

**PREPARING AND PRESENTING A**

**PROPERTY CASE IN**

**THE FEDERAL**

**MAGISTRATES COURT**

**Federal Magistrate Michael Baumann**

**Federal Magistrates Court of Australia**

**Brisbane**

## **INTRODUCTION**

1. There is an old adage in business - “that we don’t plan to fail, we fail to plan”.
2. The same may be said for litigation where the failure to properly prepare a case often leads to a less than satisfactory result. That is not to say that litigants do not occasionally achieve a result “despite” their poor representation rather than “because” of their good representation, but that is a risk any competent practitioner should seek to avoid.
3. This paper is directed to a number of practical issues which arise during the preparation of a case for property settlement conducted in the Federal Magistrate’s Court of Australia. Many experienced litigators will, no doubt, regard some of the observations as trite and common sense - however after 5 years on the bench I observe that many of the basic elements of good case preparation are not being consistently practiced. Clearly also in a paper of this kind, it is not intended to try and cover every element of preparation - only those which more often arise or seem to be disregarded more regularly.

## **PROOFING THE CLIENT**

4. It is essential that the client be properly proofed at the earliest opportunity. A detailed and complete Statement of Facts should identify the strengths and weaknesses of your case.
5. Ensure that there have been no previous property orders made and if divorced, when that occurred.

6. Like any time limit in litigation, you should identify any need to consider s.44 (3) of the Act or relief under s.79A, at the first interview. At times parties separate; go to a local Court with their own arrangement which is made into an order; and subsequently reconcile. Often parties have entered into “informal” settlements post separation which they believe bind them.
7. Clients often have a desperate need to tell you their whole story - in their way. Often it is easier - and quite beneficial - to allow them to do so by writing out or preparing at home their story. It then becomes easier to explain to them why it is not necessary to incorporate aspects of their life history which are relevant; inflammatory; laden with fault attribution or plainly dangerous to incorporate in an Affidavit.
8. Beware of the client who insists that you **must** incorporate every detail of their version in their Affidavits. Your duty to your client is not to make the consultation less anxious for them by agreeing with everything they say - it is to give professional advice. Affidavits filled with nonsense rarely hit the target - and cause longer replies and potentially more costly trials.
9. The client statement will found the basis for your informed negotiations and Affidavit preparation. It will give you a greater opportunity to “use the words” of the client. Of course, one must at times filter the colourful recollections of the client, but using the words of a client often makes a powerful statement. Remember, they are the ones ultimately likely to be in the witness box (not you) - and it is a very lonely place when under cross examination, they are being asked to explain statements or words (drafted by you), they do not fully understand.

10. At any early stage get the client to complete at their leisure a Financial Statement. It represents a “good starting checklist” of basic current financial matters. It also helps you to understand what sort of client you are dealing with - a person who thinks “near enough is good enough” to a person who maintains scrupulous records and is capable of accounting “for every cent”.
11. When you have your client’s statement - test it in the comfortable confines of your office. Consider preparing a chronology of major events which helps:-
  - a) trace funds: for example, from one property into another;
  - b) identify extra-ordinary financial benefits and how they were used; and
  - c) exemplifies the effect on work histories of the birth of children; illnesses, accidents and the like.
12. Through this process you will also consider whether any evidence is likely to support Kennon type arguments; waste under the Kowaliw principles etc.

## **DISCOVERY**

13. Before you can hope to engage the opposition in the critical fundamental exercise of discovery - make sure your client has made full and complete discovery and disclosure to you. You should at an early stage of your retainer obtain any documents which your client has in their possession relevant to the matters in issue. Often a party will tell you they left everything in the “filing cabinet” at home - in which case you need to get clear instructions about what they recall being there.

14. The documents you obtain early may assist greatly in corroborating your client's version of events or, at least, identify other likely grounds of enquiry for non party discovery or eventually as the target of a subpoena.
  
15. Proper discovery by both parties is essential and clearly the failure to make proper discovery can lead to adverse influences being drawn about a client's credibility- and have a significant effect upon the ultimate result (see *Weir* (1993) FLG 92 - 338; *Black & Kellner* (1992) FLC 92-287) In *Weir* the Full Court commented: -

*“It seems to us that once it has been established that there has been a deliberate non-disclosure..... then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature”*
  
16. When you are aware of what documentary corroboration is available, if needed, you are also in a better position to consider, even at this early stage, what witnesses you may need to consider calling if your case compels it. Consider proofing these witnesses earlier - and with elderly and unwell persons and even those regularly overseas; consider a short, crisp affidavit being prepared early to avoid the difficulties of their unavailability at a trial.
  
17. My experience suggests that interparty discovery is not being undertaken with the attention to detail it often deserves. Do not expect any sympathy from the Court if you attempt to conduct discovery in the witness box. Good and early discovery should narrow the issues for determination; lead to shorter property trials and therefore less cost to the client.

