ISSUES IN COMPLEX FINANCIAL PROCEEDINGS

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1. Involvement of third parties in financial proceedings

1.1 In the majority of cases the fact that jurisdiction is exercised *in personam* means that it will be unnecessary for financial proceedings (pursuant to Part VIII or Part VIIIAB of the *Family Law Act 1975* (Cth) ("the Act")) to involve any party other than a party to the subject marriage or de facto relationship. Orders can usually be made requiring the parties to exercise their powers to deal with property held in, for example, their family company or trust, without joining another entity as a party to the proceedings.

1.2 However, an increasingly common feature of property settlement litigation, consequent upon intermingling of financial affairs between spouses and third parties (often extended family members) is the involvement of non-spouse (or third) parties in financial proceedings. Almost invariably the involvement of third parties complicates the proceedings.

1.3 Sometimes a third party will elect to join financial proceedings as a party pursuant to an entitlement to so do. For example, each of s 79(10) (and s 90SM(10) in the case of de facto relationships) respectively expressly identify those entitled to become a party to proceedings in which an order under the section is applied for as including:

- A creditor of a party to the proceedings if the creditor may not be able to recover the debt if the order were made;
- A person who is a party to a de facto relationship (or marriage) with a party and who has applied, or could apply, for an order under Part VIIIAB (or s 79 or s78 in relation to marriage);
- A person who is a party to a Part VIIIAB financial agreement with (a party);
- Any other person whose interest would be affected by the making of the order.

[1] We gratefully acknowledge the assistance provided by reference to Michael Kearney KC's paper "Beyond the spouse: Third Parties and the Family Law Act".

1.4 More commonly, it will be necessary for a spouse party to give consideration for the need to join a third party to the proceedings. Consideration of the joinder to proceedings of a third party necessarily involves:

(a) Determination of the orders to be sought – is it necessary to seek orders directly affecting the existing rights or interests of a third party?

(b) Is involvement of the third party as a party to the litigation necessary for the Court to determine all issues in dispute?

(c) Does the Court have jurisdiction to make the orders sought against the third party?

2. Necessary parties

2.1 Rule 3.01 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* provides as follows:

3.01 Necessary parties

A person whose rights may be directly affected by an issue in a proceeding, and whose participation as a party is necessary for the court to determine all issues in dispute in the proceeding, must be included as a party to the case.

Example: if a party seeks an order of a kind mentioned in s 90AE or 90AF of the Act, a third party who will be bound by the order must be joined as a respondent to the proceeding.

2.2 Warnick J, sitting as a single Judge constituting the Full Court in *Wayne & Dillon and Anor* [2008] FamCAFC 204 ("Wayne & Dillon") considered the meaning of "necessary" under the former equivalent rule of the *Family Law Rules 2004* which provided as follows:

> *A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.*

2.3 The scope of the need for joinder was expressed by Warnick J as follows (at [11]):

> *…It seems plain enough that under the rule joinder could be permitted even though no order was sought against a third person. A third person might be affected by an order though not directly the subject of it and/or it might be*

discernable that findings upon which an order is based bind a third person and so in either instance that third person should be party to the proceedings.

2.4 At [17] Warnick J referred to the need for an applicant for joinder to set out the nature of the claim and the basis of it and commencing at [18] stated:

> *18. The word "necessary" … must mean something more than "useful" or "expeditious". In my view, if there are available alternative means to joinder to the substantive proceedings, of obtaining from a third person or someone already a party what is needed to allow an applicant for joinder to establish an identified "case", joinder is unlikely to be "necessary".*
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> *19. However, if a cause of action, recognisable at law, against a "third person" is particularised, then it is at least highly likely that joinder will be "necessary for the court to completely and finally determine all matters in dispute…*

2.5 It will be apparent that who is a "necessary" party will be driven by the issues joined in the proceedings and the relief sought and whether either resolution of the issues, or the relief sought, directly affects a third party. In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd; Walker Corporation Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, the High Court stated:

> *131. Walker Corporation submitted that where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined. That submission is correct…*

2.6 Clearly then, when orders are sought which, if made, would directly affect the rights or liabilities of a non-party the non-party is a necessary party and must be joined to the proceedings. It may be necessary to join a third party having regard to the potential need to enforce orders in the event of default (or demise) of a spouse party.

2.7 As is also clear, it is necessary that the cause of action, or bases for relief claimed against the third party, be clearly articulated so that the basis for joinder can be readily established.

2.8 In some cases there is a need to observe the distinction between a non-party being a necessary **witness** as distinct from a necessary party to the proceedings. It is

neither “necessary” nor appropriate to join as a party a non-party whose involvement does not go beyond being a necessary provider of evidence.

3. Pleadings

3.1 In *B Pty Ltd and Ors v K and Anor* (2008) FLC 93-380 (a case referred to in *Wayne & Dillon*) the Full Court considered an appeal from orders allowing the joinder of multiple third parties as respondents. In that appeal the Full Court considered both the need for there to be a pleading of some kind where a claim against a third party is to be mounted; and the sufficiency of particulars to support joinder of a third party. Commencing at [43] the Full Court held:

> *43. In the usual run of applications for alteration of property interests or parenting orders, the fact of marriage or parenthood, accompanied, in respect of the former, by a history of contribution to and acquisition of, property, and in respect of the latter, evidence that relates to any aspect of a child's interests, is sufficient to make the existence of a "cause of action" apparent. No pleading in the traditional sense is required to identify further facts material to the cause.*
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> *44. However, the narrative or descriptive nature of evidence is often unsuited to formulate or particularise a cause of action against a third party. Something resembling a statement of claim will generally be necessary.*

3.2 At [52] the Full Court held:

> *We do not accept that it is proper to allow joinder of third parties merely upon the formulation of a paragraph in, or to be added to, an application, on the basis that at trial facts to support the application may be asserted and proved. Sufficient facts must be asserted to demonstrate that, if proved, the law arguably provides the relief sought.*

3.3 Recently in *Lund & Whittall* [2024] FedCFamC1F 271, Berman J considered a case where the wife sought to join the husband's company and his business party to the proceedings for the purpose of enforcement in the event the husband was in default of his obligations under final orders. The wife also sought orders for it to be declared that the husband's company and his business partner held certain property upon trust.

Berman J referred to a number of authorities and cited the following at [34]:

> *"In Gormley & Gormley [2023] FedCFamC1F 296, Campton J said as follows:-*

> 33. *In Hancock Family Memorial Foundation Pty Ltd v Fieldhouse [No. 3] [2010] WASC 233 Le Miere J … articulated, in precise terms, why it is necessary for a party seeking to join a third party to litigation to establish an arguable case, in the following terms:*
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> > 27. *The applicant on a joinder application must show that there is an arguable case sufficient to resist the entry of summary judgment by the parties sought to be joined. It would be futile to order that a person be joined as a defendant if the material before the court disclosed that if the person, having been joined as a defendant, applied for summary judgment the application would succeed."*
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> (Citations omitted)

Berman J also referred to the fact that there were no pleadings or particulars provided in affidavits to explain the basis upon which the applicant pursued the trust claim she asserted; and noted that the applicant did not seek orders pursuant to Part VIII AA of the Act; or the *Corporations Act* 2001 (Cth) or other legislation (although His Honour later outlined the possible operation of those provisions to the case before him).

Applying the propositions stated in *Wayne & Dillon,* Berman J did not consider that the applicant established the basis for joinder and concluded *"as currently drafted, I am not able to recognise an appropriate cause of action and the basis for same against the proposed second and third respondents."*

3.4 Aside from the prospect of the Court requiring a pleading where a third party is involved, there is, it is suggested, much to be gained by the formulation of a comprehensive Statement of Facts, Issues and Contentions; or Statement of Claim or Points of Claim or like form of pleading where a case involves a third party. The central advantages of using a comprehensive pleading such as a Statement of Facts, Issues and Contentions (as distinct from a bare points of claim which might be confined only to facts), is that such a pleading:

(a) Identifies the **relevant** facts; and

(b) Identifies the **issues** for decision; and

(c) Consequently enables the relevance and admissibility of evidence to be determined; and

(d) Identifies the essential contentions advanced for the relief claimed; and

(e) Identifies the juridical bases for the relief claimed – particularly important where a claim seeks to attract accrued jurisdiction as discussed below.

