

Specialist Accreditation Scheme



2021 Family Law Assessment Requirements



THE LAW SOCIETY
OF NEW SOUTH WALES



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Performance Standard

Standard of Accredited Specialist

The standard of an Accredited Specialist in Family Law is that of a *specialty competent practitioner* in the core skills and practical capabilities in the selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. This standard is to be distinguished from the idea that the Scheme requires the highest technical legal knowledge across all aspects of the selected area of practice.

Methods of Assessment

The program for Specialist Accreditation in Family Law consists of three assessments as set out below. To gain accreditation a candidate **must pass all three assessments**.

Candidates will be assessed on the law as it stands on the date of assessment.

Legislation and Provisions

Candidates should be familiar with the relevant parts of legislation relating to the Core Knowledge Areas - Topics for Assessment, regulations and other materials listed in **schedules 4 and 5**.

Important

Candidates are advised to read and familiarise themselves with the 2020 Guide to Application and Assessment which contains important information regarding application, process, resources and special consideration etc. This document can be found at: lawsociety.com.au/specialists



Timetable

The shaded area below shows the core assessment period including the dates associated with each assessment.

Candidates need to focus on this core assessment timeframe and plan their workload well in advance.

Based on feedback reports from previous years, candidates are encouraged to dedicate and manage their time during this period to optimise their performance across all assessment tasks.

Candidates are reminded that participating in the Specialist Accreditation program requires a considerable level of commitment if candidates are to achieve their desired outcome.

Activity	Date
Question & Answer sessions for potential candidates	February 2021
Applications close	Wednesday, 31 March 2021
Candidature confirmed	Week commencing Monday, 3 May 2021
Mock file	Released: Wednesday, 12 May 2021 Due: Wednesday, 2 June 2021
Written examination	July 2021
Simulated interview	August 2021
Results released to candidates	October 2021
Reassessment and/or Appeal application close	14 days from notification of results
Reassessment results released	December 2021
Appeal results released	December 2021



Schedule 1

Mock File

Release date: 10am, Wednesday 12 May 2021

Due date: 4pm, Wednesday 2 June 2021

Candidates will be required to prepare an advice for a client in the form of a letter and prepare appropriate court documents with respect to the various issues raised. This is likely to include an initiating application and relevant supporting Affidavit(s) but may also or alternatively require the drafting of an agreement such as a Binding Child Support Agreement, Financial Agreement or Parenting Plan. The examiners will assess communication skills as well as understanding and application of the law to the given fact situation.

Assessment Criteria

Candidates will be assessed on their:

- a. Ability to identify relevant issues from the materials provided;
- b. Depth of understanding of the law and skill in applying that knowledge to the given fact situation;
- c. Ability to provide practical, clear and accurate written letter of advice; and
- d. Skills in interpreting and drafting documents.

Note:

- Candidates are not expected to provide any advice relating to costs agreements or disclosure statements.
- Candidates may use the resources of their offices in completing this exercise. However, consultation with any other person in completing the exercise is not permitted.



Schedule 2

Written Examination

Examination date: TBD* July 2020

Venue: TBC*

The examination is divided into two sections:

Section A – 60%

Two essay answer questions in areas of family law commonly encountered in practice.

Section B – 40%

Short answer questions that will assess areas across family law that are encountered in the day to day practice of a specialist.

Note: In order to pass the examination, the candidate must achieve at least a 50% score on each of Section A and Section B.

Assessment Criteria

Candidates will be assessed on their:

- a. Ability to identify relevant issues from a given fact situation;
- b. Depth of knowledge of the law and skill in applying that knowledge to the given fact situation;
- c. Knowledge of procedural rules and practices; and
- d. Ability to provide practical, clear and accurate answers.

*All candidates will be notified of the examination time and venue in advance of the examination date.



Schedule 3

Simulated Interview

Interview date: TBD* August 2021

Venue: The Law Society NSW, 170 Phillip Street,
SYDNEY NSW 2000

The candidate will conduct a simulated first interview with a person acting in the role of a client. The exercise will take about 60 minutes and will be recorded for assessment purposes.

This simulated interview is intended to assess a wide range of performance standards, including those relating to interaction between the solicitor and client, taking instructions and giving advice, terms of engagement, assessing facts and legal options, canvassing the options with the client and developing the initial plan.

The candidate may (but is not required to) bring written material to the interview including instruction sheets or notes. Any file note prepared as part of the simulated interview will not form part of the final assessment for this component.

The candidate is expected to demonstrate a clear ability to take and receive instructions, deliver preliminary advice and provide information to the "client" in a manner which satisfies the assessment criteria, core knowledge and the performance standard.

Assessment Criteria

Candidates will be assessed on the following performance standards:

- a. Gathers facts and assesses instructions;
- b. Advising;
- c. Rapport, empathy, attitude; and
- d. Communicates clearly and appropriately.

A sound knowledge of the relevant law, rules and procedures is also required.

*All candidates will be notified of the interview time and venue in advance of the interview date.



Schedule 4

Topics for Assessment

Candidates will be expected to display a high standard of knowledge regarding:

- a. The *Family Law Act 1975* (Cth), *Family Law Rules 2004* (Cth), the *Child Support (Assessment) Act 1989* (Cth), the *Federal Circuit Court Act and Rules* and other relevant legislation and case law;
- b. The core knowledge areas set out in schedule 4 of the Assessment Requirements; and
- c. State Legislation relating to domestic violence, children, medical procedures and professional responsibilities, and the intersection between state and federal legislation.

The contents of schedule 4 (updated as at December 2018) should not be taken as exhaustive. It is aimed at assisting candidates in their preparation for Specialist Accreditation.

Candidates will be assessed on the law as it stands on the date of assessment.

Candidates will be expected to:

- a. Address complex issues that might arise in any of the core knowledge areas;
- b. Identify relevant issues and problems from the fact scenarios provided;
- c. Provide practical, clear and accurate advice;
- d. Draft documents in accordance with relevant procedural rules and principles; and
- e. Demonstrate adherence to the ethical and professional “best practice” of family law.

Note:

- The cases and sections of legislation are provided by way of guideline assistance only. In the event that any new legislative reforms become effective before the date of assessment or new cases delivered, practitioners will be required to be aware of the changes to the law resulting from that legislation or those cases.
- Parts, divisions, sections, orders and rules, if cited without legislative reference, are parts, divisions, sections, orders or rules of the *Family Law Act 1975* (Cth) or the *Family Law Rules 2004* (Cth).

1. Divorce

- Jurisdiction
- Ground: Section 48
 - meaning of separation (including separation under one roof): Section 49
Hedley v Hedley [2009] FamCAFC 179; FLC 93-413, *Stanford v Stanford* (2012) 247 CLR 108.
- Effect of resumption of cohabitation: Section 50
 - requirements where marriage is less than two years: section 44 (1B).
- Section 55A declaration – Children
- Effect on wills
- Time limits for property and maintenance applications: section 44(3); *Anderson v McIntosh* [2013] FamCAFC 200
- Applications for leave to institute proceedings out of time: *In the Marriage of Whitford* (1979) 24 FLC 90-162; *Hedley* (2009)
- Effect of fraud: *Walton v Esposito* [2016] FamCA 336

2. Nullity

Grounds for nullity and consequences of nullity decrees: *Nagri v Chapal* [2012] FamCA 464; *Attorney-General (Cth) v Kevin and Jennifer* [2003] FamCA 94.