18. Rule 24.03 compels full and frank disclosure and sets out a helpful checklist. Part 14 of the Federal Magistrates Court Rules, which relates to all proceedings in the Court's jurisdiction, sets out the power to make orders for discovery, specific questions and the like consistent with s.45 (1) of the Federal Magistrates Court Act. Consider applying to the Court to use those powers if you are meeting obstacles.
19. In appropriate cases, often involving businesses and business records, you should consider inspecting original documents (with your client present), rather than just obtaining copies. It always surprised me in practice how often a client, (understanding the nuances of a business method adopted by the parties), found on the back of records; in the margins or on cheque butts a "gem" which support a peculiar business dealing or supported a line of enquiry.
20. The purpose of this paper is not directed to issues arising from the application of Part VIII A of the Family Law Act 1975 or in respect of injunctions binding third parties. A helpful article on these issues by Jeremy St John SC of the Victorian Bar, can be found at (2005) 11 CFL 126.

### **ARMED AND READY**

21. Having taken the time to properly prepare early, you are in a better position to engage the other party in pre litigation negotiations; prepare Affidavits and urgent applications quickly; and give your client the best chance of settling the matter early on a reasonable basis.

22. You will also enhance your own reputation as a practitioner who makes statements on behalf of the client from a generally well founded position, rather than seen to be “shooting from the hip”.

## **PRINCIPLES**

23. The earlier observations made by me, have much of their foundation in my earlier practice as a criminal defence lawyer. In that arena, where the onus of proof for every element of an offence rests upon the prosecution, one’s preparation was directed forensically to identify those relevant elements and the apparent weaknesses in the prosecution case.
24. Even though Family Law proceedings have some special features, they are essentially civil proceedings and the balance of this paper is directed to some of the issues and evidentiary considerations which arise from the elements of the area being litigated - in this case property settlement.
25. The approach to be adopted in a property case is well settled and often restated by the Full Court, for example in *Hickey* (2003) FLC 93-143 that:-

*“The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of s.79. That approach involves four inter-related steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of ss.79 (4) (a), (b) & (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant*

*matters referred to in ss.79 (4) (d), (e), (f) and (g) (“the other factors”) including, because of s.79 (4) (e), the matters referred to in s.75 (2), so far as they are relevant, and determine the adjustment (if any) that should be made to the continuation based entitlements of the parties established at step two. Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case: Lee Steere (1985) FLC 91-626; Ferraro (1993) FLC 92-335; Davut & Raif (1994) FLC 92-503; PRPIC (1995) FLC 92-574; Clauson (1995) FLC 92-595; Townsend (1995) FLC 92-569; Biltoft (1995) 92-614; McLay (1996) FLC 92-667; JEL & DDF (2001) FLC 93-075 and Phillips (2002) FLC 93-104”*

26. This statement of principle must be at the forefront of your consideration as you take instructions; prepare for and attend the conciliation conference and if necessary, prepare for trial.
27. It may also be appropriate at this early stage to consider whether you are minded to assert that the matter be considered on an “asset by asset” basis or the more usual and preferred “global basis”. It bears restatement, that it is often apparently thought a determination of this issue might, tactically or otherwise, shape a better net result for your client. Whilst the method of analysis and weighting to be applied to the various assets might differ - the resultant order can never be other than what is “just and equitable” in the view of the Court. Occasionally a Court may undertake an analysis, by way of a check of the facts as found using both approaches but that is not necessary.

## FIRST STEP

28. At first blush identifying the assets and liabilities seems a simple exercise, and often it is. Increasingly however, in my view, less attention than is deserved to devoted to this step.
29. Clearly the starting point is assets, financial resources and liabilities at the date of co-habitation. This paper is not an appropriate vehicle for a analysis of when co-habitation is construed to occur. Again usually this is not an issue. The nature and style of personal relationships are such however that the emotional commitment does not always coincide with the financial support, commitment and intermingling which one identifies often as the start of a serious relationship.
30. Obtaining a clean picture of the co-habitation possessions of the parties is critical, more so in short relationships, but not withstanding the direction in *Pierce* 24 FAML R 377 in all matters. Importantly the often-quoted and adopted statement in *Pierce* at 385 that: -

*“In our opinion it is not so much a matter of erosion of contributions but a question of what weight is to be attached in all the circumstances to the initial contribution by a party with all other relevant contributions of both the husband and wife. In considering the weight to be attached to the initial contribution in this case of the husband, **Regard must be had to the use made by the parties of that contribution**”*

(My emphasis)

reminds us to look at the use to which the funds were put.

31. Ensure you identify liabilities brought in - credit cards; loans on motor vehicles, mortgages on real estate; all clearly must be assessed. You can anticipate if those liabilities existed, the other party will emphasise them, so as to reduce the **real** benefit of the contribution. Look to the evidence that may be available to support or corroborate the client's recollection.
  