(see *Dare v Pulham* (1982) 148 CLR 658).

3.5 In the absence of applicable rules of pleading in the family law jurisdiction then, subject to the terms of any order or direction about pleadings, it is arguable that a party may not be confined strictly to a pleaded case (compare *Khalif & Khalif* [2021] FamCAFC 123 at [38] with *Gilchrist & Gilchrist and Anor* [2009] FamCAFC 199).

4. Jurisdiction

4.1 An appreciation of the nature of Federal jurisdiction being exercised under the Act is fundamental in determining whether the Court can make orders directly impacting upon the interests of a third party.

4.2 As was stated by Toohey J in *Harris v Caladine* (1991) 172 CLR 84:

> *…Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred.*
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> *(citations omitted)*

4.3 It would appear that the legislative changes, effective from 1 September 2021 via the *Federal Circuit and Family Court of Australia Act 2021* ("the FCFCOA Act"), gave original jurisdiction under the Act to Division 2 and removed it from Division 1. Division 1 is invested with original jurisdiction under the Act by transfers of proceedings by and from Division 2. The curious result of the imperative of a "single point of entry" for proceedings under the Act is that the conferral of jurisdiction upon the superior Court of record (Division 1) depends upon a transfer of proceedings to it from the inferior Court (Division 2). For a discussion of jurisdiction post 1 September 2021 see *Gilford & Cavaco* [2024] FedCFamC1A 55 (15 April 2024). That is a particularly cumbersome outcome where a respondent seeks to add other relief (e.g. property settlement) in responding to, for example, an application confined to parenting orders.

4.4 There are some additional limited circumstances in which the Courts are expressly conferred with jurisdiction other than pursuant to the FCFCOA Act – for example

s 1337C of the *Corporations Act 2001* (Division 1) and s 27 of the *Bankruptcy Act 1966* (Division 2).

4.5 The Courts have authority to decide "matters" within jurisdiction. The question that arises is whether the issue involving third parties form a part of such a matter or not – giving rise to the need to consider whether such issues come within what has been described as the "accrued" jurisdiction of the Courts or, alternatively, the "associated jurisdiction" conferred by statute.

4.6 As stated by Gibbs CJ, Wilson and Dawson JJ in *Smith & Smith* (1986) 161 CLR 217 at 236:

> *… [h]owever, the view that has been accepted by the majority of the court in a line of cases commencing with Philip Morris Inc. v. Adam P. Brown Male Fashions Pty Ltd. is that the grant of jurisdiction to determine a matter carries with it jurisdiction to determine the whole matter, and that "a 'matter' is a justiciable controversy which must either be constituted by or must include a claim arising under a federal law but which may also include another cause of action arising under another law, provided it is attached to and is not severable from the former claim": Fencott v Muller. In Stack v Coast Securities (No 9) Pty Ltd, Mason, Brennan and Deane JJ., affirmed the view that the Constitution gave power to the Parliament "to give authority to federal courts to decide the whole of a single justiciable controversy of which a federal issue forms an integral part". For present purposes, these propositions may be accepted as being correct".*
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> *(footnotes omitted)*

4.7 As to that which will be considered to constitute a "matter" in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585 Gummow and Hayne JJ, with reference to *Fencott v Muller* (1983) 152 CLR 570 at 608, said that:

> *In Fencott it was said that: "in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter." The references to "impression" and "practical judgment" cannot be understood, however, as stating a test that is to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided*

on limited information. But the question is not at large. What is a single controversy "depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships". There is but a single matter if different claims arise out of "common transactions and facts" or "a common substratum of facts", notwithstanding that the facts upon which the claims depend "do not wholly coincide". So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are "completely disparate", "completely separate and distinct" or "distinct and unrelated" are not part of the same matter.

(footnotes omitted)

4.8 The facts in *Warby & Warby* (2002) FLC 93-091 provide a useful illustration of facts where consideration of "matter" and a "single justiciable controversy" arise.

In *Warby*, the wife and her father purchased a property as tenants in common in 1982. Their contributions to the purchase price were disputed. There was a mortgage to the National Australia Bank. In 1984/1985 the husband and wife started to live together in the property.

In about 1986/1989 the wife's father discharged the mortgage. At about the same time or shortly afterwards, an agreement was entered into:

- According to the wife, between the wife and the wife's father for repayment to the wife's father of the sum paid by the wife's father to discharge the mortgage, or;
- According to the husband, between the parties and the wife's father for repayment to the wife's father of an amount (in periodic payments) to extinguish the wife's father's equity in the property.

On 21 January 1989 the parties married. About three years later the repayments to the wife's father under the agreement were completed. In 1994, the parties separated.

The husband filed an application seeking, *inter alia*, that the wife's father be joined as a party to the proceedings and that the proceedings started by the husband so far

as they seek orders against the wife's father are within the accrued jurisdiction of the Court. The wife opposed these orders.

The Full Court decided, on a case stated, that the Family Court had power to exercise jurisdiction even if a third party refuses to participate. Once the Court has accepted that it has jurisdiction to make a decision which affects properly notified third parties, that party cannot thwart the making of orders by refusing to participate in the proceedings.

The Full Court in *Warby* relied on *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 and *Fencott v Muller* (1983) 152 CLR 570.

At p88,790 the Full Court concluded:

> *As a matter of law, the Family Court of Australia is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms a part. The factual circumstances of the case will determine whether the jurisdiction arises and whether it is appropriate to exercise the jurisdiction.*

As is made clear in *Warby* the principal reason to invoke the Court's accrued jurisdiction is that there exists one justiciable controversy based upon a common sub-stratum of facts. On the facts in *Warby* the Full Court concluded (at p88,792):

> *In the present case there is a single property that is central to the parties' controversy. The Family Court cannot determine and settle the property of the parties without determining the relative beneficial interests of the parties to the marriage and the wife's father in the property. It is not to the point that a State court could make orders as to the dispute between the parties to the marriage and the wife's father, and that the Family Court of Australia could then determine the family law dispute between the parties to the marriage. It is enough to say that even taking the narrow view of accrued jurisdiction represented by Wilson J's judgment in Philip Morris, in this case "the federal question could not be resolved without the determination of the non-federal question". The Family Court of Australia must ascertain as a first step the property pool of the parties available for distribution.*

4.9 A further illustration of various claims for relief attracting accrued jurisdiction is provided by the case of *F Firm & Ruane & Ors* [2014] FamCAFC 189. In that case the Full Court considered that whilst a damages claim against a solicitor for

negligence concerning a financial agreement was "entirely different" from proceedings as to the validity of the agreement; each claim formed part of a single justiciable controversy. In distinguishing the earlier Full Court decision in *Noll & Noll & Anor* (2013) FLC 93-529 Thackray J (commencing at [45]) stated:

