Table of Contents

5. Property Part 1: Framework, Methodology, and Adjustment

Australian matrimonial property law is not a fixed community-property regime. The court does not simply divide all assets equally. It exercises statutory discretion to alter existing legal and equitable interests where the legislation permits and where doing so is just and equitable.

5.1 Definition of Property Under the Family Law

"Property" is interpreted broadly and may include real property, personal property, shares, business interests, debts, equitable interests, and certain interests connected with trusts. Trust structures do not necessarily place assets beyond the reach of the family law jurisdiction when a party's rights or powers bring the trust within the statutory analysis (*Kennon v Spry*).

***Duff and Duff* (1977) FLC ¶90-217; (1977) 29 FLR 46:** The husband and wife were lawfully married and had separated. The wife sought orders under Pt VIII of the Family Law Act 1975 adjusting the husband's legal interests in multiple assets held solely in his name. The husband argued a narrow reading of s 4's definition of "property". He submitted that the Family Court only had jurisdiction over assets that were **jointly owned** by both spouses, or assets the wife held a direct legal/equitable title to at separation. His core submission was that the assets was registered solely in the husband's name, purchased entirely from his separate earnings, fell outside the court's power under s 79. He contended s 79 only allowed redistribution of jointly-held matrimonial assets. The wife argued for a broad, purposive interpretation of s 4 and s 79, consistent with the Parliamentary intention to create a comprehensive regime for adjusting financial positions of separating spouses regardless of legal title. No dispute existed over the parties' contributions to the marriage; the sole legal question turned on the scope of the court's jurisdiction over sole-name assets.

- The Court dismissed the husband's appeal.

- The definition of "property" in s 4 of the *Family Law Act 1975 (Cth)* extends to **all assets to which either spouse is entitled, whether held solely or jointly, in possession or reversion**. Joint ownership is not a precondition for the asset to fall within the court's jurisdiction.

- Under s 79, the Family Court possesses broad discretionary power to make orders altering a party's legal or equitable interests in assets held solely in that party's name, provided the court undertakes the statutory assessment of contributions and future circumstances required under s 79(4) and s 75(2).

***Kennon v Spry* (2008) 238 CLR 366**: Husband established a trust with himself, the wife and other family members as beneficiaries. The husband was also the trustee. Under Cl 2 of the trust, the husband (trustee) may at any time vary the terms of this trust but not in such a manner as to increase in any way his rights under this trust to the beneficial enjoyment of the fund. When their relationship gets sour, the husband removed both himself and the wife as beneficiaries of the trust. Husband then only is a trustee. The husband later established 4 children's trust with him being the trustee as well. He then moved all capitals from the original trust to the children's trusts.

- **Issue 1:** The question is whether s 85A is to be applied in this case - s 85A(1) of the *Family Law Act* provided that: The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage. The wife sought to enforce the court order to set aside the children's trust and the instrument excluding her as the beneficiary. The husband submitted that the original trust predated the marriage and was neither an ante-nuptial nor a post-nuptial settlement and thus s 85A have no application. He also submitted that because the trusts include not only the parties of marriage as beneficiaries, but also other family members (siblings and their issues) and thus, the trust is not ante-nuptial or post-nuptial settlements.

    - The Court held that the purpose of s 85A was to extend Ct's power to property which didn't fall within s 79. Under s 85A, there is less direct connection required between the settlement and the marriage. The inclusion of other people doesn't necessarily deny the nuptial element of the settlement. The question is the extent to which the marriage in the proceeding should be related to the settlement.

    - S 85A ensure that where a previous arrangements cannot continue, the property is applied equitably to the benefit of the parties. Whether the disposition qualifies as a nuptial property depends on whether it has the purpose of benefiting parties to the marriage. s 85A also requires the Court to make orders by reference to parties' contribution.

- **Issue 2:** whether the trust asset is still a property of the parties. Court held that legal title to the trust asset coupled with the power of the trustee amounts to a marital property. Wife argued that it is, because so long as the husband remained to be the trustee, he would be free to distribute income to himself. On the other hand, the husband quoted *Ascot Investments Pty Led v Harper* and argued that neither party had the trust assets as their property, because they are objects of the trustee's power of appointment.

    - The Court held that the trust asset is a property because most properties are acquired during marriage; husband has legal title. He is the sole trustee and one of the beneficiaries, and he has control over the property; husband had no obligation to apply the property to any other or particular beneficiaries.

A **financial resource** is not presently owned property but is a source of future financial benefit or support. The distinction matters because property may enter the pool for adjustment, while a financial resource is usually relevant to the parties' future circumstances.

5.2 Discretion under Section 79

- ***Family Law Act 1975* (Cth) s 79:** the provision specified in the guide for alteration of property interests of parties to a marriage; use the version applicable to the dispute.
- Broad discretion permits individualised justice but can reduce predictability. The tension is visible in debates about whether property outcomes should be governed by clearer presumptions, structured principles, or guidelines.