3. Children

3.1 Dispute resolution

- Confidentiality re: counselling and family dispute resolution - Section 10D and H.
Unitingcare – Unifam Counselling & Mediation & Harkiss & Anor [2011] FamCAFC 159; (2011) 46 Fam LR 12; *Smith & Duke* [2015] FamCA 990;
- Admissibility of statement made in counselling and family dispute resolution: Sections 10E and 10J. *Unitingcare* (supra);
- Section 10F definition of “family dispute resolution” and s10G definition of “family dispute resolution practitioner”
- *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), regulation 25(2)



- Role of Family Relationship Centres
- Section 63DA and s60D obligations of advisors
- Section 60I - pre-filing dispute resolution requirements and exceptions - *Ellwood & Ravenhill* [2019] FamCAFC 153
- Section 60J

3.2 Jurisdictional requirements and discretion to exercise jurisdiction

- Standing:
 - Section 65C; *Aldridge & Keaton* [2009] FamCAFC 229 at [54]; (2009) FLC 93-421; *Mankiewicz & Anor & Swallow & Anor* [2016] FamCAFC 153; *KAM & MJR & Anor* [1998] FamCA 1896; [1999] FLC 82-847;
 - Section 69C; *Burton v Churchin* [2013] FamCAFC 180.
- Best interest of children and forum; *Kwon and Lee* [2006] FamCA 730, *ZP and PS* [1994] HCA 29; (1994) 181 CLR 639. *Karim & Khalid* [2007] FamCA 1287, *Sahrawi & Hadrami* [2018] FamCAFC 170, *Pascarl & Oxley* [2013] FamCAFC 47
- Definition of “Parent” - Section 60H, 60HA, 60HB: *Aldridge & Keaton* [2009] FamCAFC 229 at [54]; (2009) FLC 93-421; *Re Mark; An Application relating to Parental Responsibility* (2003) FamCA 822 (2003) FLC 93-173; *Masson and Parsons* [2019] HCA 21
- Court’s power to make parenting order: Section 65D(1); *Doherty & Doherty* [2016] FamCAFC 182;
- Approach to making of parenting orders: *MRR v GR* (2010) 240 CLR 461;
- Meaning of “Parenting Order” and matters parenting orders can deal with: 64B; *Reynolds & Sherman* [2016] FamCAFC 240
- Whom parenting orders may be made in favour of: Section 64C, *Bondelmonte* [2017] HCA 8
- Types of children parenting orders can deal with: Section 65H
- Parenting orders may be subject to later parenting plans: Section 64D; *Banks & Banks* [2012] FamCA 158
- Effect of death on parenting orders: Section 65K; *Feranti & Connor* [2010] FamCA 71; *Leicester & Blackett and Anor* [2016] FamCA 228
- *B v B (Re Jurisdiction)* [2003] FamCA 105; (2003) FLC 93-136; *EJK v TSL* [2006] FamCA 730; (2006) FLC 93-287

3.3 Parental responsibility – Part VII, Div 2

- Meaning: Section 61B, 61C, 61D, 61DA, 61E
- Section 65DAC - effect of parenting order that provides for shared parental responsibility:
 - How to approach the task of drafting orders for parental responsibility - *Doherty & Doherty* [2016] FamCAFC 182
- Difference between obligations re day to day issues and “major long-term issues”
- Section 4 definition of “major long-term issues”
- Different consultation requirements for day to day issues and *major long-term Issues*: 65DAE
- *B v B* (1997) FLC 92-755; *Goode & Goode* [2006] FamCA 1346; *Goode v Goode* (2006) FLC 93-286; *Masson and Parsons* [2019] HCA 21

3.4 Parenting orders: general principles – Part VII, Div 5

- Pre-action procedures and exceptions: Rule 1.05 and Schedule 1 of the *Family Law Rules* 2004 (Cth)
- Considerations for interim and final orders: *Goode & Goode* [2006] FamCA 1346; [2006] FLC 93-286
- Approach of court to determining parenting orders
- Best interests of children as paramount consideration: Section 60CA; Section 65AA: *T v S* [2001] FamCA 1147; (2001) FLC 93-086; *AMS v AIF* (1999) 199 CLR 160
- Relevant sections: Section 60B, 60CA, 60CC, 61DA and 65DAA
- Relationship between Section 60B and s60CC: *Goode and Goode* [2006] FamCA 1346; [2006] FLC 93-286
- Objects and principles: Section 60B, *Maldera & Orbel* [2014] FamCAFC 135
- Relevant best interest factors: Section 60CC; primary and additional considerations: *Aldridge v Keaton* (2009) FLC 93-421; *Slater & Light* (2011) FamCAFC 1
- Section 60CC(2A): How the court must apply the primary considerations
- Presumption of equal shared parental responsibility: section 61DA
- Approach of court to these sections: *Goode and Goode (supra)*; *Taylor v Barker* [2007] FamCA 1246, [2007] FLC 93-345, and obligation for court to work through primary and additional considerations in section 60CC, prior to considering whether section 61DA presumption applies, does not apply or is rebutted; *Dundas v Blake* [2013] FamCAFC 133; [2013] FLC 93-552, *Vallans & Vallans* [2019] FamCAFC 260
- Discussion of “meaningful relationship”: *G v C* [2006] FamCA 994; *Mazorski v Albright* [2007] FamCA 520; (2007) 37 Fam LR 518; *McCal v Clark* [2009] FamCAFC 92; [2009]

FLC 93-405; *McCall v Clark (No 3)* [2010] FMCAfam 1443; *M & L (Aboriginal Culture)* [2007] FamCA 396; [2007] 93-320; *Marsden and Winch (No.3)* [2007] FamCA 1364, *Vigano & Desmond* [2012] FamCAFC 79

- Where presumption applies, court's obligation to consider equal time and substantial and significant time: Section 65DAA, what court considers to determine whether appropriate: Section 65DAA(3) and (5);
- Interpretation of Section 65DAA: steps for court to work through: *MRR v GR* (2010) 240 CLR 461
- What is "substantial and significant time": Section 65DAA(3), *Tibb and Sheean* [2018] FamCAFC 142; *Ulster & Viney* [2016] FamCAFC 133
- Meaning of "reasonably practicable": *Collu & Rinaldo* [2010] FamCAFC 53; (25 March 2010), *Strahan & Liddy* [2015] FamCAFC 95; (19 May 2015)
- Example of where presumption rebutted: *Treloar & Nepean* [2009] FamCAFC 206; (2009) FLC 93-407
- Court's power to make an order outside of what parties applied for: *U v U* (2002) 211 CLR 238; (2002) FLC 93-112; *Bolitho v Cohen* (2005) FLC 93-224
- non parents and section 60CC factors: *Donnell & Dovey* [2010] FamCAFC 15, *Burton & Churchin and Anor* [2013] FamCAFC 180.
- grandparents and great grandparents; *Mankiewicz and anor & swallow and anor* [2016] FAMCAFC 153
- Principles in Child Related Proceedings; Section 69ZN, Section 69ZQ
- *Duarte and Anor & Morse* [2019] FamCAFC 93
- Other issues concerning Parenting Orders - stay of proceedings pending appeal: *Lockley & Bardot* (2016) FamCAFC 185
- Section 60CC(3)(a) and children's views: *Bondelmonte v Bondelmonte* [2017] HCA 8; (2016) 259 CLR 662; *R v R: Children's Wishes* [2000] FamCA 43; *Re In the Marriage of R (Children's Wishes)* [2002] FamCA 383
- Section 60CD and 60CEZ:B ways in which views can be put before the court
- Admissibility of statements by children: *Family Law Rules 2004* (Cth), r 15.02, section 100B
- How children's views should be considered and weighed: *H v W* [1995] FamCA 30; (1995) FLC 92-598
- Family Reports/Expert Evidence
- Section 65PDAA: *Gallimore and Gallimore* {2018} FamCA 249
- *Renald & Renald (No 2)* [2017] FamCAFC 133 (14 July 2017)