> *45. I accept that the husband's claim for damages in* Noll *was "entirely different" from that made concerning the validity of the agreement and the s 79 claim. However, that fact should not have been influential. I respectfully suggest that the question that should have been posed was whether the claim came within the "scope of the controversy" which is "identifiable independently of the proceedings… brought for its determination": Fencott v Muller at 603.*
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> *46. As was said in ASIC v Edensor Nominees Pty Ltd (2001) 204 CLR 559 at 586, citing Crouch v Commissioner of Railways [1985] HCA 69; (1985) 159 CLR 22 at 37, the focus in this context should be on "the substance of the dispute" and "the substantial subject matter of the controversy". Importantly, the scope of the controversy is not limited to matters incidental to that which attracted federal jurisdiction in the first place: Philip Morris at 475 per Barwick CJ, cited with approval in Fencott v Muller at 603.*
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> *47. The substance of the dispute in Noll as in the present case, was the status of the agreement and the legal consequences if it was found not binding. Central to the entire dispute were facts pertaining to the agreement. The ensuing damages claims depended on facts relevant to the validity of the agreement itself. The preliminary question common to both parts of the controversy was whether the requirements of Part VIIIA had been met. If they had not been met, other questions would arise, the answers to which could impact on the other part of the controversy. Chief amongst these would be the entitlements under s 79. In Noll, there was the added complication of the existence of the wife's own claim for damages against the husband, arising out of the same agreement in relation to which the husband was seeking damages against the wife's solicitors. It would seem to me there was real potential for the claims to become entangled.*

> *48. Accordingly, in my view, the claims were not "severable", in the sense that word is used in the authorities, especially as each was "incidental, if not essential, to [the determination of the other] and because the … various claims for relief necessarily arose out of common transactions and facts": Philip Morris per Mason J at 512 cited in Fencott v Muller at 605.*

4.10 *Warby* has been the subject of some criticism to the extent that the Full Court took account as a factor, in determining whether the Court should exercise jurisdiction, whether the Court has power to grant appropriate remedies in respect of the "attached" claims (see, for example, Timothy North SC "Accrued Jurisdiction: Questions of Discretion and Power" at the 11th National Family Law Conference September 2004).

4.11 It is respectfully suggested that this criticism is supported by reference to the subsequent decision of the High Court in *Rizeq v Western Australia* (2017) 262 CLR 1 where at [55] and [56] Bell, Gageler, Keane, Nettle and Gordon JJ said:

> *… it is commonplace that resolution of a matter within federal jurisdiction may involve application both of Commonwealth law and of State law. Indeed it can happen that a matter in federal jurisdiction is resolved entirely through the application of State law. Application of State law in federal jurisdiction came for a period to be described, "[f]or want of a better term", as "accrued jurisdiction". There is "no harm in the continued use of the term 'accrued jurisdiction' provided it be borne in mind … there is but one 'matter'". However, the imprecision the term introduces into the word "jurisdiction" means that the term is best avoided. There is but one matter and that matter is entirely within federal jurisdiction, as distinct from State jurisdiction.*
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> *The simple constitutional truth is that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction – because they are laws.*
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> *(footnotes omitted)*

4.12 *Rizeq* was applied by the Full Court in *Camden Pty Ltd & Laue and Ors* (2018) FLC 93-840 where the Full Court determined that the Court had accrued jurisdiction in that case to determine various contractual and trust interests involving third parties.

4.13 The Court's accrued jurisdiction was recently the subject of Appeal Court consideration in *Akbar & Gandega* [2023] FedCFamC1A 174. In Akbar, the former business partner of the husband was joined (by the wife) to property settlement proceedings as between a husband and wife. The husband and this former business partner had previously reached an agreement about the terms on which the husband would withdraw from the business, including the payment to him of a sum of money. The husband alleged the business partner had breached that agreement including by the non-payment of the sum, but had not brought any action against him prior to the matrimonial proceedings. The wife joined the business partner to the property settlement proceedings seeking to pursue that person for damages on behalf of the husband. By the time of the trial, the husband also joined in seeking relief against the business partner.

4.14 The trial proceeded on the assumption that the court had jurisdiction to hear and determine both the matrimonial property settlement action and the non-federal damages claim.

4.15 On appeal, Austin J (with whom the other members of the Court agreed) observed,

> *15. The jurisdiction of the Federal Circuit and Family Court of Australia (Division 1) to entertain the common law and equity causes of action against the appellant could only have possibly existed in one of two ways: first, by the invocation of s 78 of the Act; or secondly, by finding the causes of action were an inherent part of the federal "matter" litigated between the spouses.*
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> *…*
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> *20. The causes of action alleged by the husband against the [business partner] were "choses in action" and hence "property" in his hands (National Trustees Executors and Agency Co of Australasia Ltd v FCT (1954) 91 CLR 540 at 584; Loxton v Moir (1914) 18 CLR 360 at 379).*
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> *21. Yet s 78 of the Act only empowered the primary judge to declare the husband's existing title or right in the chose in action, which title or right the wife certainly did not separately enjoy. The provision did not empower the primary judge to hear and adjudicate the causes of action*

by granting a compulsory remedy, thereby converting the husband's "chose in action" into a "chose in possession".

…

27. Here, the primary judge did not purport to resort to the use of power under s 78 of the Act to determine the causes of action against the appellant, but it would have been an error if his Honour had done so. Such power only authorised the primary judge to identify and declare the husband's existing property interest, not to adjudicate the contested common law and equity claims.

28. Claims grounded solely in contract, tort, equity or some other form of non-matrimonial relationship (such as partnership or corporation shareholdings) are not likely to attract jurisdiction as a matrimonial cause when the spouses' marriage is purely coincidental to the dispute… The connection of such common law, equity or statutory causes of action to matrimonial causes is even more tenuous when vested in and asserted by one spouse against third party strangers to the marriage or family unit.

29. However, when federal law, like the Act, confers original jurisdiction on a federal court in respect of a "matter" – such as the matrimonial cause concerning the adjustment of spouses' property interests – the jurisdiction extends to authorise the determination of the whole "matter", the entire resolution of which controversy may entail the consideration and application of both federal and State law.

…

32. More recently, the High Court has emphasised the need to determine the ambit of the federal "matter" by advertence to the conduct of the parties, the relationships between them, and the laws which attach rights or liabilities to such conduct and relationships.

…

34. Merely because the anterior determination of the non-federal causes of action between the husband and the [business partner] would influence the identity and value of the property owned by the husband, then amenable to adjustment orders within the matrimonial cause,

does not bring the non-federal causes within the purview of the federal matter. The convenience of first determining whether or not the husband should have judgment for a certain sum of money entered in his favour against the appellant on any of the common law or equity causes of action is not the same as the essentiality of determining those causes for the purpose of then determining the matrimonial cause…

5. Part VIIIAA

5.1 Under Part VIIIAA of the Family Law Act the Court may make the following orders in proceedings under s 79 (or s 90SM) which bind a third party:

- An order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor.
- An order directed to a creditor of one party to a marriage to substitute the other party, or both parties to the marriage, for that party in relation to the debt owed to the creditor.
- An order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made.
- An order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.
- An order directed to a third party to do a thing in relation to the property of a party to the marriage.
- An order which alters the rights, liabilities, or property interests of a third party in relation to the marriage.

5.2 There are specific conditions which must be met before the Court can make any of the above orders. The conditions to be met include:

- The making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage.
- If the order concerns a debt of a party to the marriage – it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full.

- The third party has been accorded procedural fairness in relation to the making of the order.
- The Court is satisfied that, in all the circumstances, it is just and equitable to make the order.
- The Court is satisfied that the order takes into account:
    - The taxation effect (if any) of the order on the parties to the marriage;
    - The taxation effect (if any) of the order on the third party;
    - The social security effect (if any) of the order on the parties to the marriage;
    - The third parties' administrative costs in relation to the order;
    - If the order concerns a debt of a party to the marriage – the capacity of a party to the marriage to repay the debt after the order is made;
    - The economic, legal or other capacity of the third party to comply with the order;
    - If, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters - those matters;
    - Any other matter that the Court considers relevant.

