 60CE*); ICL facilitates expression
- > COUNTER-ARGUMENT: Party seeking less contact may argue the other parent poses unacceptable risk under *Isles v Nelissen*; responding party may argue current arrangements demonstrate safe and loving parenting capacity

WRITE: Applying (*s 60CC(2)* FLA), the best interests of *[child]* are served by *[proposed orders]* because: (a) safety -- *[no family violence established / family violence by [Party]]* under s 4AB requires supervised contact; (d) capacity -- *[Party A]* has *[demonstrated / failed to demonstrate]* capacity to meet *[child]*'s needs; (e) relationship -- both parents *[maintain / Party B has not maintained]* a meaningful relationship with *[child]*; (f) child's views -- *[child, aged X, has expressed a preference for / has not expressed a clear preference but the ICL has reported]*.

Step 4: Parental Responsibility: The court may grant sole or joint (shared) parental responsibility (*s 61C FLA*). Note: the presumption of equal shared parental responsibility (*s 61DA*) was REMOVED by the 2024 amendments. The court must now assess what arrangement serves the child's best interests without any starting presumption.

- > Joint parental responsibility means both parents make major long-term decisions together (schooling, medical, religion)
- > Sole parental responsibility to one parent may be ordered where joint decision-making is impractical (high conflict; family violence; refusal to cooperate)
- > COUNTER-ARGUMENT: Party seeking sole parental responsibility must demonstrate joint decision-making is not workable -- citing specific past failures or risks arising from the other party's conduct

WRITE: *[Joint / Sole]* parental responsibility to *[Party A / both parties]* is in *[child]*'s best interests because *[joint decision-making is [workable given the parties can communicate / not workable given the history of [family violence / inability to agree / unilateral decisions by Party B]]]*. Sole parental responsibility to *[Party A]* avoids *[specific harm or dysfunction]*.

Step 5: Unacceptable Risk: Where a party alleges future risk of harm, the court applies the standard in *Isles v Nelissen* [2022] FedCFamC1A 97. The risk does not need to be proven on the balance of probabilities -- it is an evidence-based assessment, not a factual finding.

- > Factual finding of past harm (e.g., sexual abuse occurred): must be established on balance of probabilities with *Briginshaw* caution
- > Predictive risk of future harm: NOT subject to balance of probabilities -- assessed on all available evidence; the possibility of harm can be sufficient
- > COUNTER-ARGUMENT (for accused party): Argue past abuse not proven to the requisite standard; any risk is speculative and cannot found a restriction on time with child
- > COUNTER-ARGUMENT (for claiming party): Even if past abuse not proven, the possibility of future harm combined with [other risk factors] establishes unacceptable risk under *Isles v Nelissen*

WRITE: [Party B] poses [an / no] unacceptable risk of harm to [child] because [evidence of past [abuse / exposure to family violence / substance misuse] combined with [other risk factors] creates a sufficient risk of future harm, even absent a finding on the balance of probabilities (*Isles v Nelissen*)]. The appropriate response is [supervised time / suspension of time / therapeutic programs before unsupervised contact].

Parenting -- Key Cases

Case	Principle	Watch Out / Application
<i>Isles & Nelissen</i> [2022] FedCFamC1A 97 (Full Court, 5 judges)	Unacceptable risk of future harm does NOT need to be proven on balance of probabilities (<i>Briginshaw</i>); it is an evidence-based assessment distinct from finding past facts	Overruled <i>Potter and Potter</i> [2007]; still requires evidence, not mere speculation -- 33% risk hypothetical in judgment
<i>M v M</i> (1988) HCA	Court will not make orders exposing child to unacceptable risk of harm; best interests paramount; distinction between past abuse finding and future risk	Foundation case for unacceptable risk doctrine; still good law after <i>Isles</i>
<i>Briginshaw v Briginshaw</i> (1938) HCA	Civil standard of proof; seriousness of the allegation affects the strength of evidence needed -- codified in s 140 Evidence Act 1995 (Cth)	Applies to FACTUAL findings of past harm, not to predictive risk assessments
<i>Rice v Asplund</i> (1978) FamCA	Court will not revisit final parenting orders unless there has been a significant change in circumstances -- codified in s 65ZYGA FLA (post-2024)	Always check if prior orders exist before applying

Walpole v Secretary, Department of Communities and Justice (2020)	Hague Convention case; plurality refused return to intolerable situation (not just direct harm); called for reform of Regulations	Led to 2022 amendments to Family Law (Child Abduction Convention) Regulations; 'intolerable situation' limb more flexible than direct harm
Eastley & Eastley [2022] FedCFamC1A 101	Post-Isles confirmation: accumulation of factors not individually proven on balance of probabilities can establish unacceptable risk	Powerful tool for party alleging pattern-based risk (DV, substance abuse combined)