

FAMILY LAW EXAM NOTES

PRELIMINARY STEPS

- Consider whether they are a married or de facto couple (s90SB for de factos) and which provisions will apply for property settlement (s79(1) or s90SM)

TIME FRAME ISSUE

- Determine any time frame issued (proceedings must be brought 1 year after divorce, or 2 years after end of de facto relationship) (s44)
- NOTE: If couple wants to apply for divorce, then must be separated for 1 year- s48(1)
- NOTE: If married couple has gotten a divorce, they can bring proceedings whenever they wish (no time limit)
- NOTE: Couple do not need to be divorced to initiate proceedings

ALTERNATIVE DISPUTE RESOLUTION

- Suggest that couple would be wise to consider options for settling without a full hearing (esp if there is not a significant property pool) (Rule 4.01 and Schedule 1 of FCFCR Rules)
- E.g. BINDING FINANCIAL AGREEMENT (s90C) or consent order.

NOTE DISCLOSURE REQUIREMENTS

- Full financial disclosure required for either- Rule 6 of FCFCR Rules

STANFORD

Note that Court will follow the approach in **Stanford (2012)** in property settlement proceedings.

I.e. The Family Court has jurisdiction as the proceedings constitute a 'matrimonial cause' pursuant to s 4(1)(ca) of the FLA. The proceedings are between parties to a marriage with respect to their property and are in relation to the dissolution of that marriage.

s79(1) indicates that the court may make such orders as it considers necessary and appropriate for a formerly married couple. However, s79(2) confirms that the court cannot make orders unless it is satisfied that it is just and equitable to do so (s79(2)).

STANFORD STEPS

STEP 1: DETERMINE THE LEGAL AND EQUITABLE PROPERTY

STEP 2: IS IT JUST AND EQUITABLE TO MAKE AN ORDER (S79(2) / S90SM)

STEP 3: IF YES, LOOK TO CONTRIBUTIONS (SS79(4)(a)-(c) and ss90SM(4)(d)-(g))

STEP 4: CONSIDER ADDITIONAL MATTERS IN SS79(4)(d)-(g) / 90SM (4)(d)-(g), INCLUDING S79(2) AND S90SF(3)

STEP 5: RESOLVE, IN THE CIRCUMSTANCES (INCLUDING SUPER) WHAT ORDER WOULD BE JUST AND EQUITABLE (s79(2) / s90SM(3))

DEFINITION OF DE FACTO

S90SB FLA

- (a) Relationship for at least 2 years; or
- (b) There is a child of the relationship;
- (c) The party made significant contributions (i), and a serious injustice would occur if order/declaration not made (ii)

TIME LIMITS (in which you must start application for proceedings)

- **s44 FLA**- No proceedings can be instituted 12 months after divorce or 2 years after the end of a de facto relationship, **except** if:
 - **44(4)(a)** hardship would result; or
 - **44(4)(b)** applicant for spousal maintenance would have been unable to support self without an ITPAB 12 months after divorce

NOTE: Can be separated for years prior to divorce
Hardship test is broad = Richardson

FAMILY DISPUTE RESOLUTION / SETTLEMENT

MANDATORY DISPUTE RESOLUTION

- Before seeking an order to obtain parenting order, must seek DR
- Exception- **s60I(9)**
 - Child abuse, family violence or risk of either
 - Urgency
 - Unable to participate effectively

ROLE OF THE COURT IN FDR

- **S13C**- Court may at any stage in the proceedings make orders:
 - One or more of the parties attend a family counsellor
 - Parties attend FDR

MODULE 4: RESOLUTION / SETTLEMENT OF PROPERTY MATTERS AND LEGISLATIVE FRAMEWORK FOR PROPERTY DIVISION (Week 7)

S79 / 90SM FLA 1975 – Alteration of property interests

MARITAL PROVISION

S79(1) In property settlement proceedings, **the court may make such order as it considers appropriate:**

- (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them – **altering the interests of the parties to the marriage in the property...**

DE FACTO PROVISION

s90SM(1) In property settlement proceedings after the breakdown of a de facto relationship, **the court may make such order as it considers appropriate:**

- (a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them – **altering the interests of the parties to the de facto relationship in the property...**

THRESHOLD TEST FOR DE FACTO PROPERTY (s90SB)– Court will make an order in relation to property for a de facto couple under s90SE, 90SG or 90SM, or a declaration under 90SL, **ONLY if the court is satisfied:**

- (a) that the period, or the total of the periods, **of the de facto relationship is at least 2 years**; or
- (b) that **there is a child of the de facto relationship**; or

- (c) that
- (i) the party to the de facto relationship who applies for the order or declaration **made substantial contributions** of a kind mentioned in paragraph **90SM(4)(a)** **(financial contributions made to de facto relationship)** **(b) (non-financial contribution made to the de facto relationship or a child of the de facto relationship)** **or (c) (contribution made in the capacity of homemaker or parent);** and
 - (ii) failure to make the order or declaration would result in serious injustice to the applicant...

PROCEEDINGS

- **CONSENT ORDERS** - Orders of the Court
- Made under **s79 / 90SM**
- FCFCOA (FL) Rules – 10.2(1) – How to apply – Orally during hearing; by lodging draft consent order; by tendering draft to judicial officer during court hearing OR if no case afoot, by filing application

WHETHER A FINANCIAL AGREEMENT IS BINDING

- **ss90B, C, D** – Depending on whether arrangement was agreed to before, during or after marriage
- Whether financial agreement can be set aside **s90K**

FINANCIAL AGREEMENTS / PRENUPS

- Can be pre, during or after relationship
- After separation – usually only to avoid spousal maintenance as otherwise would usually use consent order

STEP 1: IS THERE A FINANCIAL AGREEMENT?

Whether an agreement is a Financial Agreement (**ss90B** **(financial agreements before marriage)**, **C** **(during marriage)**, **D** **(after divorce order made)**)

- The agreement is in writing;
- Parties not party to another financial agreement covering same matters;
- The agreement stated to be made under relevant FLA section;
- Agreement relates how property / resources to be dealt with upon breakdown;
- Or deals with maintenance (whether marriage broken down or not)

STEP 2: IS THE FINANCIAL AGREEMENT BINDING BETWEEN PARTIES UNDER CONTRACT/EQUITY?

VALIDITY / ENFORCEABILITY AND EFFECT OF FINANCIAL AGREEMENTS AND TERMINATION AGREEMENTS – **S90KA**

S90KA - The question of validity/ enforceability is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts

STEP 3: WHETHER FINANCIAL AGREEMENT CAN BE SET ASIDE