ALRC, Family Law for the Future: An Inquiry into the Family Law System Chapter 6 The Case for Reforming the Division of Property

Current legal framework: Broad judicial discretion. Courts first identify legal/equitable titles, then adjust assets only if just and equitable under s 79 factors (contributions, future needs, parenting roles etc.). No fixed splitting formula, unlike New Zealand's equal-sharing presumption or community property regimes overseas.

Empirical findings: Most separating couples hold assets under $300,000 with few asset types. Low-asset groups struggle to reach settlements formally. Mothers receive an average 57% of assets; domestic violence and primary childcare impact allocation. Litigation fees are prohibitively high for ordinary families.

Core debate on discretionary vs prescriptive systems:

1. **Presumption-based rules:** Improve legal clarity and cut legal costs;
2. **Retain discretion:** Accommodate diverse family circumstances, avoid unfair outcomes for de facto couples and excessive complex exemptions.

Critical reform topics: Debts, bankruptcy, superannuation splitting, binding financial agreements, spousal maintenance, financial remedies for family violence victims.

Why Are Decisions on Family Property So Inconsistent?

Root structural causes of inconsistency:

1. The *Family Law Act 1975* lacks clear legislative objects or ranking of statutory decision-making factors

2. Misleading landmark precedents (Mallet, Shaw, Collins) distorted judicial interpretation of discretion rules
3. The Full Court of the Family Court fails to deliver unified doctrinal guidance for trial judges
4. Rare High Court appeals create minimal authoritative corrective rulings
5. Judges hold an overly broad, constitutionally questionable view of their discretionary power

Practical harms identified:

- Ordinary separating parties cannot reliably forecast settlement outcomes
- High legal costs from drawn-out litigation over ambiguous legal standards
- Uneven financial justice across similar separation cases

Implicit policy implication: The unstructured, wide discretionary framework requires statutory clarification to restore consistency and improve access to justice.

5.3 Basic Methodology

The cases commonly associated with the methodology include *Hickey*, *Stanford*, *Bevan*, *Chancellor & McCoy*, *Omancini*, and *Kane*. A disciplined analysis asks:

1. **What are the parties' existing legal and equitable interests?** Identify and value assets, liabilities, and superannuation; resolve disputes over ownership and classification.
2. **Is it just and equitable to make an order altering those interests? *Stanford*** makes this a genuine threshold inquiry, not an automatic assumption. ***Bevan*** applies *Stanford*, but note that it would be a fundamental misunderstanding to read Stanford as suggesting that the matters referred to in s79(4) should be ignored in coming to that decision. ***Chancellor v McCoy*** also note that where parties kept finances entirely separate during the marriage, it might not be just and equitable to make an adjustment.
3. **What contributions did each party make?** Consider financial, non-financial, homemaker, parenting, and welfare contributions across the relationship and, where relevant, before and after it. See ***Topic 6. Property Part II***. Note that successful marital investment conduct and asset growth from routine spousal financial management do not constitute special legal contributions and the outdated "special skills" doctrine no longer applies (***Kane***)

4. **What prospective or adjustment factors apply?** Consider matters such as age, health, income, earning capacity, care of children, financial resources, and other relevant circumstances under the applicable statutory framework.

5. **Is the proposed outcome just and equitable overall?** Stand back and evaluate the practical effect of the orders.

The process is evaluative rather than mathematically exact. Percentages are a means of expressing the outcome, not a substitute for reasoning.

Key Authorities

***Hickey and Hickey and Attorney-General for the Commonwealth (Intervenor)* (2003) FLC ¶93-143:**

Facts: The separated husband and wife negotiated a binding consent property settlement, agreeing on fixed lump-sum asset division:

- Husband: $104,000 from the marital asset pool
- Wife: $174,000 from the marital asset pool

Both parties proposed adding a catch-all declaratory clause into the formal consent orders, which stated:

> *Except as otherwise provided in these orders, the husband and the wife each be declared the sole legal and beneficial owners of all items of property or resource including money, motor vehicles, insurances, equities, superannuation entitlements and personal effects currently in the possession or control of each of them respectively.*

Individual superannuation holdings were kept entirely separate (no transfer/split between spouses):

- Wife's superannuation interest: $25,000
- Husband's superannuation interest: $10,600

The primary judge at first instance refused to include the requested catch-all declaration within the consent orders. The parties appealed to the Full Court to resolve three discrete legal questions about declaratory orders and superannuation rules.

Judgment: Appeal allowed; the primary judge's refusal to include the catch-all declaratory clause was set aside. Consent orders remitted to the trial court with direction to incorporate the full residual ownership declaration (including superannuation) as requested by the parties.