5.3 Examples of the types of orders the Court may be able to make under these provisions are orders which:

- Adjust the proportion of the debt each party is liable to pay a creditor.
- Adjust the terms of a contract between the parties to a marriage or de facto relationship and a creditor.
- Allow the Court to order directors to register the transfer of shares or restrain a company from taking certain action against a party to a marriage. By reason of s90AC it is irrelevant that such an order may override the articles of a company, the general law, or estate law. For an example see *Hunt v Hunt* (2006) 36 FamLR 64.
- Restrain a person from repossessing property of a party to a marriage or de facto relationship.

- Restrain a person from commencing legal proceedings against a party to a marriage or de facto relationship.

- Make orders or injunctions that are binding on trustees.

5.4 In *B Pty Ltd and Ors v K and Anor* (2008) FLC 93-380 the Full Court determined that Part VIIIAA is not a source of power in itself. Rather, the section permits the entry of orders in respect of third parties in proceedings pursuant to s 79 (or s 114). The Full Court observed (at 82,804):

> *In our view, the correct conclusion was that, as the wife set out her proposed claim, she did not show that the power conferred by s 90AE could arguably be engaged. Any order made pursuant to s 90AE(2)(b) must be for the purpose of effecting a division of property between the parties. The order that the wife proposed was for the purpose of increasing the property of the parties, by an unknown amount and on unknown principles.*

5.5 In *Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 Kiefel CJ and Keane J observed (at [6]):

> *It must be understood, however, that the power of the Court under Pt VIIIAA to make an order directed to a third party is not at large. The power to make an order under s 90AE(1) is conditioned by s 90AE(3)…*

In summary, their Honours determined that the power to make an order under s 90AE(1) is only enlivened upon fulfillment of the conditions expressed in s 90AE(3).

5.6 At [71] Gordon J observed that s 90AE was intended to cover, and covers, a range of possible arrangements that a party to the marriage may have which involve a third party, including ownership of life insurance products, shares in corporate entities and the creditors of the parties to a marriage whether they are family, friends or financial institutions. Her Honour noted that the range of available orders was "intended to be broad …" by reference to the explanatory memorandum. However, Her Honour emphasised that the circumstances in which orders may be made against a third party are confined to the conditions expressed in the legislation. At [73] Gordon J observed: *"Part VIIIAA is facultative and protective".*

5.7 In *Tomaras* the High Court determined that s 90AE(1)(b) permitted the Court to make an order directed to a creditor of one party to the marriage to substitute the other party to a marriage in relation to a debt owed to a creditor but only upon satisfaction of the pre-conditions to making of an order as set out in s 90AE(3).

5.8 The Full Court has determined that Part VIIIAA of the Act does not constitute a code; the remedies available to the Court are not confined to those set out within Part VIIIAA (*Camden Pty Ltd & Laue and Ors* (2018) FLC 93-840).

5.9 Relatively recently, in *Jess & Jess (No 4)* [2023] FedCFamC1A 189 (3 November 2023) the Appeal Court has stated by way of *obiter* that s 90AE(2) provides a "broad power" for the Court to make orders against a third party "in relation to the property of a party" and s 90AE(3)(a) provides that such orders may be made if "reasonably necessary … to effect a division of property".

The facts in *Jess*, briefly stated as relevant for present purposes, are that the husband and his adult son fraudulently created a trust deed for the purpose of divesting the husband of valuable units in a unit trust and thereby placing that property beyond the property available for adjustment as between the husband and wife in s 79 proceedings. Before, and continuing after, the husband's death the wife has pursued orders pursuant to s 106B to restore the units as available property amenable to a s 79 order. In the proceedings the wife contends that her claim for the settlement of the units (or part of them) upon her, pursuant to s 79 of the Act, gives her a proprietary claim sufficient to found an equitable tracing claim to substantive property derived from the units.

In determining an appeal from interlocutory orders for disclosure the Appeal Court made these observations in relation to the scope of s 90AE(2) and (3):

> *31. To the extent that the claim by the wife is expressed as a "tracing claim", the applicants argue that the wife is unable to trace the property in the Units as she never held a proprietary interest in the Units, only the husband held such an interest. The discovery would be necessary for the wife to identify the consequences of the transfer of the husband's Units to the son in order to seek such further orders (pursuant to s 106B of the FLA) as may be required to effect the return of the full value of the Units. The wife also argues that her claim for the settlement of the Units (or part of them) upon her, pursuant to s 79 of the FLA, gives her a proprietary claim sufficient to found the tracing claim. This argument was not well developed and may be difficult to sustain in light of the decision in Re Chemaisse; Federal Commissioner of Taxation (Intervener) [1990] FamCA 32; (1990) FLC 92-133 at 77,915.*
>
> *32. To the extent that the wife's reliance upon equitable tracing principles is based upon the husband having an equitable proprietary interest in the*

property "derivative of the original" Units (that is, tracing follows the husband's property in the Units into the substitute property), the wife is entitled to attempt to prove that the husband's equitable proprietary interests in this respect are part of the "property" of the husband for the purpose of the s 79 proceedings. If the husband's tracing rights are only a mere equity outside the ambit of "property" as the term is used in the FLA, s 90AE(2) provides a broad power for the Court to make orders against a third party "in relation to the property of a party" and s 90AE(3)(a) provides that such orders may be made if "reasonably necessary … to effect a division of property". The effect of s 90AE(2) of the FLA, in this respect, appears to allow the wife to pursue a claim of the husband against a third party in order to obtain the relief the husband would obtain had he sought the remedy, as an incident of obtaining her relief pursuant to s 79 of the FLA. That is, s 90AE appears to admit of a spouse pursuing the other spouse's rights in a way that is analogous to subrogation for the purpose of recovery upon those rights in order to access property for the purpose of a property settlement pursuant to s 79. Without this power, a wife's claim for a property settlement could easily be stymied by a husband failing to effectively pursue his rights against another to recover what may be the most substantial asset for the property settlement…

5.10 Very recently in yet another instalment of the continuing litigation in *Jess*, in *Jess & Jess (No 5)* [2024] FedCFamC1A 85 a differently constituted Appeal Court expressed (at [76]) its agreement with the observations in *Jess (No 4)* at [31] and [32] quoted.

5.11 A final point of interest concerning jurisdiction is discussed in *Jess (No 4)*, by reference to numerous authorities, relating to the "first duty" of a Court to satisfy itself that it has jurisdiction. Commencing at [19] the Appeal Court discusses the discretion, where the question of jurisdiction involves complex questions of law and fact, to postpone determining the question of the Court's jurisdiction until after it has heard the whole case.

6. Corporations and Trusts

6.1 In *BP and KS* (2003) FLC 93-157 Warnick J undertook an analysis of cases where the Court had found that trust property was property of a person in control of a trust. Warnick J emphasised the distinction between, on the one hand, notionally including assets of a trust in a "pool" for the purpose of considering the orders to be made

adjusting other property interests; and on the other hand, orders dealing directly with trust assets. At [79] Warnick J observed:

"To [include the assets of the trust in the pool] is a notional step in a process of reasoning, as distinct from the executive nature of a court order dealing with trust assets".

6.2 This highlights that two "related" questions often need to be considered before taking the step of joining a third party to property settlement proceedings. First, is the *in personam* jurisdiction directed to the parties sufficient? For example, where a company is wholly owned and controlled by one or both of the spouses then the power to make orders *in personam* will usually be sufficient to deal with the company and its property. Second, do the parties or either of them hold sufficient property interests outside of any entity involving other third party interests to satisfy the legitimate claim for property settlement – albeit that it will be necessary to consider those other interests in the "notional" exercise?

6.3 Where third parties have an interest in a family company; or a spouse party holds an interest in a third party entity/company then consideration needs to be given to the range of potential sources or bases of remedy, as follows:

(a) The Court's accrued jurisdiction as earlier discussed;

(b) The Court's jurisdiction under the *Corporations Act 2001* (including, for example, the ability to make orders to remedy oppressive conduct);

(c) The Court's jurisdiction to deal with the company under the Act – s 78 (Declarations); s 114 (Injunctions); s 106B (Setting aside transactions) and Part VIIIAA (Orders and injunctions binding third parties);

(d) The Court's power pursuant to s 85A to make orders directly in relation to the property the subject of an ante-nuptial or post-nuptial settlement made in relation to the marriage;

(e) Establishing that a third party is the alter-ego of a party to the proceedings; or that the third party is the puppet of a party to the marriage/de facto relationship; or that the arrangements with a third party constitute a sham.