32. Applications for loans; bank statements; acquisition or sales evidence all should be investigated if the issue is in doubt and it is likely to have some significance. Suffice it to say, this requires some proportional response. In a marriage of say 30 years, trying to determine the value of the FJ Holden may be a less than fruitful endeavour. In small pool cases, often the parties over-exaggerate the value of their cars, stereo and household goods. Remind them of the valuation methodology adopted - namely market value - not replacement value as is often the basis for insurance. I get surprised how often people in the early years of their adulthood claim to have \$50,000 worth of furniture.
  
33. Increasingly, the value of property at separation is regarded by parties as critical - and it can be. If, for example, there is a significant period of time between separation and trial, then the extent to which post reparation contributions demand a further assessment can often be shaped by the relative increase in values. Clearly, where a very buoyant property market has existed, the party who has remained in the home can understandably perceive the increase in value has more to do with their post separation contributions than market forces. It is a sad truism, that merely spending \$50,000 on a pool and landscaping does not mean the property has increased in value by \$50,000.

34. It is increasingly common for items of disputed value to be the subject of a single expert opinion under Rule 15.09. Practitioners should be aware of their right to seek leave (under R 15.12) to adduce evidence of another expert on the same issue.
35. In smaller property cases, business valuations do not as often arise. Even for small “owner-operated” enterprises, full discovery of financial statements (and, if challenged, source documents) is necessary. BAS statements often provide a quick snapshot of the business. For this paper I do not propose to deal with the issues to be considered when securing a proper business valuation from a Court expert. Another person at this Conference does so in more depth.
36. When considering assets at the date of trial, give proper consideration to interests which your client may have in family trusts and companies and to an estate in the process of administration. This latter issue is different to an “anticipated inheritance” which I deal with later in this paper.
37. It is necessary to put admissible probative evidence before the Court as to the value of an asset if it is in dispute. This does not mean an appraisal from a local Real Estate Agent, merely attached to an Affidavit of the party. “Red Book” appraisals of cars (now conveniently it seems available of the internet) are similarly devoid of any forensic value.
38. Recently the Full Court in *Lam and Ram* (2005) FAMCA 868 agreed that it was open for the trial judge to admit medical and other expert reports merely annexed to the Husband’s Affidavit rather than those reports being the subject of individual affidavits by the relevant medical practitioners and other experts. No notice as required under s.67 of the Evidence Act had

been given, yet the trial judge admitted the evidence under s.78 of the Evidence Act. In so doing, the trial judge accepted the submission, based on “proportionality” that having regard to the modest asset pool; the costs involved in obtaining expert evidence; and the fact that the issue was not seriously challenged as a fact that he would receive the evidence in this form. With reliance on the observations of Hill J in *Tsang Cai Ming v Uvanna Pty Ltd* (1996) 140 ALR 273 @ 282, the Full Court agreed with the trial judge’s exercise of discretion on admissibility. It would be unwise to think such an approach will apply to every case.

39. In this respect s.76(1) of the Evidence Act prohibits the admission of opinion evidence unless it falls within the exception based on specialised knowledge (s.79). Practitioners need to be conscious of the need for their expert to be qualified to give the opinion (see *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *H and H* (2003) FMCfam 31). Also, in *O’Donnell & Murphy* (2003) FAMCA 417, Kay J reminds us that whilst s.69(2) of the Evidence Act creates an exemption to the hearsay Rule for “business records”, it is not an exception to the “opinion rule.”
40. Recently in *AM and MM* (2005) FAMCA 443, the Full Court observed the practical difficulties where a party does not put before the Court any evidence about the value of the pre-cohabitation assets and liabilities and said:-

*“in these circumstances it was not necessary for the trial judge to make any findings relating to the value of these properties as at the date of commencement of cohabitation.”*

41. Whilst the parties at trial may reach a compromise as to two differing values, *“it is not open to the Court merely to adopt a mean or average figure between the rival opinions.”* (Lenehan (1987) FLC 91-814 @ 76.142)
  
42. In *Borriello* (1989) FLC92-049, the Full Court referring to the decision of the High Court in *Commonwealth v Milledge* (1952) 90 CLR 157 (in which the High Court said (pages 161-162) that the correct approach to be applied to the resolution of a valuation dispute should be *“a common sense endeavour after consideration of all material to fix a value satisfactory to the mind of the Court as representing the Value”*), said at 77.558, that the principle was that a *“trial judge was obliged to satisfy himself by means of the application of proper principles, that he had arrived at the value of the property on the relevant date.”*
  
43. As long as *“proper principles”* are applied, finding between two competing valuations may be permissible. This may, for example, result from adoption of a proper methodology but a different reliance on sales evidence before the court (or, for a business, adopting one capitalisation rate over another). When a determination of value may not be possible on the evidence, to order a sale may be the *“proper solution”* (see *Little* (1990) FLC 92-147; *Smith* (1991) FLC 92-261).
  
44. Before turning to the second step, I mention the issue of liabilities - particularly those which have their source from funds from family members. It is not unusual to see marital couples receiving the benefit of loans, gifts or other assistance from their respective families. The character of those benefits at the time they were provided, often is said to have changed, post separation and at trial.