- Section 62G: *In the Marriage of Hall* (1979) 5 Fam LR 609, *Gaines v Gaines* [2013] FMCAfam 108; *Makita (Australia) Pty Ltd v Sprowles* [2001] 52 NSWLR 705, *Muldoon & Carlyle* [2012] FamCAFC 135
- Independent Children’s Lawyer (ICL): Part VII, Division 10, sections 68L and 68LA
- Instances in which an order for an ICL can be made and criteria for appointment: *Re K* (1994) FLC 92-461
- Child abuse:
 - Section 4(1) Definition of “abuse”
 - Section 60CC(2)(b); Section 67Z, Section 67ZA; Section 67ZBB; and definition of “interested person”: Section 67ZK
 - Unfounded allegations: *L v T* [1999] FamCA 1699 allegations of child abuse: Part VII Division 8, subdivision D
 - Unacceptable Risk Test: *M v M* (1988) 166 CLR 69, *Banks & Banks* [2015] FamCAFC 36
 - standard of proof: *Sharwin & Weldee* [2012] FamCA 1081; *Re W (Sex Abuse: Standard of Proof)* [2004] FamCA 768; *W and W (Abuse Allegations: unacceptable risk)* (2005) FLC 93-235; *N and S* (1996) FLC 92-665.
- Long term supervision orders: *Champness & Hansen* [2009] FamCAFC 96; *Malburon & Waldlow* [2013] FamCAFC 191; *Slater & Light* [2013] FamCAFC; *Gorman & Huffman and Anor* [2016] FamCAFC 174; (5 September 2016)
- Family violence and Intervention Orders Cases: *Alam v Minister for Immigration and Citizenship* [2012] FMCA 616 FMCA 616; *Schieffer v Schieffer* [2013] FamCA 168; Family Violence
- *In the Marriage of JG and BG* (1994) FLC 92-515: Notice of abuse
- Other issues:
 - Occupancy of home
 - Sexual orientation
 - Religion
 - Aboriginality
 - Splitting of siblings
 - Surrogacy: *Ellison and Anor & Karnchanit* [2012] FamCA 602, *Mason & Mason and Anor* [2013] FamCA 424 *Shaw & Lamb and Ors* [2018] FamCAFC 42
 - *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180

- Families and sperm donor fathers; *Masson and Parsons* [2019] HCA 21
- Schooling
- Change of name: *Darley & Darley* (2016) FamCAFC 10,
- use and admissibility of academic opinion: *McGregor v McGregor* [2012] FamCAFC 69
- Family violence – intersection between different jurisdictions.
- Vexatious proceedings s 102QB *Mankiewicz and Anor & Swallow and Anor* [2016] FamCAFC 153
- Stay of proceedings pending appeal: *Lockley & Bardot* (2016) FamCAFC 185

3.5 Relocation

- Section 4 - definition of “major long-term issues”:
 - *Hendy & Penningh* [2018] FamCAFC 257
 - *Oswald & Carrington* (2016) FamCAFC 152
 - *U v U* (2002) 211 CLR 238
 - *Hepburn v Noble* [2010] FamCAFC 111; *Collu v Rinaldo* [2010] FamCAFC 53; *MRR v GR* (2010) 240 CLR 461; *McCall v Clark* [2009] FamCAFC 92; *Starr v Duggan* [2009] FamCAFC 115; *Sealey v Archer* [2008] FamCAFC 142; *Taylor v Barker* [2007] FamCA 1246.
 - *Sayer & Radcliffe and Anor* [2012] FamCAFC 209.
 - *Jurchenko & Foster* [2014] FamCAFC 127.
 - *Wendland & Wendland* [2017] FamCAFC 244.
 - *Grella & Jamieson* [2017] FamCAFC 21.

3.6 Family Violence

- *Final bias and interim hearings; s 61DA, s 60CG*
- *SS v AH* [2010] FamCAFC 13,
- *Marvel v Marvel* [2010] FamCAFC 101
- *Eaby & Speelman* [2015] FamCAFC 104
- *Salah & Salah* [2016] FamCAFC 100
- *Searle & Mellor* [2017] FamCAFC 46
- *Cimorelli & Wenlack* [2020] FamCAFC 58
- *Hurley & Melton (No. 2)* [2020] FamCA 917, *Owen & Owen* [2020] FamCA 90, *Hills & Caldwell* [2020] FamCA 574

3.7 Parenting plans and orders (particular issues)

- Part V11 Divisions 4 to 6

3.8 Contravention of parenting orders

- Part VII Division 13A: The parenting compliance provisions
- *Stapleton & Hayes* (2016) FamCAFC 171

3.9 Alteration of parenting orders: Section 65D (2)

- The precondition of fresh circumstances: changed circumstances; undisclosed material facts
- The precondition as a preliminary issue: *In the Marriage of Rice and Asplund* (1979) 6 Fam LR 570; *SPS and PLS* (2008) FLC 93-363; [2008] FamCAFC 16
- *Searson & Searson* [2017] FamCAFC 119
- When parenting order terminates:
 - *Family Law Act 1975* (Cth)
 - Subsection 65H
 - J and K.

3.10 Abduction of children – within Australia and overseas

- Part VII Division 13: Registration of state, Territory and Overseas orders
- *Family Law (Child Abduction Convention) Regulations 1986*
- Part VII Division 8 - Subdivision C: Location and Recovery of Children

3.10 Child protection convention

- Division 4 of Part XIII AA
- *Family Law (Child Protection Convention) Regulation 2003* (Cth)
- Commonwealth Child Protection Measure s 111CD
- *Bunyon & Lewis* (NO 3) [2013] FAMCA 888

3.11 Paternity

- Part VII Division 12 – Subdivisions D and E



- *Clarence & Crisp* (2016) FamCAFC 171

3.12 Reaching agreement

- Parenting plans and Consent Orders
- Section 63C

3.13 Court sanction of medical procedures

- Section 67ZC (1)
- *Re Marion* (1992) 175 CLR 218
- *Re Carla (Medical Procedure)* [2016] FamCA 7
- *Re Alex* [2009] FamCA 1292
- *Re Bernadette* [2011] FamCAFC 50
- *Re Jamie* [2013] FamCAFC 110
- *Re Kelvin* [2017] Fam CAFC 258
- *Re Matthew [2018] FamCA 161*
- *Re Chloe* [2018] FamCA 1006
- *Re: Imogen (No. 6)* [2020] FamCA 761
- *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7; [1986] AC 112

3.14 Children in detention

- *Minister for Immigration and Multicultural and Indigenous Affairs v B (No 3)* (2004) 219 CLR 365

4. Spousal Maintenance

- Establishing a claim
- Threshold finding under Section 72; lack of adequate support and capacity to pay:
 - *In the Marriage of Eliades* (1981) FLC 91-022
 - *In the Marriage of Bevan* (1995) FLC 92-600
- Consideration of "any other adequate reason" under section 72(1)(c):
 - *Elei and Dodt* (2018) Fam CAFC 92.
- Consideration of Section 75(2) factors



- Consideration of Section 74: exercise of discretion
- “Adequately” and “properly”: *Brown v Brown* [2007] FamCA 151, *Rollins – Wallis v Wallis* [2008] FamCA 1272
- Relationship between spousal maintenance and property orders
- Section 77A requirements:
 - *Doig v Doig* [1999] FamCA 1363
 - *Caska v Caska* [1998] FamCA 118

- *In the Marriage of Clauson* (1995) FLC 92-595: Cessation of spousal maintenance orders
- See also:
 - *In the Marriage of Vautin* (1998) FLC 92-827
 - *DJM v JLM* [1998] FamCA 97
 - *Maroney v Maroney* [2009] FamCAFC 45
 - *In the Marriage of Naphali* (1988) FLC 92-021
 - *Hall v Hal* (2016) 332 ALR 1
 - *Malone v Malone* [2016] FamCA 432
 - *Bardsley v Bardsley* [2016] FamCA 408
 - *Sandberg v Sandberg* [2016] FamCA 357
 - *F v F* [2016] FCWA 68.