7. Shams

7.1 In *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 the High Court stated at 354 that:

… it would be unreasonable to impute to the Parliament an intention to give power to the Family Court to extinguish the rights, and enlarge the obligations, of third parties, in the absence of clear and unambiguous words. It can safely be assumed that the Parliament intended that the powers of the Family Court should be wide enough to prevent either of the parties to a marriage from evading his or her obligations to the other party, but it does not follow that the Parliament intended that the legitimate interests of third parties should be subordinated to the interests of a party to a marriage, or that the Family Court should be able to make orders that would operate to the detriment of third parties. There is nothing in the words of the sections that suggests that the Family Court is intended to have power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform. It is one thing to order a party to a marriage to do whatever is within his power to comply with an order of the court, even if what he does may have some effect on the position of third parties, but it is quite another to order third parties to do what they are not legally bound to do …

Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it.

At 354-355 Gibbs J said:

The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it.

7.2 In *Gould and Gould v Swire Investments Ltd* (1993) FLC 92-434 at 80, 432 Fogarty J (with whom Nicholson CJ and Finn agreed) said of the meaning of sham:

The meaning of the term "sham" was discussed by Lockhart J in a decision of the Full Court of the Federal Court in Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy … his Honour concluded:-

> *"A 'sham' is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive".*

7.3 Subsequently in *Raftland Pty Ltd as Trustee for the Raftland Trust v Commissioner of Taxation* (2008) 238 CLR 516 the High Court gave consideration to the term "sham" noting that "the term is ambiguous and uncertainty surrounds its meaning and application …".

Kirby J, after referring to the passage cited above in *Sharrment* said the following:

> *Important to this description is the idea that the parties do not intend to give effect to the legal arrangements as set out in their apparent agreement, understood only according to its terms. In Australia this has become essential to the notion of sham, which contemplates a disparity between the ostensible and real intentions of the parties. The courts must therefore test the intentions of the parties, as expressed in documentation, against their own testimony on the subject (if any) and the available objective evidence tending to show what the intention really was.*

7.4 What follows from *Raftland* is that a sham does not necessarily indicate fraud and the term may be used in a "less pejorative" sense. Further, the sham aspect may not be with respect to the entire transaction or instrument, but merely a part. As to that, the majority said:

> *… in various situations, the court may take an agreement or other instrument, such as a settlement on trust, as not fully disclosing the legal rights and entitlements for which it provides on its face. If that be so, the parol evidence rule in Australia identified [in] Hoyt's Pty Ltd v Spencer does not apply.*
>
> *One such case is where other evidence of the intentions of the relevant actors shows that the document was brought into existence "as a mere piece of machinery" for serving some purpose other than that of constituting the whole of the arrangement…*

…

The presence of an objective of deliberate deception indicates fraud. This suggests the need for caution in adoption of the description "sham". However, in the present litigation it may be used in a sense which is less pejorative but still apt to deny the critical step in the appellant's case. The absence of a present entitlement … may appear from an examination of the whole of the relevant circumstances, and these are not confined to the terms of the Raftland Trust instrument.

7.5 In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 486 Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ cited *Sharrment (supra)* for the following proposition:

"Sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

(footnoes omitted)

8. Alter-ego or mere puppet

8.1 If it can be established that a company or trust is the "alter-ego" of a spouse party, such a finding will enable the assets of a third party to be treated as property of a party to a marriage. In *Ashton & Ashton* (1986) FLC 91-777 Strauss J (with whom Ellis and Emery JJ agreed), said at 75,653:

…The powers which the husband has in the Ashton Family Settlement give him control of the trust either as trustee or through a trustee which is his creature, and at the same time he is able to apply all the income and property of the trust for his own benefit. In my opinion, in a family situation such as the one here, this Court is not bound by formalities designed to obtain advantages and protection for the husband who stands in reality in the position of the owner. He has de facto legal and beneficial ownership …

No person other than the husband has any real interest in the property or income of the trust except at the will of the husband.

8.2 In *Harris & Harris* (1991) FLC 92-254 the Full Court said:

In our opinion, the husband's interest as a beneficiary under the trust in combination with his rights and powers as appointor and guardian place him,

for the purposes of section 79 of the Family Law Act, into the position of an owner of property which property is constituted by his interest and his rights and powers under the trust. This property is properly evaluated as equivalent to the value of the assets of the trust.

Under section 79 the court may make orders altering the interests of the parties in this property. If necessary, the court may require the husband to exercise his rights and powers under the trust deed such to bring about a settlement of the property out of the corpus or income of the trust for the benefit of the wife.

8.3 In *Atkins & Hunt and Ors* (2020) FLC 93-992 the Full Court considered whether a company substantially controlled by the husband was to be regarded as the mere puppet of the husband or the alter-ego of the husband. In that case the husband operated a business through the company and half of the A-class shares in the company, which entitled the holder to exclusive control of the company, were owned by the husband. The other half were owned by another company in which the husband was a 99% shareholder. While the trial was pending the husband disposed of a majority of the shares held by him in this other company. At trial the wife argued that the subject company was a mere puppet of the husband. The Trial Judge rejected this argument.

The Full Court dismissed the wife's appeal finding that it was open to the Trial Judge to find that the company was not a mere puppet or alter-ego of the husband. The onus was on the wife to prove that the company was a mere puppet. After referring to *Ascot Investments Pty Ltd v Harper* (supra) the Full Court observed at [33]:

… the wife … focused on the capacity of the husband to control (the company) as demonstrating that the company and the controller should be treated as one and the same. However that argument must be rejected, for … something more than mere control is required.

8.4 In *Harris & Dewell & Anor* (2018) FLC 93-839 the Full Court in dismissing the appeal before it in relation to interests in a unit trust concluded as follows (from [66]):

In concluding that the [unit trust] was not property of the husband and that "[t]he [father], albeit he is 99 years of age, continues to maintain his legal and beneficial interest in the [unit trust]" (at [103]) her Honour quoted, at [102] what was said by Finn J in Stephens and Stephens:

… I accept that no earlier authority in this court has gone so far as to hold that control alone without some lawful right to benefit from the

assets of the trust, is sufficient to permit the assets of the trust to be treated as property of the party who has that control …

It should be accepted that the principles emerging from the High Court and from the decisions of this Court to which reference has been made permit of a finding that property ostensibly that of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the "puppet" or "creature" of that party. The metaphor is used to connote a situation where the person or entity with control (the "puppet") does nothing without the party (the "puppet master") controlling or directing that person or entity.

Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. In our respectful view, it is in that sense, that Finn J speaks of "some lawful right to benefit from the assets of the trust".

… if the principles emerging from the authorities are to avail the wife, it was necessary for the evidence to establish that the father was the puppet and the husband was the "puppet master". It is the father who, by reason of the powers contained in the trust deed and his position as the sole unit holder, can obtain, or effect the obtaining of, a beneficial interest in the property of the trust".

9. Discretionary Trusts

9.1 It is beyond the scope of this paper to provide a comprehensive analysis of the way in which trusts are approached in financial cases so the following discussion of discretionary, constructive and resulting trusts is addressed in a very summary way.

9.2 In *Kennon v Spry* (2008) 238 CLR 366 ("*Kennon v Spry*") the High Court extensively considered the factors resulting in the treatment of assets of a discretionary trust as constituting "property" within the meaning of s 4(1) of the Act for the purposes of property adjustment. Those factors included the capacity to control; legal title; powers of distribution and the source of the trust fund.