45. Whilst I will deal in a later section of this paper with the principles which arise from Kessey's case, I can do no better than to recite a part of the Full Court decision in *Honda* (2001) FAMCA 134as follows:-

*"24. In Biltoft and Biltoft (1995) FLC 92-614, the Full Court said at 82,124:-*

*A general practice has developed over the years that, in relation to applications pursuant to the provisions of s. 79 the Court ascertains the value of the property of the parties to marriage by deducting from the value of their assets the value of their total liabilities. In the case of encumbered assets, the value thereof is ascertained by deducting the amount of the secured liability from the gross value of the asset. See, *Ascot Investments Pty Ltd v. Harper & Anor* (1981) 148 CLR 337 where Gibbs J. (as he then was) pointed out at p355 that the 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". Where the assets are not encumbered and moneys are owed by the parties or one of them to unsecured creditors, the court ascertains the value of their property by deducting from the value of their assets the value of their total liabilities, including the unsecured liabilities."*

*25. At 82,127, the Court said:-*

*"Notwithstanding the general practice which has developed, the Court has indicated that it may properly determine not to take into account or to discount the value of an unsecured liability in certain circumstances. Such liabilities would*

*include but are not limited to a liability which is vague or uncertain, if it is unlikely to be enforced or if it was unreasonably incurred.”*

*26. Other examples of exceptions to the general practice are to be found in a number of authorities, including Antmann and Antmann (1980) FLC 90-908 and Af Petersens and Af Petersens (1981) FLC 91-095, both of which were discussed by the Full Court in Biltoft and Biltoft (supra).*

*27. We respectfully agree with the observation of Evatt CJ. in Prince and Prince (1984) FLC 91-501 at 79,076, including her Honour’s observation that the assessment of debts and liabilities is not necessarily arrived at by a strictly mathematical or accountancy approach in all cases.”*

46. Clearly it is a matter of fact whether the advance
- was made
  - was received
  - how it was used
  - if it was, at the time of advance, a loan and if so what conditions (repayment; interest etc) attached to it
  - was documented in any manner
47. It is necessary for you to put the best evidence before the Court to explain or establish these relevant facts. A failure for example, to call evidence from the person who made the advance or provided the benefit could lead to an adverse inference (see discussion on the Rule in *Jones v Dunkel* later).

48. Contingent liabilities (eg taxation; capital gains tax etc) are just that:- “contingent” and the degree to which the Court can take them into account in the first steps depends on the quality of the evidence and, often, on the nature of the order. For a good example of a recent discussion by the Full Court on this issue see *TWN and PAQ* (2005) FAMCA 677.
49. It follows that there will be cases where the nature of certain future events compels consideration of whether an adjournment of the proceedings under s.79(5) to (7) should be sought. A delay can allow for assets to vest or liabilities to crystallise. Again the purpose of this paper is not to explore in depth the principles which apply to that type of application but generally see, for example *Carson* (1999) FLC 92-835.

## **SECOND STEP**

50. It is your duty to collect and put probative evidence before the Court so that it might properly identify and assess the contributions under s.79(4). This does not, in practice, appear to present difficulties - save that at times it may be useful to restrain the client from detailing every event when they did something. This area is prone to an exaggeration of one’s own contribution whilst at the same time an attempt to minimise the other parties.
51. It is good sense to carefully use words such as “never” and “always” in Affidavits - if you must use them at all.
52. Proper concessions about the contributions made by the other party (or their family) often give a sense of “reality” to the history. The use of superlatives like, “an excellent cook”, “marvellous provider” or “creative landscaper” do not always assist.

53. Whilst the direct and indirect financial contributions are more capable of objective corroboration, often no attempt to do so is apparent - especially when it is known that it is an issue. Again this is a matter which is usually satisfied by fulsome discovery, however particularly with direct financial contributions, the use of a **Notice to Admit Facts** is a strategy worth consideration.
54. A Notice to Admit is a common approach in civil litigation. Rule 15.31 provides that where a party delivers such a notice and the other party does not, within 14 days, dispute the Fact (or the authenticity of the document), *“the other party is taken to admit, for the proceedings only, the fact or the authenticity of the document”*. Cost consequences can flow from the expense **incurred** to prove a disputed fact (R15.31(4)). For a helpful exploration of the importance of this procedure, how to best use it, and the way in which a Court will consider an application by a party to withdraw an admission, see the decision of Jarrett FM in *Page and Glover* (2004) FMCAfam 277 (where he relies heavily on the Queensland Court of Appeal decision in *Riddlfi v Rigato Farms Pty Ltd* (2001) 2 QdR 455).
55. If you are aware of contributions made by family members, then the principle arising from *Kessey* (1994) FLC 92-495 needs to be considered, where at 81.150 the Full Court said, expanding the statements of principle enunciated by Fogerty J in *Gosper* (1987) 91-818 that:-
- “... this case would establish that where there is no evidence of any intention by a parent - donor as to whether he or she wished to benefit only his or her child or also to benefit the spouse of the child as well as the child, then the fact of the parent - child relationship, especially in circumstances where that has been a relationship of support on the part of the child, will be sufficient to establish a*