- Registrable spousal maintenance liabilities
- Lump sum spouse maintenance
- Urgent v Interim orders

5. Child Maintenance and Support

5.1 Child maintenance

- Section 66C FLA – Primary duty to maintain children
- Section 66E FLA – Jurisdictional aspects
- Section 66L FLA – Adult Child Maintenance

5.2 Child support

- Limited and Binding Child Support Agreements, section 86 of the Assessment Act
- *Sathra v Sathra* [2013] FamCAFC 142

- Child (Section 24 *Assessment Act*)
- Parent (Section 25 *Assessment Act*)
- Non – parent carer (Section 25A *Assessment Act*)
- The Child Support Formula – Division 2
- Elements of the Child Support Formula
- Re-establishment income
- Section 117 Departures – Division 4 – Part 7:
 - General Grounds of departures: section 117(2) *Assessment Act*
 - *In the Marriage of Gyselman* (1992) FLC 92-279
 - Earning Capacity section 117 (4) (d), Section 117(7A), (7B)
 - *DJM v JLM* [1998] FamCA 97
 - *Skinner v Cluny* [2013] FamCA 301
 - *Child Support Registrar v Crowley* [2015] FamCAFC 76
 - Departures from Administrative Assessments section 98B section 98C(2), section 117(2) – grounds for departure
 - *Billing v Tillick* [2018] AATA 220.

- Change of assessment:
 - Estimates
 - Section 60, 61, 62, 63, 64 *Child Support (Assessment) Act 1989* (Cth)
 - Objections to Registrar Decisions
 - Court Review
 - Administrative Appeals Tribunal Social Services and Child Support Division

- Court review:
 - Review of AAT decisions – see above
 - Part VIII Registration Act
 - *Family Law Rules 2004* (Cth) division 4.2.5
 - When another application is pending Section 116(1)(b) *Assessment Act*
 - Complex applications Section 98E, Section 98R
 - Disputed parentage – Section 106, 107 *Assessment Act*.
 - Stay orders Section 111C *Child Support Registration Act*; *Abani v Abani* (SSAT Appeal) [2014] FCCA 2058. *Jones v Child Support Registrar* [2007] FCA 1732
 - *Palvig v Bowden* [2018] FamCA 973
 - time limit on backdating assessments: section 111(1) *Assessment Act*
 - *Teal v Teal* [2010] FamCAFC 120

- Non-periodic amounts Section 123 *Assessment Act*
- Urgent child support Section 139(1) *Assessment Act*
- Order for recovery of wrongly paid child support
- Section 143 *Assessment Act*
- *Magill v Magill* (2006) 226 CLR 551
- *DRP v AJL* [2004] FMCAfam 440 Recovery, Enforcement and Penalties

Note:

- *Assessment Act – Child Support (Assessment) Act 1989* (Cth)
- *Registration Act – Child Support (Registration and Collection) Act 1989* (Cth)
- *Tribunals Amalgamation Act 2015* (Cth)

Financial Agreements

6.1 Conceptualising a financial agreement

- What constitutes a financial agreement within the meaning of the Act? *Senior & Anderson* [2011] FamCAFC 129
- Contractual underpinnings of a financial agreement: *Sullivan v Sullivan* [2011] FamCA 752
- Concurrent agreements under Part VIIIA and Part VIIIAB: *Piper v Mueller* [2015] FamCAFC 241

6.2 Matters that a financial agreement can deal with (Subsection 90B, 90C, 90D, 90UB, 90UC and 90UD)

- Property
- Financial resources
- Spousal maintenance (see further Subsection 90E and 90UH for specific drafting requirements, and Subsection 90F and 90UI)
- Incidental or ancillary matters (including adult child maintenance)
- Superannuation – Sections 90XH and 90XHA. Interplay with section 90XJ(1)(a).
- Lifestyle clauses:
- Agreements with third parties

6.3 Challenging a financial agreement

- Onus of proof: *Hoult v Hoult* [2013] FamCAFC 109
- Is the agreement binding (applying Subsection 90G and 90UJ)?

- Legal advice:
 - *Logan v Logan* [2013] FamCAFC 151
 - *Ruane v Bachman-Ruane* [2009] FamCA 1101

- If the agreement does not comply with section 90G(1), can it be “saved” pursuant to section 90G(1A)?
 - *Parker & Parker* [2012] FamCAFC 33
 - *Abrum & Abrum* [2013] FamCA 897.

- Ought the agreement be set aside (applying Subsection 90K and 90UM)?
- Non -disclosure of assets:
 - *Cording & Oster* [2010] FamCA 511
 - *Parke & Parke* [2015] FCCA 1692
 - Subsection 90K(1)(b) – legal and equitable principles that may render an agreement “void, voidable or unenforceable”.

- Unconscionable conduct and/or undue influence:
 - *Thorne & Kennedy* [2017] HCA 49\
 - *Frederick & Frederick* [2018] FCCA 1694.
 - ***Eaves & Eaves (No.2)* [2020] FamCA 863**

- Impracticability:
 - *Herold v Kay* [2012] FMCAfam 1071
 - *Sanger v Sanger* [2011] FamCAFC 210
 - *Parke v Parke* [2015] FCCA 1692.

- Material change in circumstances:
 - *Parkes v Parkes* [2014] FCCA 102
 - *Fewster & Drake* [2016] FamCAFC 214
 - ***Daily & Daily* [2020] FamCA 486 (this refers to many of the cases)**
 - ***Matech & Matech* [2020] FamCA 163**

- Uncertainty/incompleteness: *Garvey & Jess* [2016] FamCA 445 - **query also *Jess & Garvey* [2018] FamCAFC 44 para 89-135**
- Mistake: *Phak & Xu* [2015] FamCA 939.
- Use of equitable and contractual principles to render enforceable an agreement:
 - Part performance
 - Implied terms:
 - *Bryson & Bryson* [2012] FMCAfam 197
 - ***Warwick & Mia* [2018] FamCA 426**



- Estoppel.

6.4 Agreements made prior to 2009 statutory amendments

- *Black v Black* [2008] FamCAFC 7
- Retrospective operation of the post-Black statutory provisions: *Wallace v Stelzer* [2013] FamCAFC 199

6.5 Third parties and financial agreements

- Separation declarations: Australian Securities and Investments *Commission v Rich* [2003] FamCA 1114
- Agreements binding on third parties
- Applications by third parties to set aside Financial Agreements:
 - *Grainger v Bloomfield* [2015] FamCAFC 221.