9.3 Notably, an important factor in *Kennon v Spry* was the fact that the assets which were made the subject of a discretionary trust had been accumulated jointly by the parties to the marriage during the course of marriage – not involving any third parties – and

the husband was in effect the sole trustee of the trust, and the person with the only interest in the assets, as well as the holder of a power to appoint them.

9.4 *Kennon v Spry* does not stand for the proposition that the assets of a discretionary trust will in all circumstances form part of the available "property" for adjustment. To the contrary, the particular circumstances identified in *Kennon v Spry* dictated that conclusion.

9.5 It follows that (outside of a *Kennon v Spry* case; or a sham or alter ego / puppet situation) where a spouse party is a beneficiary of a discretionary trust involving also that person's parents or extended family members, that interest usually falls to be considered as a financial resource rather than "property" within the meaning of s 4. Often, such discretionary trusts will have been established by third party family, such as parents, and the trust fund or assets will have been furnished or contributed to by such third parties.

10. Constructive trusts

10.1 Not infrequently an argument will arise in property settlement proceedings that property in the legal ownership of a third party (often an extended family member or members of a spouse party) is beneficially owned by a spouse party and thus forms part of the property available for adjustment. It will therefore be argued that a constructive trust ought be imposed with respect to that property, requiring the third party to be joined to the proceedings.

10.2 Conversely, in some cases it will be argued that property legally owned by one or both spouses has been sourced from extended family and that a constructive trust exists for the benefit of those non-spouses.

10.3 There are two types of constructive trust. One is the common intention constructive trust. A common intention constructive trust will be recognised where the common intention of the parties demonstrates that it was intended that a party would have a beneficial interest in the property and that party has acted to their detriment in reliance upon such intention.

10.4 The establishment of a common intention is a question of fact that may arise from express agreement or will be inferred from conduct (*Silvia (Trustee) v Williams* [2018] FCAFC 194). Such intention is usually formed at the time of the transaction and may be established by the party claiming the beneficial interest having acted to their

detriment (*Khalif & Khalif* [2021] FamCAFC 123). If established, it would be unconscionable for the other parties to deny the common intention.

10.5 A remedial constructive trust may be imposed by operation of law without reference to the intention of the parties concerned and indeed may be contrary to the desires and intentions of the constructive trustee. The principles concerning a remedial constructive trust are discussed in *Muschinski v Dodds* (1985) 160 CLR 583. With respect to a remedial constructive trust the enquiry is not confined to the actual or presumed intentions of the parties, but as to whether, according to the principles of equity, it would be a fraud for the party in question to deny the trust.

10.6 In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 the High Court observed (at 108) citing Cardozo J in *Beatty v Guggenheim Exploration Co* [1919] 225 NY 380:

> *… When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee…*

10.7 In *Khalif & Khalif* [2021] FamCAFC 123 the Full Court of the Family Court adopted the "essential elements" of a common intention constructive trust as set out in *Hohol v Hohol* [1981] VicRP 24; (1980) FLC 90-824 as follows:

> *…first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be formed at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly, that the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property.*

10.8 In *Khalif,* the Full Court also referred with approval to the decision of Coldrey J in *Rusmussen v Rusmussen* [1995] VicRp 38; [1995] 1 VR 613 as follows:

> *…In determining whether there is a common intention that a claimant was to have a beneficial interest in the property the court will look firstly for direct evidence of any express communications between the parties or the making of admissions by them. In addition, the common intention may be inferred from the conduct of the parties, for example, contributions to the cost of the property claimed or its maintenance. Such conduct is also of factual importance in*

determining whether a claimant has acted to his or her detriment. However, what is to be enforced is an actual intention inferred as a matter of fact…

10.9 A recent example of a case involving the imposition of a common intention constructive trust, and the onus of proof to establish such a trust, is provided by *Davis & Peterson* [2023] FedCFamC1A 13.

11. Resulting trusts

11.1 Not infrequently, a spouse party to financial proceedings, or a parent or other extended family member of that spouse party, will seek to advance a case that that parent, or other extended family member, has provided, or contributed to, the purchase price of a property in the legal ownership of the spouse party. It will be contended that the spouse party holds that property upon trust for the beneficial interest of the parent or other family member.

11.2 In *Calverley v Green* (1984) 155 CLR 242, Deane J stated at 266:

where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it.

11.3 In *Muschinski v Dodds* (supra), Gibbs CJ referred to the then recent consideration of the equitable rules relating to the creation of a resulting trust in *Calverley v Green* and stated those principles to be as follows:

Where, on a purchase, a property is conveyed to two persons, whether as joint tenants or as tenants-in-common, and one of those persons has provided the whole of the purchase money, the property is presumed to be held in trust for that person, to whom I shall, for convenience, refer as "the real purchaser". However a resulting trust will not arise if the relationship between the real purchaser and the other transferee is such as to raise a presumption that the transfer was intended as an advancement, or in other words a presumption that the transferee who had not contributed any of the purchase money was intended to take a beneficial interest.

11.4 In *Kawada & Kawada & Ors* [2012] FamCA 273 O'Reilly J considered the principles concerning the interrelationship between the competing presumptions of resulting trusts, on the one hand, and the presumption of advancement. After reviewing the relevant authorities Her Honour concluded in relation to the principles at [40]:

"In relation to the present case, I would extract the following principles as particularly relevant:

1. *All evidentiary presumptions give way to facts showing the contrary: Buffrey, [14(1)].*
2. *The presumption of advancement is a rebuttable presumption: Shephard v Cartwright, [445-6].*
3. *Although a purchase in the name of a child, if altogether unexplained, will be deemed to be gift, evidence as to the surrounding circumstances of the purchase might lead to the conclusion it was a trust, not a gift: Russell v Scott, [453].*
4. *Where evidence has been given as to the intentions with which the parties effected a transaction, it is unlikely that the question whether or not there is a presumption of advancement will be important, or at least decisive, for if there is a presumption, it is only prima facie, and evidence may be given to rebut it: Napier, at 154-5.*
5. *Whether either presumption is rebutted depends upon the intentions solely of the party who provided the money: Buffrey, [14(4)(a)].*
6. *Subsequent acts and declarations are admissible as evidence only against the party who did or made them, and not in his favour: Shephard v Cartwright, 445-6; subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so; but, generally speaking, it is necessary to look at what was said and done at the time: Charles Marshall, 363-4.*
7. *This however does not exclude testimonial evidence of intention, so that a person whose intention at an earlier time is in issue may give evidence of it, even though the weight of the evidence, coming as it does from an interested witness, must be scrutinised with care: Damberg, [45].*
8. *Whilst the Briginshaw principles do not apply, proof nonetheless is required of a "definite intention" to retain beneficial title, not a "nebulous intention to rely upon the … relationship as a source of control over the property": Damberg, [44].*

9. *The rules for admissibility of evidence are those of the general law "that any modifications effected by the Evidence Act 1995 (Cth) are applicable": Damberg, [45].*

(emphasis omitted)

11.5 O'Reilly J moved to consider the provisions of s 140 (1) and (2) of *Evidence Act 1995 (Cth).*

11.6 In *Kawada* the husband's parents claimed a resulting trust over a motor vehicle and, *inter alia*, a real property. The real property had been purchased in 1999 and was the former matrimonial home of the husband and his wife. It was held in the husband's name. The husband's parents provided both the purchase price and stamp duty. The husband and his parents contended for a resulting trust. The wife sought to meet the case by relying upon the presumption of advancement seeking the conclusion that the property had been gifted to the husband.

11.7 At trial, O'Reilly J concluded that the facts indeed gave rise to a resulting trust and as such, the property was not to be included as part of the spouse parties' property interest.

12. Section 85A

12.1 Section 85A provides as follows:

Ante-nuptial and post-nuptial settlements

(1) 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.