*contribution of the donation by or on behalf of the child of the parent. In other words, a contribution by a parent of a party to a marriage to the property of the marriage will be taken to be a contribution made by or on behalf of the party who is the child of the parent unless there is evidence which establishes it was not the intention of the parent to benefit only his or her child.”*

56. Clearly therefore, to rebut this evidentiary presumption, evidence must be called to show that the intention of the parent was to benefit both parties directly - not indirectly. As I raised earlier when dealing with loans, a succinct affidavit from the parent deposing to the intention at the time of the gift may put that issue to rest quite quickly.

57. The effect on the assessment of contributions arising from a personal injuries award could be a subject of a detailed paper in itself. Suffice it to say for present purposes that:-

*“in most cases, a damages verdict arising from a personal injuries claim, whenever received, is a contribution by the party who suffered the injury” (Aleksowski (1996) FLC 92-705 at 83.437)*

58. Often the personal injuries award has been the subject of compromise, such that the separate heads of damage are not specifically agreed or quantified. Where a trial judge has such details “different considerations might apply” however as the Full Court, by majority (Holden & Warnick JJ) observed in *Keenahan* (2004) FAMCA 360, if certain portions of a damages award (in the case under appeal, the components for pain and suffering and future economic loss) are viewed as a contribution exclusively by the injured party, against which the other parties contributions are not measured, then this may result in the other party’s contributions being devalued.

59. The extent to which the contribution to the family as a homemaker and parent is to be assessed is less controversial than it was when the Family Law Act came initially into effect. This issue is often the source of the most inflammatory remarks - for little determinative value. Statements as to the quality of care given to the children; how clean the house was and the like are founded on a perception, it seems, that the quality of the contribution is more important than the "quantity" of the contribution.
60. Recently the Full Court (Kay, May & Boland JJ) in *Brown* (2005) FMCA 389, had cause to consider whether the trial judge had given appropriate weight to all contributions, particularly those of the Wife as homemaker and parent and referred to the passage in *Ferraro* (1993) FLC 92-335 that:-
- "the task of evaluating and comparing the parties' respective contributions where one party has exclusively been the breadwinner and the other exclusively the homemaker, is a most difficult one to perform because the evaluation and comparison cannot be conducted on a "level playing field." Firstly, it involves making a crucial comparison between fundamentally different activities, and a comparison between contributions to property and contributions to the welfare of the family. Secondly, whilst a breadwinner contribution can be objectively assessed by reference, to such things as that party's employment record, income and the value of the assets acquired, an assessment of the quality of a homemaker contribution to the family is vulnerable to subjective value judgments as to what constitutes a competent homemaker and parent and can not be readily equated to the value of assets acquired. This leads to a tendency to undervalue the homemaker role."*

61. It must also be remembered that the performance of a role as homemaker and parent is not just a contribution under s.79(4)(c) but also can be a significant contribution under s.79(4)(b) (see *Dawes* (1990) FLC 92-108).
62. The need to consider s.79(4)(g), in my view should in appropriate causes act as a catalyst to consider whether the proceedings for property settlement are an appropriate vehicle to seek to “add on” some relief under the *Child Support (Assessment) Act 1989*, as permitted, with leave by s116(1B) of that Act. The evidence as to financial circumstances required for property proceedings is essentially the same for applications for departure (when the ground is under s.117(2)(c)) or applications for payment in a substituted Form (s.124). In appropriate cases it can also more effectively bring some certainty and finality to the party’s financial positions. The costs of the issue being ventilated at the same time as property proceedings will usually be less than a “stand alone” application.

### **THIRD STEP**

63. Again, the nature of this paper does not compel a thorough investigation of every s.75(2) factor. Most, in any event, speak for themselves and the relevance to each case differs on the facts of the case. It is however, a worthwhile exercise when proofing your client to systematically get instructions on each of the factors so that a relevant issue is not overlooked. Sometimes a client will simply not tell you about an issue because they were never asked to consider the matter - or just didn’t think it was relevant.
64. I do not propose to cover the ground so competently and fully attended to by my colleague FM Slack in his paper entitled “The Impact of Income and

Earning Capacity on Property Settlement outcomes” delivered at this conference. I strongly recommend it to you.