6.6 Intersection with the accrued jurisdiction (actions in negligence against one's own advisors)

- *Noll v Noll* [2013] FamCAFC 24
- *F Firm v Ruane* [2014] FamCAFC 189



7. Property

- *Family Law Act 1975* (Cth) – Section 79 and 78
- Part VIII & Part VIII AB of FLA, F.L. Rules 2004, FCC Rules 2001
- Corporatisation of de facto relationships
- *Fenton & Marvel* [2013] FamCAFC 132

7.1 Four Step Approach to Determining Property

- *Hickey & Hickey & Attorney-General for the Commonwealth of Australia* [2003] FamCA 395
- *In the Marriage of Clauson* (1995) 18 Fam LR 693
- *In the Marriage of Lee Steere* (1985) 10 Fam LR 431
- *In the Marriage of Ferraro* (1992) 16 Fam LR 1
- *In the Marriage of Townsend* (1994) 18 Fam LR 505
- *In the Marriage of Biltoft* (1995) 19 Fam LR 82
- *In the Matter of McLay* (1996) 20 Fam LR 239
- *Campbell & Kuskey* (1998) 22 Fam LR 674
- *Stanford & Stanford* (2012) 247 CLR 108
- *Baglio & Baglio* [2013] FamCA 105
- *Sebastian & Sebastian (No 5)* [2013] FamCA 191
- *Bevan & Bevan* [2013] FamCAFC 116
- *Bevan & Bevan* [2014] FamCAFC 19
- *Vass & Vass* (2015) FamCAFC 51
- *Trevi & Trevi* [2018] FamCAFC 173
- *Pates & Pates* [2018] FamCAFC 171
- *Fielding v Nichol* [2014] FCWA 77 (WA de factor matter with comments about Stanford/addbacks)
- Development of the concept that the Four Step Process is merely a shorthand distillation of the legislation which illuminates the path and not a legislatively mandated decision process - *Bevan & Bevan* [2013] FamCAFC 116; *Bevan & Bevan* [2014] FamCAFC 19.

PRELIMINARY STEP:

It must be determined whether it is just and equitable to alter property interests *Stanford v Stanford* (2012) 247 CLR 108; *Bevan* (2013) Section 79(2) FLA.

Step 1: Identifying and valuing property, liabilities and financial resources

- The court seeks to ascertain the net value of all property of the parties by deducting from their total gross property their liabilities, including unsecured liabilities
- Property is defined under Section 4 of the *Family Law Act*
- Financial resources and expectation do not constitute property but are relevant and should be identified and evaluated
- Duty of full disclosure of relevant financial circumstances: *Family Court Rules* FL.13:
 - Principle of “full and frank disclosure”
 - *In the Marriage of Weir* (1992) 16 Fam LR 154; *In the Marriage of Black and Kelner* (1992) 15 Fam LR 343; *Chang & Su* [2002] FamCA 156
 - *Tate v Tate* [2000] FamCA 1040
 - Methods of obtaining financial information
 - Identify and value relevant property: *In the Marriage of Duff* (1977) 15 ALR 476; *In the Marriage of Zorbas* (1990) 14 Fam LR 226
 - Treating assets of company or trusts as assets of a party/discretionary trust: *Mercanti v Mercanti* [2015] WASC 297; *In the Marriage of Ashton* (1986) 11 Fam LR 457; *In the Marriage of Stein* (1986) 11 Fam LR 353; *In the Marriage of Harris* (1991) 15 Fam LR 26; *BP v KS* [2002] FamCA 1454; *Foda v Foda* (1997) 21 Fam LR 653; *Coventry & Coventry & Smith* [2004] FamCA 249; *Kennon v Spry* (2008) 238 CLR 366; *Harris & Dewell and Anor* [2018] FamCAFC 94
 - Interest in a partnership: *In the Marriage of Best* (1993) 16 Fam LR 937; *B v B* [1999] FamCA 1142, *Carbon & Klousner* (2015) FamCA 842
 - Superannuation: *Coghlan v Coghlan* [2005] FamCA 429. Prepaid legal costs; *DJM v JLM* [1998] FamCA 97
 - Valuations and Expert Evidence: *Higgins & Higgins* (2016) FamCAFC 32
 - *In the Marriage of Clauson* (1995) 18 Fam LR 693 - *In the Marriage of Lenehan* (1987) 11 Fam LR 615 - *In the Marriage of Borriello* (1989) 13 Fam LR 415 - *In the Marriage of Harrison* (1996) 20 Fam LR 322 - *In the Marriage of Smith* (1991) 15 Fam LR 206 - liabilities: *In the Marriage of Biltoft* (1995) 19 Fam LR 82
 - Notional property: *De Angelis & De Angelis* [1999] FamCA 1609
 - Income tax, capital gains tax, stamp duty and GST: *In the Marriage of Rothwell* (1993) 18 Fam LR 454; *Rosati v Rosati* [1998] FamCA 38; *Campbell v Kuskey* (1998) 22 Fam LR 674; *Commissioner of Taxation v Tomaras* [2018] HCA 62
 - *Income Tax Assessment Act*
 - *Rodgers v Rodgers* (No 2) [2016] FamCAFC 104

- *Pfenning v Snow* [2016] FamCA 29
- Stamp duty
- Section 90: *Gazzo v Comptroller of Stamps* (Vic) (1981) 149 CLR 227
- CGT: *Rosati v Rosati* [1998] FamCA 38
- Add-backs – three categories: *AJO & GRO* [2005] FamCA 195; *In the Marriage of Townsend* (1994) 18 Fam LR 505; *NHC v RCH* [2004] FamCA 633; *Bevan v Bevan* [2013] FamCAFC 116 ; *Chan & Su* [2002] FamCA 156; *Trevi & Trevi* [2018] FamCAFC 173
- *Trang & Kingsley* [2017] FamCAFC 120
- *Chianti v Leume* [2007] WASCA 270

Step 2: Identify and evaluate contributions of parties

- Section 79 (4) and section 90SM (4): No starting point of equality; *In the Marriage of Mallet* (1984) 156 CLR 605; *Figgins v Figgins* [2002] FamCA 688; *Global v Asset by Asset* approach; *In the Marriage of Norbis* (1986) 161 CLR 513; *Cahill v Cahill* (2006) FLC 93-253; *In the Marriage of Lenehan* (1987) 11 Fam LR 615; *M v M* [2006] FamCA 913; *In the Marriage of Zyk* (1995) 19 Fam LR 797; *Pittman v Pittman* [2010] FamCAFC 30
- Court's approach Section 79(4)(a)-(c) : *In the Marriage of Zyk* (1995) 19 Fam LR 797; *In the Marriage of Waters and Jurek* (1995) Fam LR 190; *In the Marriage of Malet* (1984) 156 CLR 605; *Steinbrenner v Steinbrenner* [2008] FamCAFC 193; *Brodie v Brodie* [2009] FamCAFC 6 FamCAFC 6:
 - direct financial contributions
 - indirect financial contributions: *Palkovich & Palkovich* (2016) Fam CAFC 134
 - financial contributions by or on behalf of a child of the marriage
 - non-financial contributions
 - contributions to the welfare of the family.
- Special contributions or skills: *Smith & Fields* (2015) FamCAFC 57, *JEL v DDF* [2000] FamCA 1353; *Kane v Kane* [2013] FamCAFC 205; *Hoffman v Hoffman* [2014] FamCAFC 92
- Financial contributions in short marriages: *In the Marriage of McMahon* (1995) 19 Fam LR 99; *In the Marriage of Goodwin and Goodwin Alpe* (1990) 14 Fam LR 801 post separation contributions: *In the Marriage of Jacobson* (1988) 12 Fam LR 828; (2005); *Ilett v Ilett* [2005] FLC 93-221