(2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.

(3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.

12.2 This section is arguably one of the least utilised provisions of the Act. This is somewhat curious given the attention paid to the section by each of Heydon and Kiefel JJ in *Kennon v Spry* (2008) 238 CLR 366. It is to be noted that the other

members of the Court did not permit the wife's late attempt to rely upon the provision. Whilst the decisions of Heydon and Kiefel J are both obiter and in conflict with one another each address the potential operation of s 85A.

At 443 Kiefel J said:

"*Section 85A(1) is intended to have a wide operation, to property held for the benefit of the parties on a settlement to which they have contributed. It is intended to apply to settlements whether they occur before or during marriage. The essential requirement of the section is that there be a sufficient association between the property, the subject of the settlement and the marriage the subject of the proceedings. It does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made. It is sufficient for the purposes of the section that the association of which it speaks (made in relation to) be present when the Court comes to determine the application of the property settled under s 85A(1) …".*

Moreover, Kiefel J rejected a contention that s 85A was not intended to, and could not, operate to the detriment of third parties, observing (at 446) that:

"Ascot Investments Pty Ltd v Harper, to which reference was made, was not concerned with a situation such as concerns the third parties in this case. It was there held that the Family Court had no power to order directors of a company to register shares, where the Memorandum and Articles of Association of the company enabled them to decline to do so, at least where the company was not controlled by the husband. It was not doubted that the rights of third parties may be indirectly affected by orders of the Court. It has long been accepted that third party interests could be altered by courts dealing with property the subject of a nuptial settlement. Whether, and the extent to which, a court would alter such interests might depend upon the remoteness or uncertainty of those interests. Here the interests of the other beneficiaries, in the due administration of the Trust, were always subject to the husband's control. The extent of that control, to the detriment of the third parties' interests, was shown by the attempted distribution of the entire Trust property to the children's trusts".

As already noted Haydon J was in express disagreement with the approach of Kiefel J and, as also noted, the other members of the Court did not deal with the s 85A discussion. Nevertheless, it would seem that the judgment of Kiefel J, albeit obiter, provides scope for argument concerning s 85A to be taken up in an appropriate case in future.

13. Section 106B

13.1 The operation of this section can have a direct impact on third party interests where it is applied, given that it provides power for the Court to set aside, or restrain the making of, an instrument or disposition involving a third party.

As is now well-established (see for example *Ferrall and McTaggart as Trustees for the Sapphire Trust & Ors v Blyton and Blyton* (2000) FLC 93-054), in order for the section to be operative the following matters need be established:

- That there are proceedings pending pursuant to the Act;
- That there exists a relevant instrument or disposition;
- That the instrument or disposition was made "by or on behalf of, or by direction or in the interest of, a party";
- That the instrument or disposition was "made to defeat an existing or anticipated order or, irrespective of intention, be likely to defeat such an order".

14. Consequences of joinder

14.1 A third party who is joined to proceedings as a party has, as a general proposition, the same rights and obligations as each other party. A third party has obligations of disclosure and is bound by the orders made in the proceedings and may seek, and be subject to, orders as to costs.

15. Removal as a party

15.1 Rule 3.05 provides for a party to make application to the Court to be removed as a party by filing an application supported by an affidavit stating the relationship (if any) of the applicant to each other party; and the evidence in support of the application.

15.2 Generally, whilst the rule does not specify the basis upon which an application for removal will be granted, the usual contention will be that the party is not a "necessary" party within the meaning of Rule 3.01.

15.3 This gives some emphasis to the Court having before it precise particulars of the claim being advanced against the third party seeking removal.

15.4 An alternative to seeking removal, or perhaps in conjunction with such an application, the third party may seek to have any claim against it summarily dismissed on the

usual contentions as to the claim having "no reasonable likelihood of success": see *Ebner & Pappas* [2014] FamCAFC 229.

16. Protecting privilege

16.1 Although not confined to complex financial proceedings, the nature of these cases, often involving historical commercial transactions; the need to involve a range of third party advisors; and historical and/or current client-third party advisor communications; makes it critically important that the scope of privilege is well understood and applied.

17. Legal professional privilege

17.1 A comprehensive summary of the principles is contained in the judgment of Macauley J (when a trial Judge of the Common Law Division of the Supreme Court of Victoria prior to his appointment to the Court of Appeal) in *Cargill Aust Ltd v Viterra Malt Pty Ltd & Ors (No 8)* [2018] VSC 193.

17.2 The relevant facts in *Cargill* were that Cargill purchased a business from Viterra in 2013. The sale of the business was the subject of the proceedings more generally – Cargill was claiming damages for misleading and deceptive conduct and breaches of the agreement in relation to the purchase.

17.3 Cargill had been assisted in the purchase by internal lawyers, external lawyers and Goldman Sachs (financial advisors) as well as other advisors.

17.4 In the course of proceedings subpoena issued to Goldman Sachs seeking the production of documents. Cargill contended that these documents were the subject of legal professional privilege and ought not be produced to Viterra.

17.5 After referring to the applicable principles collected in the judgment of Young J in *AWB v Cole (No 5)* (2006) 155 FCR 30, and by reference to submissions made on behalf of Cargill, Macauley J set out at [18] the following relevant principles to be applied in determining whether legal professional privilege fixes to a particular communication:

- *Legal professional privilege protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services.*

- *The party claiming privilege bears the onus of establishing that the communication was undertaken, or the document brought into existence, for the dominant purpose of giving or obtaining legal advice.*
- *The onus may be discharged by (inter alia) evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by reference to the nature of the documents supported by argument or submissions.*
- *The purpose for which a document is brought into existence is a question of fact that must be determined objectively.*
- *A dominant purpose is one that predominates over other purposes; it is the prevailing or paramount purpose.*
- *An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.*
- *Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it is appropriate to assume that legitimate legal advice was being sought, absent any contrary indications.*
- *Legal professional privilege will attach to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.*
- *A communication made by a third party adviser to a client's lawyer, and a communication made by a third party adviser to a client, will in each case be privileged if made for the requisite dominant purpose of the client obtaining legal advice from the lawyer.*
- *Where a communication includes a third party, the question is whether the inclusion of the third party means that the communication or document is no longer confidential; if the third party was under an express or implied obligation not to disclose its contents, the document remains privileged.*
- *Where a lawyer has been retained for the purposes of providing legal advice in relation to a particular transaction or series of transactions, communications between the lawyer and the client relating to the transaction will be privileged, notwithstanding that they do not contain advice on matters of law; it is enough*

that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser to the client.

- *The principle of legal professional privilege extends to any document prepared by a lawyer or client from which one might infer the nature of the advice sought or given, and to internal documents or parts of documents of the client, or of the lawyer, reproducing or otherwise revealing communications which would be covered by privilege.*

18. Privilege relating to communications involving third party advisors

18.1 In *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No. 4)* [2014] FCA 796 Young J set out relevant privilege principles related to claims of privilege concerning communications including third party advisors as follows:

> *37 So far these are well known principles of general application. But in this case many of the documents in question do not involve direct lawyer-client communications, but are rather third party adviser internal documents or communications between a third party adviser and Asahi. Accordingly, something more needs to be said. I have synthesised the following propositions from Pratt [(2004) 136 FCR 357] at [41]-[47] per Finn J and [105]-[107] per Stone J.*
>
> *38 First, a communication made by a third party adviser to a client's lawyer if made for the requisite dominant purpose of the client obtaining legal advice from the lawyer will be privileged. Direct evidence of purpose can come from the third party adviser, the lawyer or the client. The purpose may also be readily inferred given the directness of the communication from the third party adviser to the client's lawyer. Further, it is not necessary to ask whether the third party adviser was acting as the agent of the client, including in making the communication to the client's lawyer. The absence of such an agency does not deny the existence of the privilege attaching to the communication, although its presence may fortify it. In terms of the third party adviser's status, the important characterisation is "not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party" (Pratt at [41]).*
>
> *39 Second, a communication made by a third party adviser to a client if made for*

the requisite dominant purpose of the client then obtaining legal advice will be privileged. Again, direct evidence of purpose can come from the third party adviser or from the client; it can also come from the lawyer, but that usually may not be as probative if the lawyer was not a party to the communication. The purpose is not as readily established as in the previous scenario.

