MILLER DU TOIT CLOETE INC AND UNIVERSITY OF THE WESTERN CAPE

27TH ANNUAL FAMILY LAW CONFERENCE

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PROPERTY SETTLEMENT IN AUSTRALIA

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PROPERTY SETTLEMENT IN AUSTRALIA

This is very much a potted guide to property settlement in Australia.

I have largely kept out case law, although we have extensive case law. Part of the challenge in being a family lawyer in Australia is that a vast number of family law cases are reported on Austlii. It is almost impossible to keep up with the torrent.

TWO ACTS

There are, in essence, two Acts that govern property settlement and spousal maintenance in Australia:

- *Family Law Act 1975* (Cth).
- *Family Court Act 1997* (WA).

The *Family Law Act* covers *all* property settlement and spousal maintenance that arises in every State and Territory other than Western Australia. The Act also covers married couples in Western Australia. The *Family Court Act 1997* (WA) concerns itself with de facto property cases and spousal maintenance in Western Australia only.

Under Australia's complex constitutional requirements, the Commonwealth Parliament has power in effect to legislate as to property settlement and spousal maintenance of married couples, but not de facto couples. All the States (except Western Australia) have referred their powers to legislate about de facto property settlements and spousal maintenance to the Commonwealth. The result is that de facto couples in Western Australia have to have recourse to the State Act, not the Commonwealth Act. Most family lawyers in Australia never dealt with the WA Act, but spend their lives concerned with the *Family Law Act 1975* (Cth) only.

WHO IS COVERED?

Anyone who has been married or in a de facto relationship. Australia does not discriminate on the basis of sexuality. If an overseas marriage is polygamous, for example, while that marriage would not be recognised in Australia for the purposes of the *Marriage Act 1961* (Cth), it is recognised for the purposes of property settlement and spousal maintenance.

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NOT PART OF THE DIVORCE

Unlike much of the world, an application for property settlement is a separate application to an application for divorce.

Divorce in Australia is no fault. The basic requirement is that the parties have separated for a year. Where Australia has jurisdiction for property settlement, a *forum non conveniens* issue may arise relating to that or principal relief. Assuming that the basis of jurisdiction arises, Australia will retain jurisdiction unless it is a clearly unsuitable jurisdiction, according to the High Court.

TIME LIMITS

For married couples, an application for property settlement or spousal maintenance must be brought within one year of divorce, or such further time as allowed by leave. The obvious difficulty with this time limit is that if the parties never divorce, the time limit never runs. In one case I had many years ago, the parties had not divorced 13 years after they had separated, with the result that the husband then brought a successful claim against the wife for property settlement.

By contrast, de facto couples have a time period of two years post-separation. This, by its nature, is a much harder and faster deadline than may occur with married couples. There has been, as a result, a number of decided cases about when the de facto relationship broke down, so that as to when the time limit commenced.

Similarly, there have been many disputes about whether or not there is a de facto relationship. What is a de facto relationship is a question of fact to be determined by the Court, and that parties need not live together for there to be a finding that it exists.

Australia is a common law jurisdiction. The implications of that include that lawyers are officers of the Court, and that if orders are not made as to property settlement, then the underlying common law and statutory regime applies to the property in question, for example, the rules as to when a joint tenancy is severed.

In one case many years ago, the husband and wife reached an in-principle agreement signed by them, which any family lawyer would have said was not enforceable in any way (as it was not in the form of the prescribed agreement under the *Family Law Act 1975*, or orders made under that Act). Nevertheless, by conduct and agreement, they had severed the joint tenancy. It is no surprise to learn that the widow had sought all of the home following the husband's death, but the result was that she was only entitled to her half interest in common[2].

SECTION 79

An application for property settlement under the *Family Law Act 1975* (Cth) is necessarily brought under section 79 (or for de facto couples under s.90SM). In essence, there are two types of applications that can be brought:

- An application for a declaration as to the ownership of property, under section 78 (or s.90SN), or

[2] *Sprott v Harper* [2000] QCA 391.

- An application for property settlement i.e. adjustment of existing ownership of property, under section 79.

JUST AND EQUITABLE

The High Court has told us in *Stanford*[3] that to undertake a property settlement exercise under section 79 is a holistic one. The first step is to make a determination about whether it is just and equitable to undertake a property settlement, as is required under section 79(2). In most cases, it will be just and equitable to do so.

However, it is not always so. For example, in a case some years ago involving a lesbian couple who had been together for many years, but had always kept separate finances, the Court determined that it was not just and equitable for there to be a property settlement[4].