- Third party contributions (gifts, loans etc): *In the Marriage of Gosper* (1987) 11 Fam LR 601; *In the Marriage of Kessey* (1994) 18 Fam LR 149; *AB v ZB* [2002] FamCA 1178; *In the Marriage of Pellegrino* (1997) 22 Fam LR 474
- Gifts and inheritances: *In the Marriage of Bonnici* (1991) 15 Fam LR 138; *White and Tulloch v White* (1995) Fam LR 696; *In the Marriage of De Angelis* [1999] FamCA 1609; *Calvin & Mc Tier* [2017] FamCAFC 125; *Holland & Holland* [2017] FamCAFC 166.
- Redundancy packages; *In the Marriage of Burke* (1992) 16 Fam LR 324; *Tomasetti v Tomasetti* [2000] FamCA 314
- Windfalls: *In the Marriage of Zyk* (1995) 19 Fam LR 797, *Farmer v Bramley* [2000] FamCA 1615
- Expectation of an inheritance: *In the Marriage of White* (1995) FLC 92-640; *G v G* [2000] FamCA 1075
- Interest in a partnership: *In the Marriage of Best* (1993) 16 Fam LR 937
- Waste: *In the Marriage of Kowaliw* (1981) FLC 91-092, *In the Marriage of Townsend* (1994) 18 Fam LR 505; *Browne v Green* [1999] FamCA 1483, *Gao & Wang* (2016) FamCAFC 183
- Vicissitudes of life: *In the Marriage of Vautin* (1998) 23 Fam LR 627
- Accident verdicts: *In the Marriage of Holmes* (1990) FLC 92-181; *In the Marriage of Zubcic* (1995) FLC 92-609; *Aleksovski v Aleksovski* (1996) 20 Fam LR 894; *Fontana & Fontana* [2018] FamCA 63
- Relevance of domestic violence: *Kennon v Kennon* (1997) 22 Fam LR 1; *Rosati v Rosati* [1998] FamCA 38; *Farina & Lofts and Ors* [2019] FamCA 27
- Pre-marriage property and contributions: *In the Marriage of Bremner* (1994) 18 Fam LR 407; *Daly & Terrazas* [2019] FamCAFC 142
- Big money cases: *Figgins v Figgins* [2002] FamCA 688; *JEL v DDF* [2000] FamCA 1353
- Contribution to the welfare of children of the other party from a previous relationship: *In the Marriage of Robb* (1994) 18 Fam LR 489
- Initial Contributions: *Pierce v Pierce* [1999] FLC 92-844; *Cabbell & Cabbell* [2009] Fam CAFC 2015; *Wallis & Manning* [2017] Fam CAFC 14
- *Jabour & Jabour* [2019] FamCAFC 78
- *Hurst & Hurst* [2018] FamCAFC 196

Step 3: Identify and assess the various relevant matters set out in Section 79(4) (d) to (g) which includes Section 75 (2) and Section 90SM(4)(d) to (g) which includes Section 90SF (3) Factors

- Approach recommended by the High Court: *In the Marriage of Mallet* (1984) 156 CLR 605

- The various factors set out in the sub paragraphs of Subsection 75(2) and 90SF(3) are to be applied to the extent that they are relevant: *In the Marriage of Collins* (1990) 14 Fam LR 162
- It is not appropriate to consider and quantify each of the factors separately but to arrive at a decision of overall adjustment: *In the Marriage of Clauson* (1995) 18 Fam LR 693
- The weight given to each factor is a matter for judicial discretion: *In the Marriage of Mallet* (1984) 156 CLR 605
- The factors are prospective but are based on the roles the parties adopted during their relationship: *In the Marriage of Waters and Jurek* (1995) 20 Fam LR 190
- Age and state of health of the parties: *W v W* (1997) 21 Fam LR 343; *In the Marriage of Lawrie* (1981) FLC 91-102, *Fontana & Fontana* (2016) FamCAFC 11; health of one party — short life expectancy
- Income, property and financial resources of each party and capacity for gainful employment: *DJM v JLM* [1998] FamCA 97; *Gould v Gould* [2007] FamCA 609; *Sindel v Milton* [2010] FamCAFC 232; *In the Marriage of Best* (1993) 16 Fam LR 937; *SurrIDGE & SurrIDGE* (2017) FLC 93-757
- Whether either party has the care of a child under 18: *In the Marriage of Abdo* (1989) 12 Fam LR 861; large number of children in the care of one party; *Wayne v Wayne* [2010] FamCAFC 33, *Davida & Davida* [2011] FamCAFC 38 shared care
- Any fact or circumstance which the justice of the case requires to be taken into account: *In the Marriage of Black and Kellner* (1992) 15 Fam LR 343, *Gould and Gould* (2007), *Sebastian & Sebastian (No 5)* (2013) FamCA 191 - *Kane & Kane* [2013] FamCAFC 205 - non-disclosure of assets
- *Bassi v Maas* [1999] FamCA 1352 - contribution to post separation redundancy package
- Inheritances: *In the Marriage of White* (1995) FLC 92-640; *In the Marriage of Dickson* [1999] FamCA 278; *Calvin & McTier* [2017] FamCAFC 125.; *Holland & Holland* [2017] FamCAFC 166
- *Rosati v Rosati* [1998] FamCA 38: allowance for CGT, health problems with children
- Power to make substituting order in relation to a taxation debt: *Tomaras and Anor and Commissioner of Taxation* [2017] FamCAFC 14
- *Elsy v Elsey* (1996) 21 Fam LR 249: effect of orders on earning capacity
- *In the Marriage of Ramsay* (1997) FLC 92-742: lack of realisability of assets
- *Kennon v Kennon* (1997) 22 Fam LR 1: violence, short marriage, impact of relationship on earning capacity
- *In the Marriage of Way* (1996) FLC 92-702: proposed orders to be made with one party assuming significant liabilities

- *In the Marriage of Waters and Jurek* (1995) 20 Fam LR 190: adjustment in favour of one party where estate is modest and one has much higher income earning capacity;
- *Homsy v Yassa; Public Trustee* (1993) 17 Fam LR 299 discussion of Section 75(2): where one party killed the other
- *In the Marriage of Goodwin* (1990) 14 Fam LR 801: treatment of one party's interest in a trust – asset -v- resource
- In addition to the cases on income, property and financial resources of each party and capacity for gainful employment - *Pates & Pates* (2018) FamCAFC 171; *Trevi & Trevi (re-exercise)* [2019] FamCAFC 54
- *Zubcic & Zubcic* (2019) FLC 93-918 – care for an adult child with a disability
- *Scriven & Scriven* [2020] FamCAFC 236 – assessing s 75(2) factors when taking an asset by asset approach

Step 4: Consider matters of justice and equity

- *Redman v Redman* [2013] FamCAFC 183; *In the Marriage of Mallet* (1984) 156 CLR 605; *Russell v Russell* [1999] FamCA 1875; *JEL v DDF* [2000] FamCA 1353
- *Stanford v Stanford* (2012) 247 CLR 108
- *Watson v Ling* [2013] FamCA 57: equally applicable to sections 90SM(3) and 90SM(8) in particular
- *Bevan v Bevan* [2014] FamCAFC 19
- *Rodgers v Rodgers (No 2)* [2016] FamCAFC 104
- *Chancellor & McCoy* (2016) FCCA 53
- *In the Marriage of Zubcic* (1995) FLC 92-609
- *Chan & Su* [2002] FamCA 156
- *Trang & Kingsley* [2017] FamCAFC 120