65. I merely intend to emphasise that it is your duty to ensure the necessary admissible and probative evidence is produced to the Court to enable it to ground a finding as sought by you in your case. Whilst a party’s age and current workforce skills might suggest that a person’s earning capacity is modest - they may still exist - especially with some form of retraining or skills development. If that is the case your are advancing then consider the evidence to support it.
66. I am amazed how often it is submitted that the Court can take “Judicial Notice” of various facts including employability; effects of the regional property market etc. This submission does not seem to have considered the limited effect of s.144 of the Evidence Act (although it has been suggested it is wider in scope than the common law relating to judicial notice (see *Owens v Repatriation Commission* (1995) 59 FCR 559) which provides, inter alia:-
- “144(1) Proof is not required about knowledge that is not reasonably open to question and is:-*
- (a) common knowledge in the locality in which the proceeding is being held or generally; or*
- (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.”*
67. The learned authors of the Uniform Evidence Law (4<sup>th</sup> Edition) gives as an example for a matter of “common knowledge in the locality” would be, in a trial in a court sitting in Sydney, the location of the Harbour Bridge and of a

document the authority of which cannot reasonably be questioned, a meteorological document to prove when the sun rose on a particular day.

68. Where issues of health arise, and in the absence of an acceptance of not only the illness or condition and the effect of some, your must call probative evidence. If it is a significant issue in the case, referral for an expert report under R15.09 might well be the best and most cost effective approach. If future surgery, hospitalisation and/or time off work for rehabilitation is likely then some evidence of these aspects should be offered to the Court.
69. Within the context of s.75(o), on occasion the treatment of an anticipated inheritance arises. This is an issue to, again, be handled proportionately. Even if a party expresses a view that the other party's parents are "wealthy", this is a long way from making the matter relevant. As was said in *De Angelis* (2003) FLC 93-133:-

*"The discussion by the Full Court in White and Tulloch v White (1995) 19 FAM LR 696 of this question of the treatment of anticipated inheritances in property settlement proceedings, indicates that there is no absolute rule and that each case will depend on its even facts. However, we think it is important to remember that the Court is required in exercising the jurisdiction under section 79 of the Family Law Act to accord justice and equity to both parties. The question therefore has to be asked whether, in the present case, is would be just and equitable to the husband for the Court to have ignored the probability that, in what could well be a very short time period (given the ages of her aunt and mother), the wife could well be the owner of two properties having a combined value of almost the same amount as the value of the parties' property currently available for distribution, and particularly in circumstances where the husband*

*had been found to have done substantial improvement and maintenance work on both properties.”*

70. In that case, which some might describe as the “high water mark”, the Court considered it would have been unjust to the husband to ignore the matter even if it was categorised only as a possibility and not probability.

71. I also mention, within the range of factors which the facts of the case might deserve a submission under s.75(o), what is commonly called “the Robb factor”.

72. In *Robb* (1995) FLC 92-555, the Full Court (Lindenmeyer, Finn and Joske JJ) said:-

*“In considering whether the justice of a case requires some act done by a party to be taken into account under s.75(2)(o), the Court should, we think, have regard primarily to the existence or otherwise of any legal obligations, as between the parties, in relation to the doing of that act, and also, perhaps, to ordinary notions of justice and equity between the parties.”*

73. In that case the wife had the care of infant children from a prior marriage, for whom of course she held a primary legal duty to maintain. The second husband did not have such a legal duty, and with evidence before the trial judge of his financial and emotional support of these children, made an allowance under s.75(o) for that factor. The Full Court said that “*the justice of the case clearly required the husband’s contribution to be taken into account under s.75(2)(o)*” but that the same cannot be said of the wife’s contribution as “*in making that contribution the wife was in no way discharging or assisting to discharge any legal obligation of the husband*”.

74. This decision further reminds us to identify and produce reliable evidence before the Court of any act done to ensure it is taken into account, under s.75(o), to ensure justice in the case is achieved.

#### **FOURTH STEP – JUST AND EQUITABLE**

75. Under s.79(2) of the Act, the Court is required to be satisfied that it is the **order** to be made which is just and equitable, **not** just the underlying percentage division of the nett value of the parties assets (see *JEL & DDF* (2001) FLC 93-075 and *Russell* (1999) FLC 92-877).
76. In this context, the decision in *Phillips* (2002) FLC 93-104) is often relied upon as a basis for “rejigging” the order following the earlier analysis.
77. I acknowledge the considered observations made by my colleague FM Walters in *OSF & OJK* (2004) FMCAfam 63 and his view that:-
- “the testing of any proposed orders by reference to s79(2) is not a fourth substantive step (properly so called) in the property settlement exercise.”*

And that the case of Phillips:-

*“is not and cannot reasonably be interpreted as authority for the proposition that a Court exercising jurisdiction under the Family Law Act in relation to property settlement should “stand back” and make substantive alterations to the result that has been reached after the application of what has been described as the first three steps in the property settlement exercise.”*

and that:-

*“All that is left in such a circumstance is to alter the form, structure or balance of the orders required to give effect to that overall decision, in order to ensure that s79(2) is not offended.”*

78. In my view Phillips very much relies upon its own facts, but that it is not unfair to place some weight, in some cases, for a party (for example) to retain the home, but to the extent that the factor overwhelms the legitimate claims of the other party. If a Court, in the exercise of its discretion, is being asked to make an order which might distribute the species of assets in a particular manner then evidence as to why justice will be served is required. For example, if a party with the care of young children wishes to retain the family home, evidence as to the extent to which the party can afford to borrow against the home (with evidence from a loan facilitator) is often helpful