DETERMINING THE PROPERTY POOL

Assuming that the court then determines that it is just and equitable for it to embark upon the process of considering making orders as to property settlement, the next step is to determine what is the property pool i.e. a balance sheet. The High Court said in Stanford that this was an exercise of determining the legal and equitable ownership in property. The exercise necessarily requires also determining the liabilities that are owed.

Put simply, it is necessary to determine what is the cake that is to be cut.

Overseas property is typically taken into account. This may be included, depending on the nature of the property, within the asset pool, or a more nebulous concept, that of a financial resource. A financial resource is something much like a cloud, in that the party has control of it, or appears to have control of it, and it may or may not have a value. An overseas home for example may be treated as property or a financial resource. If the latter, usually a value is able to be attributed to it.

An overseas pension fund, however, would typically be treated as a financial resource. It is a question of fact whether it can be valued.

Many arguments occur between the lawyers for parties about what is the size of the pool. It seems that much of a family lawyer's life is seeking to prove the size of the pool. Thankfully, there is a practice, enforced if need be by the court, to obtain joint valuations and joint experts about such things as the interest to the party of shares held in a family company. That practice developed from the prior practice of one expert (typically called by the wife) who would ascribe a large value to the other party's shareholding in a family company (adopting, for example, a helpful cap rate and minimising any discount from the husband holding a minority interest), contrasted with the other expert (typically called by the wife), who came to the opposite conclusion.

The Court has long eschewed being locked into the formal arrangements about the incorporation of a company and the settlement of a trust. The Court has long looked to the reality. For example, whoever has the power to sack the corporate trustee of the family trust has control over that entity. It is not uncommon that the entity is seen to be the alter ego of the

[3] [2012] HCA 52.
[4] *Chancellor & McCoy* [2016] FamCAFC 256.

party in question. Less commonly, the Court might find that what is presented as reality is in reality a mirage- or as it is called, a sham.[5]

It should be assumed that in Australia all the property of the parties is included in the pool, unless there is some unique factor of law, or fact to do with the item in question, that excludes it.

There may be a dispute about:

- What was owned at separation.
- What is the size of the pool as at the date of hearing (which is the size of the pool to be determined by the court).
- Whether notional addbacks should be added to the ledger of one of the parties i.e. for example, where there has been payment out of joint funds for legal fees, or whether there has been wastage.
- Whether on the other hand there should not be addbacks because the payments are for legitimate purposes. Parties after all do not put their lives on hold because there is a property case floating around.

Sometimes it is considered appropriate that there are two pools prepared, namely, because certain property was treated differently by the parties – that should be in its own pool. It is at this point to emphasise that part of the complexity in undertaking property settlement in Australia is that it is a discretionary regime. This is seen in the next three factors:

- An assessment of contributions of the parties.
- Future factors.
- Making an order that is just and equitable (yet again returning to this).

CONTRIBUTIONS

Section 79(4) dictates that an assessment is carried out of the contributions of each of the parties to the conservation acquisition and maintenance of the property of the parties, both direct and indirect, and as to the family.

There are then disputes about:

1. What is the value to be attributed to a certain contribution. Typically, financial contributions, particularly those of initial contributions that make up a large part of the pool, are given greater weightage. These can be eroded over time, given the contributions of the other party over that time. However, the High Court has long held that an assessment needs to be carried out of the individual contributions as part of a weighing up of and balancing of the various different types of contributions. In the traditional marriage where the husband goes out to work and the wife looks after the children, her contributions are nevertheless significant.

[5] For an example of a case about trusts, see *Kennon v Spry* [2008] HCA 56.

2. If there are payments by members of one of the parties' family, for example, a payment by the husband's parents to the husband, often there is a contention about whether that payment was a loan (which therefore is a debt in the balance sheet), or whether that was an indirect contribution made by that party. Either outcome may have a significant difference as to what each of the parties may receive by way of property settlement. If it is a loan which remains unpaid, has the limitation period expired?

It has long been held as to wastage, for example, that that wastage by a party will be visited upon that party, although, this is again, subject to general discretionary issues[6].

It has long been held that family violence can be taken into account, notwithstanding that Australian is a no fault jurisdiction as to divorce, where the impact of that conduct has adversely affected the contributions of the other party[7]. In running such a case, it can be difficult to prove the impact on contributions, or difficult to properly particularise the domestic violence. Often, the exercise of having to prove these matters is such that raising that issue becomes a marginal one in terms of the resources that need to be brought to bear compared to the likely outcome.