40 *Third, where a third party such as an accountant, broker, merchant banker, financial adviser, due diligence specialist and others of a non-legal genus perform work for a client in a non-litigation setting, care needs to be taken with analysing the precise purpose for each communication. Take a substantial acquisition or merger. A client may engage and seek advice from a number of non-legal advisers as well as consulting lawyers. Legal and non-legal advice might be sought on the structure, bid vehicle, terms and conditions of any offer or agreement, finance of the bid vehicle, due diligence of the assets and liabilities of the target, assessment of the financial metrics of the target pre and post-acquisition such as EBITDA including any underlying projections, and so forth. In short, legal and non-legal advice might be sought on the same topic so that the topic in all its dimensions is fully analysed by and for the client. The various advices given by the non-legal advisers "will rarely be capable of attracting privilege for the reason that they will almost invariably have the character of discrete advices to the principal as such, with each advice, along with the lawyer's advice, having a distinctive function and purpose in the principal's decision making…" (Pratt at [46]).*

41 *Even where all such advices are interrelated, that is, they provide a collective basis for an informed decision by the client, this does not deny the force of the previous point that non-legal advices will rarely attract privilege.*

42 *Fourth, if non-legal advices are provided to a client who then chooses to provide them to its lawyers, that does not clothe the original non-legal advices with privilege. They ordinarily will have been prepared for a non-legal purpose. But copies that might subsequently be created by a client and given to its lawyers may attract privilege (Propend). Generally, privilege does not extend to non-legal advices to the client simply because they are at the same time or later "routed" to a legal adviser.*

43 Fifth, even if a client, in procuring a non-legal advice from a third party adviser has it in mind at the time that it requests that advice that it will also submit the nonlegal advice to its lawyer, that may just demonstrate a multiplicity of purposes for the creation of the non-legal advice. But in such a scenario, the privileged purpose is unlikely to be the dominant purpose. Each communication and the reason for its creation needs to be carefully reviewed.

18.2 In *Strahan & Strahan & Commissioner of Taxation* (2013) FLC 93-570 the Full Court considered an appeal from orders of a primary judge rejecting the wife's claim of privilege in respect of documents sought for production. The primary judge had made orders for the wife to produce those documents for inspection by the husband. Two of the documents the subject of the privilege claim were identified as documents from the wife's brother to the South Australian Police and "brought into the possession of [the wife's] lawyer for dominant purpose of seeking and giving professional advice and for the current litigation".

18.3 Of those documents the Full Court observed at [37]:

"The wife claims both "advice" and "litigation" privilege in respect of items 18 and 19 of Schedule B. However, the former privilege "is not available were [sic] one of the parties to the communication is a third party who is not the agent of the client for the purpose of the communication" (see, for example, Mitsubishi Electric Pty Ltd v Victorian WorkCover Authority (2002) 4 VR 332 at [9] per Batt JA). There is no evidence that the wife's brother was a "representative" of the wife nor that, even if he were, a communication effectively between the wife and a third party would be covered by legal professional privilege …"

19. Waiver of privilege

19.1 The applicable law regarding waiver of privilege is set out at ss 118 and 122 of the Evidence Act. The applicable legal principles are expanded in the two leading High Court authorities of *Mann v Carnell* (1999) 201 CLR 1 and *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

19.2 The relevant law was recently discussed by the Full Court in *Morris & Morris (No. 3)* [2023] FedCFamC1F 927.

19.3 These authorities and principles were considered at trial by Altobelli J in the recent case of *Pickford & Pickford* [2023] FedCFamC1F 1087. In that case, the husband

contended that the wife had, by her sworn evidence, waived privilege in relation to the advice to which she had deposed in that affidavit. The husband contended she had done so by acting in a way that is "inconsistent with the maintenance of that privilege". The husband contended that the evidence that the wife had herself filed in the proceedings renders implausible the proposition she advanced that the disclosure was inadvertent and hence no waiver was possible. In response, the wife contended that she signed the affidavit in question on 3 November 2023 believing it to be an amended version of the affidavit that she had previously provided, and which specifically addressed, by way of deletion, the issue of the advice she had received. Inherent in the wife's case was an acceptance that she had not read the document carefully before signing. Nonetheless, in the circumstances, the wife contended it was not a voluntary disclosure and hence the privilege had not been waived.

19.4 Altobelli J, having considered the relevant principles, was satisfied that the wife did not knowingly and voluntarily expressly or impliedly waive the privilege that attached to the advice that she referred to. His Honour found that the wife's deposition was an inadvertent and unintentional mistake and "the wife's solicitors acted quickly, and reasonably, to protect confidentiality". The trial judge also accepted that the mistake had been obvious and apparent to the husband and on that basis the privilege should not be lost.

20. Disclosure of expert report

20.1 In *Anderson & Anderson* (2000) FLC 93-016 Chisholm J considered a case where the husband brought an application pursuant to s 79A to set aside final property settlement orders which had been made by consent.

20.2 One of the properties the subject of the final orders was described as the "Yeppoon property". The husband deposed to believing that the Yeppoon property was worth $400,000 at the time of entering the consent orders in December 1997. He did not himself obtain a valuation of that property.

20.3 In March 1997 the wife swore an affidavit in support of an application for maintenance in which she asserted that property to have the same value as the husband contended for, that is $400,000.

20.4 In May 1997 in the context of the proceedings, the wife had instructed her lawyers to obtain a valuation of the Yeppoon property. That valuation came in at $165,000. The wife and her solicitor took the view that the valuation was fundamentally flawed and

the wife instructed her solicitors to not rely upon it. That valuation was not served upon, nor disclosed to, the husband's solicitors.

20.5 Ultimately the Yeppoon property was sold in giving effect to the orders and the highest bid was $100,000.

20.6 The husband sought to set aside the consent orders on the basis of a suppression of evidence and particularly pointed to the valuation obtained by the wife which was not disclosed.

20.7 The wife sought summary dismissal of the s 79A application.

20.8 Chisholm J found that the valuation is privileged under common law principles and was not liable to be disclosed in the proceedings. On that basis, the s 79A application was dismissed summarily.

21. Certificates under s 128 of the Evidence Act

21.1 Prior to the decision of the Full Court in *Field v Kingston* (2018) FLC 93-850 it was thought, following decisions such as *Ferrall and McTaggart as Trustees for the Sapphire Trust and Ors v Blyton* (2000) FLC 90-54 and *Jarvis v Pike* (2013) 50 FamLR 593 that a party could "object" to providing affidavit evidence by reason of the rules of court and the obligation of disclosure requiring evidence to be given.

21.2 It followed that lawyers had to consider whether a party ought file an unsigned affidavit seeking a certificate in respect of incriminating material or otherwise how the matter was to be approached.

21.3 In *Field v Kingston* the Full Court observed at [28] that, *"[t]here appears to be no relevant distinction to be drawn as to the form in which the evidence is given, that is whether given orally or by affidavit sworn and filed in the proceeding".* It was accepted at [44] that, *"where a party is directed to file an affidavit and the order specifies the subject matter of the affidavit, the requisite degree of compulsion may well arise permitting the issue of a certificate."* However, it was held at [43] that court Rules imposing an obligation of full and frank disclosure between parties *"provide no relevant compulsion in the sense which would enliven the application of s 128 of the Evidence Act."*

21.4 The Full Court determined that the Decision in *Ferrall* should no longer be followed (at [29] and [46]).