7.2 Adjournment of proceedings Section 79(5)

- *In the Marriage of Grace* (1997) 22 Fam LR 442
- *Blue & Blue* [2008] FamCA 787
- *Pratt v Pratt* [2012] 22 Fam LR 442

7.3 Section 106B – transaction to defeat claims

- *In the Marriage of Gould*
- *Swire Investments Ltd* (1993) 17 Fam LR 156

7.4 Consideration of third party interests

- *Halabi v Artillaga and Ors* (1994) FLC 92-470
- *Kennon v Spry* (2008) 238 CLR 366 [2008] HCA 56
- *Commissioner of Taxation v Tomaras* [2018] HCA 62
- *James & Snipper and Anor* [2018] FamCAFC 235
- *Cao & Trong and Anor* [2019] FamCA 336

7.5 Effect of death on property proceedings

- Section 79(8) FLA
- *Frost (Deceased) & Whooten* (2018) FLC 93-860
- *Grace v Grace* [2012] NSWSC 976
- *Mason and Hannaford, Mason-King (Intervener) (1994) FLC 92-446*
- *Estate of MacKenzie (deceased) & Estate of MacKenzie (deceased) & Anor* [2007]

FamCA 882

7.6 Execution of instruments by order of court Section 106A

- *In the Marriage of Corry* (1983) 9 Fam LR 201

7.7 Leave to initiate property proceedings out of time

- *Sharp & Sharp* [2011] FamCAFC 150
- *Edmunds & Edmunds* [2018] FamCAFC 121
- *Gadzen & Simkin* [2018] FamCAFC 218

7.8 De Facto Relationship

- De Facto financial cause; s 39B
- Jurisdiction: *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) and (NSW)
- *Norton & Locke* [2013] FamCAFC 202; *Somers & Collier* [2017] FamCAFC 123
- Existence of de facto relationship, s 4AA; *Jonah & White* [2012] FamCAFC 200, Grohl & Acland [2018] FamCA 732 (14 September 2018)
- Geographical requirements, s 90SK; *Harriott & Arena* [2016] FamCAFC 69
- S90SB further requirements- length of relationship, child, substantial contributions;

- *Redmond & Mullins* [2015] FamCAFC 69; *Dahl & Hamblin* [2011] FamCAFC 202
- *Whitford and Whitford* (1979) FLC 90-612; [1979] FamCA 3
- *Simonds (deceased) & Coyle* [2019] FamCAFC 47 (26 March 2019)

7.9 Effect of bankruptcy

- *Bankruptcy Act 1966* (Cth) – Section 35 and 35A; *In the Marriage of Guirguis and the Official Trustee in Bankruptcy* (1997) 21 Fam LR 356; *O’Neil and O’Neil and Tayper Pty Ltd and Kayhaven Pty Ltd and Likami Properties Pty Ltd* [1998] FamCA 67; *Cummings v Claremont Petroleum N.L.* (1996) 185 CLR 124
- Rights of creditors: *Lemnos v Lemnos* [2007] FamCA 1058; *In the Marriage of Biltoft* (1995) 19 Fam LR 82; *Re Chemaïsse; Commissioner of Taxation (Cth) (Intervener)* (1990) 13 Fam LR 724
- *Sloan & Sloan* {2018} FAMCA 610

7.10 Equitable estoppel

- *Sidhu v Van Dyke* (2014) 251 CLR 505

8. Injunctions

- Section 68B and Section 114; *Norton v Locke* [2013] FamCAFC 202; *Maple & Niu* [2016] FamCAFC 70; *Sampson & Hartnett* (No. 10) [2007] FamCA 1365; *Gilles & Irby* [2016] FamCAFC 13; *Whitby & Zeller* [2017] FamCAFC 101.
 - Section 90SS re: de facto relationships:
 - *Teh & Muir* [2015] FamCAFC 224; (2 December 2015)
 - Relevant principles (re: power and exercise of discretion):
 - General: *In the Marriage of Waugh* [2000] FamCA 1183; *Mullen v De Bry* [2006] FamCA 1380; *G v T* [2003] FamCA 1076
 - Circumstances arising out of marital relationship
 - Personal protection/non-molestation (Section 68B): *In the Marriage of Kemsley* (1984) 10 Fam LR 125; *Oates v Crest* [2008] FamCAFC 29.
- To restrain dealings in property:



- Personal rights v legal or equitable interests: *Mullane v Mullane* (1983) 158 CLR 436
- Merits of claim and degree of danger of prejudice: *In the Marriage of Sieling* (1979) 4 Fam LR 713; *Luck & Norwood* (2018) FamCAFC 207
- Real danger of prejudice: *In the Marriage of Stowe* (1980) 6 Fam LR 757
- Prejudice to third parties: *In the Marriage of Martiniello* (1981) 7 Fam LR 299
- Ordinary business dealings: *In the Marriage of Martiniello* (1981) 7 Fam LR 299
- Minimum restrictions imposed: *In the Marriage of Sieling* (1979) 4 Fam LR 713
- Undertakings: *Blueseas Investments Pty Ltd & Mitchell & McGillivray* [1999] FamCA 745.

- Injunctions and third parties:
 - Part VIII A FLA
 - Injunctions which affect third parties: *R v Dovey*; *Ex parte Ross* (1979) 141 CLR 526; *In the marriage of Tiley and Tiley* (1980) 6 Fam LR 528
 - Injunctions directly against third parties
 - Sham/puppet/alter ego: *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337
 - Power no wider for interlocutory injunctions than for permanent injunctions: *Re Ross-Jones, Marinovich and Marinovich* (1984) FLC 91-555
 - Injunctions against third parties in Section 106B proceedings: *In the marriage of Collins and Collins* (1987) 11 Fam LR 382
 - Jurisdictional questions: *Yunghanns v Yunghanns* [1999] FamCA 64
 - Circumstances in which the Court may make final orders in property proceedings against a third party, and what must be satisfied for the Court to exercise this power under the *Family Law Act 1975* (Cth).

- Exclusive Use and Occupation:
 - Relevant matters to consider: *In the Marriage of Davis* (1982) 8 Fam LR 975; *In the Marriage of O’Dea* (1980) 6 Fam LR 675; *In the Marriage of Borzak* (1979) 5 Fam LR 571; *In the Marriage of Fedele* (1986) 10 Fam LR 1069.

- Ex Parte Applications:
 - *Family Law Rules* 2004 Part 5.3 Applications without notice



- Real and urgent need to protect: *In the Marriage of Sieling* (1979) 4 Fam LR 713
- Duty of full disclosure: *In the Marriage of Dean* (1977) 2 Fam LR 11; *In the Marriage of Stowe* (1980) 6 Fam LR 757
- Preservation of Evidence: Anton Pillar Orders
- Preservation of Property: Mareva Orders.

9. Evidence

- Relevant Legislation:
 - *Family Law Act 1975* (Cth)
 - *Evidence Act 1995* (Cth)
 - *Federal Circuit Court of Australia Act 1999* (Cth)
 - *Family Law Rules 2004* (Cth), Chapter 15
 - *Federal Circuit Court Rules 2001* (Cth), Part 15.

- Evidence - Opinion – Expert Evidence – Admissibility / Basis of Opinion / Valuation
 - *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705; *Cooke v Commissioner of Taxation* [2002] FCA 1315; (2002) 51 ATR 223 at [38]; *Australian Securities & Investments Commission (ASIC) v Rich* [2005] NSWSC 149; (2005) 190 FLR 242 (at [329]); *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] FCAFC 157; *McGregor & McGregor* [2012] FamCAFC 69 at [75]-[107]; (2012) FLC 93-507; *Paino v Paino* [2008] NSWCA 276; (2008) 40 Fam LR 96.

