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Financial Relief under the Family Law Act 1975

Spousal Maintenance, Declarations and Property Adjustment

Spousal Maintenance

- Usually interim until trial
- Usually periodic
- ▶ May be lump-sum
- Capacity of payer ("reasonably able to pay")
- ▶ Need of payee ("unable to support herself or himself adequately")
- ► No presumption of standard of living
- Reasonable in the circumstances

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Declarations

- ► Party's legal/equitable interests
- Incidental orders
- May protect against third-party claim
- ▶ Ineffective if third party has existing interest

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Property Settlement

- ▶ Broad discretionary power
- ▶ Just and equitable
- ▶ Property available for division
- ▶ Retrospective assessment
- Prospective assessment

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Just and Equitable

- Underlying requirement for fairness
- ▶ Court may refuse to make consent Orders
- ▶ Threshold question: just and equitable to make order adjusting property?
- ▶ Threshold met in almost all cases

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What is Property under the *FLA*?

- ▶ Recursive definition
- Very wide interpretation
- ▶ Limited to available / existing property
- Includes:
 - ▶ Real
 - Personal
 - ► Choses-in-action
 - ► Trust interests (some)
 - ▶ Partnership Interests

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Trust Interests

- ▶ The **Doe Family Trust** is a discretionary family trust.
- ▶ Jane is one of three specified beneficiaries.
- ▶ Jane has received substantial distributions in each of the past three years.
- ▶ In prior years, **Jane** occasionally received nominal distributions.
- ▶ Does Jane's interest in the Doe Family Trust constitute property?

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Trust Interests

- Question of control
 - ▶ Power of appointment
 - ▶ Eligibility to receive distribution
- ▶ If party controls, trust interest usually treated as property
- ▶ In absence of control, trust interest usually treated as financial resource

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(Potential) Inheritance

- ▶ **John** is 93 years old. He has an aggressive form of cancer.
- ▶ He is pain-free, and he has declined treatment. He has 1 6 months to live.
- ▶ His will provides that his son, **David** is to inherit the family home.
- Does the home constitute property in David's hands?
- ▶ What if **John** had late-stage Alzheimers?
- ▶ What if **John** were in palliative care?

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(Potential) Inheritance

- Ultimately about degree of certainty
- Question of testamentary capacity
- Mere expectancy is not property

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When Court Can Make Orders Married Couples

- ▶ Parties must have married
- ▶ Application no later than one year after marriage dissolved
- ▶ Application out of time with leave
- No requirement that marriage has broken down

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When Court Can Make Orders De Facto Couples

- ▶ De facto relationship
- Relationship broken down
- Two-year time limit
- Geographical requirements
- Either:
 - ► Two-year duration
 - ► Child
 - ▶ Significant contribution / injustice
 - ► Registered relationship

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De Facto Relationship?

- Heterosexual or homosexual
- Not married
- ▶ Not related by family
- ▶ Couple living together of genuine domestic basis
- ▶ FLA sets out circumstances to be considered.
- None requiredl; none determinative

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Ousting Jurisdiction

- ► Financial Agreement
- Property, maintenance and ancillary matters
- ▶ Marriage or de facto
- Before
- During
- After

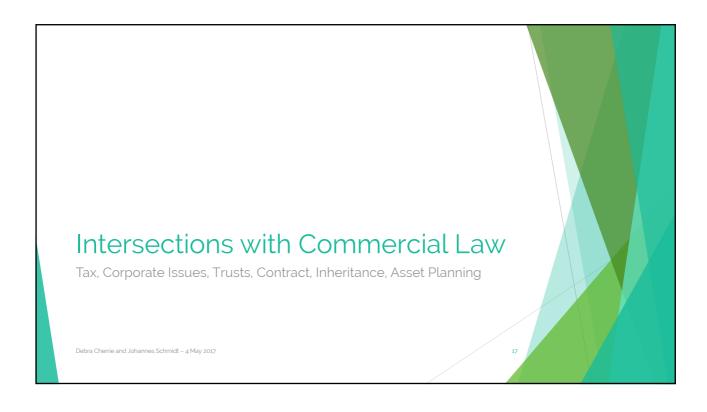
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Valuation

- ▶ Procedure depends on Court
- FCΔ
 - ► Expert evidence by single expert
 - ▶ Leave to adduce evidence of adversarial expert
- ▶ FCC
 - ▶ May engage separate experts
 - ▶ May agree on joint expert

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Corporate Issues

- Family Law Courts have jurisdiction under Corporations Act 2001
- Directors' Duties third parties
- ▶ Obtaining company records
- ▶ Appointing receivers

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Trusts

- Family Court's view of trusts and beneficiary intervention
- ▶ Trust deed advice
- Establishing control
- ▶ Family Arrangement documents and Deeds of Wishes
- ▶ Family trust elections

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Contractual and Equitable Principles • When Financial Agreements may be: • Void • Voidable • Unenforceable

Inheritance Entitlements Remainderman interests Living testators who have lost capacity – Gau v Gav [2014] QCA 308 Wills Act 1997 s 21 Debra Cherie and Johannes Schmidt – 4 May 2017

Asset Planning Financial Agreements

- Oust jurisdiction
- ▶ Maximum available asset protection for relationship / marriage breakdown
- Family charters and trust deed provisions to mandate Financial Agreements
- Value in estate planning
 - ▶ differences between financial agreements for married and de facto parties
- ► Always check for existence of Financial Agreement before implementing any change of ownership or structure for estate planning purposes
- ▶ Evidentiary value of pre-cohabitation agreements

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Asset Planning Orders in an Intact Marriage

- to change trust test individuals
- ▶ to take advantage of roll over relief
- ▶ to implement superannuation arrangements

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