## **OTHER ISSUES**

### **RULE IN JONES & DUNKEL**

79. When you are preparing your case for trial, it is important to properly consider the effect of not calling an available witness – often requiring the rule in *Jones v Dunkel* (1959) 101 CLR 298 to be brought into focus. The Rule provides that:-

*“(a) the unexplained failure by a party to give evidence or to call witnesses or to tender evidence or produce particular material to an expert witness may, not must, in appropriate circumstances lead to an inference that the uncalled evidence could not have assisted that party’s case.*

- (b) *the Rule can operate against parties not bearing the burden of proof and parties that do bear it as well.*
- (c) *the appropriate circumstances exist where it was within the power of the party to tender the evidence that was not tendered and led to the suggested inference being drawn”.*

80. It is a particularly uncomfortable feeling for a practitioner to read in a judgment that an adverse inference has been drawn on a particular important fact or event, when evidence was known to be available but was not called. Try to avoid it happening to you.

#### **WASTE & ADD BACKS**

81. This issue often arises in property cases and too often the allegations are faintly raised with little supporting evidence.
82. Recently in *Bruno (No. 2)* (2005) FMCAfam 402, FM Ryan diligently considered a number of previous decisions of the Full Court (including the recent decision in *Chorn & Hopkins* (2004) FLC 93-204) and drew on the ex judicially writings of Appeal Judge Boland to distill a set of principles which I record from her judgement as follows:-
- “i) *The principle in Kowaliw is not a fixed code.*
  - ii) *Kowaliw is a useful guideline for dealing with cases involving lost assets or income.*
  - iii) *In cases involving waste there must be a proper reason for adopting a non Kowaliw approach.*
  - iv) *If the losses occurred in the course of the pursuit of the objectives of the marriage then such losses should be shared by the parties although not necessarily equally.*

- v) *The economic consequences of waste must be dealt with in a just and equitable manner.*
- vi) *The economic consequences (loss) may be treated as a premature distribution of the asset pool and notionally added back as the asset of the party who had its sole benefit.*
- vii) *Taking the premature distribution into account in a general way pursuant to s.75(2)(o) and applying the cumulative outcome of the s.79(4) and s.75(2) findings to the smaller depleted asset pool may offend s.79(2) notions of justice and equity.*
- viii) *Where the asset pool had been seriously depleted it may be that only by giving the premature distribution its full dollar value that justice can be given.*
- ix) *The premature distribution concept is not restricted to post separation transactions.*
- x) *Where the monies have been shown to have been reasonably disposed of the notional add back approach should be the exception and not the rule.*
- xi) *Notional adjustments are not limited to wasted assets but may also include property that has been bona fide disposed of.*
- xii) *The source of the funds is relevant.*
- xiii) *Notionally included assets may include unascertained assets, even if the precise value is not known.*
- xiv) *Even if it does not involve waste, the economic consequences of a significant reduction in the asset pool must be considered”.*

83. I recommend the judgment to you and the “checklist” of facts identified by FM Ryan requires consideration, at an early stage, of what evidence you

need to call to either increase your client's prospects of funds being "added back" or otherwise adjusted or rebutting such an event. It is unlikely the mere production of a bank statement with a few entries showing withdrawals from an ATM at the "local club" will suffice to establish a gambling habit, for example.

84. In this regard the well known comments of Baker J in *Kowaliw* (1981) FLC 91-092 at 76, 643-44 bear restatement, when after saying, in effect that the economic fruits as well as the financial losses should be shared by the parties to a marriage (although not necessarily equally) he identified the following exceptional circumstances:-

*"(a) where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or*

*(b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value."*

85. In the context of this type of issue the case of in *Brigginshaw v Brigginshaw* (1938) 60 CLR 333 at p362 requires recall, where Dixon J said:-

*"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences."*

86. The Brigginsshaw test is now encapsulated in s140 of the Evidence Act, and has been the subject of discussion by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 and also the Full Court in *K v R* (1997) 22 FAML 592).
87. Even more recently Carmody J in *Derek* (2005) FAMCA 356 astutely observed:-
- “The point at which the party who recklessly or wantonly incurs debts or increased unsecured liabilities may be penalised for economic fault under the Kowaliw principle is not always easy to define as a concept or identify in practice.”*
88. And succinctly suggested that in practical terms:-
- “... the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”*
89. In an interesting recent single judge decision of Coleman J in *Crampton* (2005) FAMCA 883 (delivered 15 September 2005), His Honour accepted an independent medical specialists’ diagnosis of a “dysthymic disorder” as causing the wife’s “pathological gambling” during the marriage, sufficient to satisfy him that although the wife’s illness may not have caused her to do what she did, it did deprive her actions of the degree of “wantonness negligence or recklessness” which is required for a Kowaliw claim to succeed.
90. His Honour said to “add back” such monies lost by the wife through gambling “*would be to impose almost strict liability*” and he declined to do

so, making this observation (relying on the observations of Carmody J in Derek) that:-