In 2024 amendments were enacted to the *Family Law Act*. Section 79 has been amended to take into account liabilities of the parties, wastage issues and family violence impact as to contributions.

The explanation for these amendments has been to make it easier for self-represented litigants to understand the Act simply by reading it, rather than having to delve through case law.

A further amendment is the addition of section 79(3) which is to allow orders to be made as to companion animals – for which the usual requirements do not apply.

In my other paper for this conference, I deal with resolving embryo disputes. A 2024 case[8] determined that embryos are property for the purposes of the *Family Law Act 1975* (Cth). By law, embryos are prohibited from being sold, and therefore have no monetary value.

FUTURE FACTORS

Once there has been an assessment of contributions, then the next assessment is of future factors. This is to see whether there should be some balancing up or adjustment so as to ensure that there is a just and equitable outcome. Factors include the care of children, child support arrangements, health, and income and earning capacity of the parties.

There is a clear explanation about why this provision, currently under section 75(2). exists. If there were to be a husband and wife who had been together for many years and they had started with nothing and slowly accumulated property, the temptation might be to make an equal division of property. On face value, that would be fair. However, in the traditional marriage, the husband has continued to work and been promoted, with a substantial income. Admittedly he is paying child support, which may be substantial.

However, the wife ceased work or went back to poorer paying part-time work, with much less ability to be promoted and have higher income. This was because she has had the care of the children. Sometimes the contrast is stark between doctors, for example, who met while at

[6] *Kowaliw & Kowaliw* [1981] FamCA 70; (1981) FLC 91-092.
[7] *Kennon v Kennon* [1997] FamCA 27.
[8] *Leena & Leena* [2024] FedCFamC1F 135.

medical school, fell in love and married. His career (and income) often takes off, but hers languish behind.

Sadly, research continues to be published which shows that the burden of undertaking work at home, such as housekeeping and the care of children, still falls primarily on the shoulders of wives, rather than equally.

In that scenario, if there were to be an equal division, the wife will be much worse off, and result in what we have seen in Australia of middle aged and older women being driven to poverty (or as has been put by academics, the feminisation of poverty).

That consideration of future factors may result in no adjustment or a significant adjustment.

JUST AND EQUITABLE

The last step, which again the High Court in *Stanford* said is a holistic exercise, is to make sure that under section 79(2) that the orders are just and equitable.

I said above that Australia has a discretionary regime under the *Family Law Act*. A challenge under the Act is to assess the right range of contributions, future factors and then the final outcome. There can be plenty of room for differences as to the range to arise.

Many years ago I took part in a workshop. An experienced family lawyer stood up the front and went through a series of scenarios, asking the audience as to what is the likely outcome that the court will rule. Each table had about 10 practitioners, ranging from trainees to very senior practitioners. At each table there was often vigorous disagreement between practitioners as to the likely outcome.

I felt quite smug that with each table I scored about in the middle of the range. What we quickly discovered was that sometimes we got it right. Sometimes as a matter of discretion a judge or the Full Court came out with a completely different outcome. Usually, there was a range between low and high of about 15%.

The Court has told parties and the profession to focus on the actual outcome, not the percentages, in order to determine what is just and equitable.

For the property to be divided, it does not need to exist at the time that the parties were together. A case many years ago, *Farmer & Bramley* [2000] FamCA 1615, for example, was such a case. The parties led a very hard scrabble life for 23 years together. He was violent to her and had a drug problem.

They had children. When they separated, they in effect had no assets. He won A$5 million in the lottery. She received 15% of the winnings, with 12.5% on contributions and 2.5% for future factors.

SUPER SPLITTING

For a generation now, it has been fairly straightforward to have orders made to split superannuation (our name for retirement savings).

There are two basic types of funds: accumulation funds (which operate like a bank account) and the rarer but often quite deep pocketed defined benefit funds. This is where typically an

older type fund, such as with some Government funds, where the member receives payment upon retirement based on some formula. Governments have tried to move public servants over to contribution-type funds because these funds are particularly expensive for the taxpayer. They are often very generous to members.

The difference between the two funds is that with an accumulation fund, the member owns the interest in the fund. With a defined benefit fund, they don't. The money is owned typically by the corporation or Government in question. Therefore, there are difficult constitutional considerations as to being able to split a defined benefit fund.

It is common to have parties with a self-managed super fund. These are typically accumulation funds in nature (although I saw one years ago that was a defined benefit fund). These can be particularly difficult to deal with, as both parties are the directors of the trustee super fund, and the assets are often illiquid, such as interests in real estate. An example of the challenges of such a case can be seen here[9].

