




# Family Law

Fundamentals and Intersections with Commercial Law

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# Financial Relief under the *Family Law Act 1975*

Spousal Maintenance, Declarations and Property Adjustment

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## 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 required; 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
- ▶ FCA
  - ▶ 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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## Intersections with Commercial Law

Tax, Corporate Issues, Trusts, Contract, Inheritance, Asset Planning

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## Taxation and Duty

- ▶ CGT roll-over relief
  - ▶ *ITAA 1997* s 126.5
  - ▶ *Sandini Pty Ltd & Commissioner of Taxation* [2017] FCA 287
- ▶ Main Residence issues – *ITAA 1997* s 118.178
- ▶ Foreign resident capital gains exemptions
- ▶ Child Support Trusts – *ITAA 1936* s 102AG
- ▶ Other
  - ▶ Deemed dividends
  - ▶ GST
  - ▶ Stamp duty

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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

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## Inheritance Entitlements

- ▶ Remainderman interests
- ▶ Living testators who have lost capacity – *Gau v Gav* [2014] QCA 308
- ▶ *Wills Act 1997* s 21

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## 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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