*“In circumstances where the evidence does not suggest that the wife’s contribution during the period of her illness were otherwise deficient, it would be somewhat harsh to in effect after the event, change the terms of the contract of marriage entered into by the parties”*

- that being identified by Carmody J as:-

*“the promise to take and to hold for richer or poorer and for better or worse – to take the good with the bad.”*

91. In declining to reflect the substantial losses incurred by the wife’s gambling during the time of her illness in the contribution arena, His Honour identifies how important it was to his decision to have the evidence available from the medical specialist.

## **POST COGHLAN**

92. In *C and C* (2005) FAMCA 429 the majority considered the effect of sections 90MC and 90MS of the Act and concluded:-

*“47. The court in dealing with property proceedings and with proceedings where the parties have superannuation interests must then turn to s.79(2), which requires that any order, including an order that relates to superannuation interests, must be just and equitable.*

*48. The court is then required under s.79(4) in considering what order should be made with respect to the property of the*

*parties (and/or any superannuation interests), to take into account the following matters:...*

...

58. *Thus, we consider that because of the obligation under s.79(2) to make a just and equitable order, then in order to ensure such a result the Court should wherever there is a superannuation interest apply the provisions of s.79(4)(a) to (g) (which will include the matters contained in s.75(2)) to that superannuation interest **whether or not a splitting order is sought.***

...

63. *...the preferred approach to the determination of property settlement cases must be to prepare in addition to the list of items of property (which would clearly fall within the definition of that term in s.4(1)), a separate list containing any superannuation interest or interests (valued according to the Regulations if a splitting order is sought in any application before the Court, or if no such order is sought, valued either according to the Regulations otherwise). This of course is the approach which the trial Judge adopted in this case.*

...

65. *In summary, then, the trial Judge has a discretion as to how superannuation interests will be treated in a particular case. If superannuation is not included in the list of property but rather made the subject of a separate pool, it will be necessary where a splitting order is sought, or extremely prudent where no such splitting order is sought (in order to ensure that justice and equity is achieved) to:*

- a. *value the superannuation interest (according to the Regulations if an order under Part VIII B is sought or according to the Regulations or otherwise if no order is sought);*
- b. *consider and make findings about the types of contributions referred to in s.79(4)(a), (b) and (c) which have been made by the parties to the superannuation interests on either a global approach or an asset approach depending on the circumstances;*
- c. *consider the other factors in s.79(4) being the matters in s.79(4)(d), (e), (f) and (g); and*
- d. *ensure that pursuant to s79(2) the orders in relation to the parties' property, and any order under Part VIII B in relation to superannuation interests are just and equitable.*

66. *In the context of the consideration of the matters referred to in sub-paragraphs (b) and (c) of the last paragraph, the following matters may well be relevant: the relationship between years of fund membership and cohabitation; actual contributions made by the fund member at the commencement of the cohabitation (if applicable), at separation and at the date of hearing; preserved and non-preserved resignation entitlements at those times; and any factors peculiar to the fund or to the spouse's present and/or future entitlements under the fund."*

93. I particularly refer practitioners to the practical implications that arise from paragraph 66 of the decision of the majority careful consideration must be

given to the evidence that must be tendered in respect of valuations of superannuation interests at the various times and the contributions made by the parties. Also evidence of “*any factors peculiar to the fund or to the spouse’s present and/or future entitlements under the fund*” should be collected and offered to the Court, if relevant, in a probative form. For a recent example of how such evidence was used by a Court, and influenced the final order, I refer you to the decision of FM Brown in *Mahoney* (2005) FMCAfam 439 (delivered 25 August 2005).

## **OFFERS**

94. Before concluding this paper, I remind practitioners of the tactical, as well as legal importance, flowing from a well prepared and non-ambiguous Offer of Settlement.
95. *In Pennisi* (1997) FLC 92-774 @ p 84, 547 the Full Court said:-  

*“...offers must be seen in the context of the case and the extent of the offeree’s knowledge of the parties’ financial circumstances while the offer is live...”*
96. Circumstances at the time of an offer may include the value of any particular asset at that time (in context to what might later be established at trial) and the comparative value of the assets to be divided.
97. It is hard to imagine many property cases which proceed to trial where it would be inappropriate to file an Offer of Settlement – especially when reliance is so heavily asserted upon a well positioned offer in the context of costs and the exercise of discretion under s.117(2A) of the Act.

## CONCLUSION

98. The Court has a vested interest in seeing cases prepared properly. Not only does good preparation enhance the prospects of an earlier and sensible resolution, at times many issues have narrowed so that trial time is reduced with the flow on benefits to the litigant of a deduction in costs.
  
99. I am hopeful this paper may assist some practitioners in this endeavour.