Splitting orders are generally not available for de facto couples under the *Family Court Act 1997* (WA). De facto couples in Western Australia as to super are where married couples were 25 years ago- generally stuck not being able to split, and looking to adjust other property, or categories where splitting could be ordered, based on the type of superannuation interest.

SPOUSAL MAINTENANCE

Spousal maintenance may also be payable. The first requirement is that the party is unable to maintain themselves. If they meet that threshold, then they need to prove that the other party has the capacity to pay. The relevant factors of any spousal maintenance claim are under section 75(2).

Because of the confusion between future factors (which are currently under section 75(2)) by reference from section 79(4)(e)), being also the factors used for spousal maintenance, the 2024 amendments, to take effect in June will now, in essence, repeat the section 75(2) factors under a new section 79(5). Therefore, for a property settlement it will be a case of considering section 79 without having to refer to 75(2).

The spousal maintenance application is considered separately.

Spousal maintenance applications are comparatively rare, given the relatively generous nature of child support in Australia and the adjustments for future factors for property settlement. However, periodic spousal maintenance is ordered from time to time (typically on an interim basis). There is a requirement to end the financial relationship between the parties. Sometimes there is a further factor with property settlement, which is to make an order as to lump sum spousal maintenance. This occurs rarely in practice. If the same factors are being used for spousal maintenance and for property settlement, typically they will be relied upon for property settlement, with no spousal maintenance order.

For the last generation there has been a requirement under an order as to a lump sum, which might be property settlement and spousal maintenance, to differentiate between the two. The reason to do so is because if a party is in receipt of social security benefits (which we call Centrelink) which are means tested, then the Commonwealth Government in making any

[9] *Barre & Barre* [2021] FamCA 101.

payments to that applicant can reduce payments to the recipient, based on the amount of spousal maintenance received.

DISCLOSURE

On the way through, there is an obligation of parties to engage in full and frank disclosure in a timely manner. This obligation is contained in case law and in the rules of court, although from June, is in the Act. The obligation has been described many years ago by a judge as a case of show and tell, not hide and seek.

Nevertheless, much time and effort is often put into trying to find out what the asset pool is when the other party is believed not to have engaged in full and frank disclosure. Often, consideration needs to be given as to whether the costs and effort to be incurred in chasing down every rabbit hole about alleged lack of disclosure is proportionate. Much of the time it is not.

RESOLUTION OF PROPERTY SETTLEMENT CLAIMS

There are four ways of resolving a property settlement claim:

1. Informally.

2. By the making of orders, either consent orders or otherwise.

3. Arbitration.

4. Binding financial agreements/superannuation agreements.

Informal Resolution

Generally, for obvious reasons, this is not recommended. Clearly, if the matter is resolved informally, the other party may be able to bring a claim – either as to property settlement or spousal maintenance, and ask for more. There is an added risk that if there is a transfer of property, there could be a payment of substantial capital gains tax or stamp duty arising from that transfer, for which there might otherwise have been an exemption as a result of orders being made.

Arbitration

Arbitration has slowly taken off in Australia. Arbitration cannot occur without the consent of the parties. Once a determination has been made by an arbitrator, an order is made by the court reflecting that determination.

Orders – by consent or otherwise

Most property matters are resolved, typically by consent orders. These are usually made in chambers by Registrars.

Mediation is now the most common way of resolving matters. There is an expectation under the Act and by the court that parties engage in mediation. There are carveouts where, for example, there has been family violence. However, family violence allegations are so

prevalent that it is common, other than in the most exceptional cases, that mediation nevertheless will occur as to property settlement in cases involving family violence allegations.

Although settlement rates vary across the country, there are often high rates of resolution of property matters through mediation. With mediators in my home town of Brisbane, for example, the settlement rate is about 80%.

Binding Financial Agreements/Superannuation Agreements

It is common for parties to enter into a binding financial agreement. This can be a prenup i.e. entered into before the marriage or de facto relationship, or during the relationship, or after it has ended. The costs of undertaking a BFA tends to be higher than that of doing a consent order. This is because the parties are contracting out of the Act, so there are a series of matters that lawyers need to ensure are attended to, to enable the agreement to be binding and not be set aside.

WHAT DOES THE FUTURE HOLD?

I have been undertaking property settlements for clients for about the last 40 years. As one longtime colleague recently said to me, there has been constant fiddling by Parliament over the years as to the processes and factors to be taken into account, but ultimately no matter how many changes are made, parties who want to act badly will continue to act badly.

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