- Evidence - Opinion – Expert Evidence – Single Experts / Other Experts
 - *Bass v Bass* [2008] FamCAFC 67; [2008] FLC 93-366; *Danell & Saller* [2015] FamCA 859; (2015) 54 Fam LR 416.

- Fresh evidence on Appeal:
 - *CDJ v VAJ (No 1)* (1998) 197 CLR 172; [1998] FLC 92- 828; statements by children; *Abdo and Abdo* [\(1989\) FLC 92-013](#); *Alaim & Alaim* [2017] FamCAFC 170.

- Evidence in state court proceedings, refer to applicable Evidence Act in relevant State.
- Unlawfully or Improperly obtained Evidence; *s138 Evidence Act, SCVG &KLD (No2)* [2018] FamCA 78
- Certificates under s128 Evidence Act; *Field & Kingston* [2018] FamCAFC 145

10. Enforcement

- Part VII FLA – Division 13 A – Children
- Review of “reasonable excuse” for contravention of parenting order – *Saldo v Tindall* [2012] FamCA194
- *Family Law Rules 2004* (Cth) – Chapter 20 – Financial Orders

11. Costs

- Lawyer-client costs governed by State or Territory in which lawyer practises e.g. *Legal Profession Uniform Law Application Act 2014* or *Legal Profession Act* of the relevant state for cases commenced after 1 July 2008 and in other limited circumstances
- *Federal Circuit Court Rules 2001* (Cth), ruling 21.09
- *Family Law Rules 2004* (Cth), Chapter 19:
 - 13.14 Failure to disclose
 - 13.14 False or misleading statements
 - 13.23 Disclosure – oppressive
 - 15.13(4) Evidence - struck out
 - 15.14(4) Evidence – cross examination of witness
 - 20.06, 20.08(2)(c) - Enforcement – must detail costs in affidavit.
- Section 117: *Penfold v Penfold* (1980) 144 CLR 311 *Parker v Jacks (No 3)* [2009] FMCAfam 993
- Reasons for the making of Costs Orders
- Contracting out with client: *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR 196; *Twigg v Rutherford* (1996) 20 Fam LR 862
- Conduct or parties in relation to proceedings as a litigant and conduct as parent *Renald & Renald (Costs)* [2018] FamCAFC 4
- Party-party costs are ordered by the Court where appropriate:
 - Section 117: *Penfold* (1980)
 - *Federal Circuit Court Rules 2001* (Cth), rule 21.09
 - *Family Law Rules 2004* (Cth), Chapter 19.

- Interim costs: *In the Marriage of Barro* (1982) 8 Fam LR 85500; *Strahan v Strahan* [2009] FamCAFC 166; *Bronson v Bronson* [2013] FamCA 11
- Section 117C offers: *In the Marriage of Harris* (1987) 11 Fam LR 629; *In the Marriage of Kowalski* (1994) 18 Fam LR 193; *Camilleri and Camilleri* [2002] FamCA 1157
- Written offers of settlement
- Costs Orders against Case Guardians: s116(6) (Since October 2018) acts or omissions must be unreasonable or delayed proceedings unreasonably, r 6.13
- Costs ordered due to pre-action offer to settle – *Firmer v Britton* [2012] FamCA 576
- Costs orders against legal representatives: *Anstis v Anstis* [1999] FamCA 842
Yunghanns v Yunghanns [2000] FamCA 681; *Parker & Jacks (No.3)* [2009] FMCafam 993
- Executors of deceased estate Ordered to pay costs: *Bain & Bain (Deceased) (Costs)* [2017] FamCAFC164
- *Laurens & Laurens (No. 2)* [2017] FCCA 109
- Set aside financial agreements: *Wootton & Hillier* [2016] FamCA 965.

12. Reviews/Appeals/Transfers

- Appeals from Court of Summary Jurisdiction:
 - Nature of Hearing de novo: *Harris v Caladine* (1991) 172 CLR 84.
- Federal Circuit Court / Magistrates Court of Westerns Australia appeals and need for leave to appeal generally: section 94AAA and section 94AA *Family Law Act*:
 - *Grayden & Grayden* [2003] FamCA 359
 - *Lawson and Lawson* [2007] FamCA 1472.
- Section 104(2) of the *Federal Circuit Court of Australia Act 1999* (Cth)
- Appeals from Interlocutory Decree:
 - *In the Marriage of Tudor* (1991)15 Fam LR 16592-273.
- Leave to appeal
- Appeals to the Full Court: Chapter 22 *Family Law Rules 2004* (Cth)
- Fresh evidence:
 - *Collu and Rinaldo* [2010] FamCAFC 53
 - *CDJ v VAJ (No 1)* (1998) 197 CLR 172, *Allesch v Maunz* (2000) 203 CLR 172

- *Wall & Wall* [2002] FamCA 257 [2002] FamCA 257, *Van Ballekom v Kelly* [2005] FLC 93-233.
- Stays:
 - Pending Appeal *Family Law Rules 2004* (Cth) 22.11
 - Pending a Review *Family Law Rules 2004* (Cth) 18.09.
- Summary dismissal:
 - *Linden v The Commonwealth (No 2)* (1996) 136 ALR 251
 - *Hunter v Morrison (Contravention)* [2014] FamCA 198
 - *Barden v Barden* [2014] FamCA 745.
- *Derek v Derek* [2006] FamCA 339; *Simpson v Brockmann* [2010] FamCAFC 37 – relevant to the issue of:
 - Fresh evidence and
 - Nature of appeals generally
 - Deals with *Allesch v Maunz* (2000) 203 CLR 172; *CDJ v VAJ* (No 1) (1998) 197 CLR 172.
- McKenzie Friend
- Appeal Pathway from Magistrates Court of WA to the Court of Appeal (WA):
 - *MCG v JM* [2016] WASCA 77
 - *CDW v LVE* [2015] WASCA 247
 - *Marino & Hodney* [2016] FCWA 29
 - *FDR v JDL [No 2]* [2016] WASCA 231.
- Appeal Family Court of Western Australia: Full Court considered powers of FCWA:
 - *Teo v Guan* [2015] FamCAFC 94
 - *CDW v LVE* [2015] WASCA 247.

13. Inherent, Associated and Accrued Jurisdiction

- Associated jurisdiction
- Section 33 *Family Law Act 1975* (Cth)
- Limited Statutory Jurisdiction: *Minister for Immigration and Multicultural and Indigenous Affairs v B* (No 3) (2004) 219 CLR 365:
 - High Court's citation: [2004] HCA 20.
- *Corporations Act 2001* (Cth)



- Inherent: *DJL v Central Authority* (2000) 201 CLR 226
- Slip Rule – *Horleck v Horleck* (No 2) [2008] FamCA 683; *Higgingon & Anor* [2013] FamCA 902
- Cross-vesting: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511
- Accrued: *Warby v Warby* [2001] FamCA 1469; *Finlayson and Finlayson and Gillam* [2001] FamCA 49; *Foley v Farquharson* [2003] QSC 021; *Bishop v Bishop* [2003] FamCA 240; *Noll v Nol* [2013] FamCAFC 24; *Bergman v Bergman* [2009] FamCAFC 27; *F Firm & Ruane & Ors* [2014] FamCAFC 189
- *C v C* [2001] FamCA 459
- *Selen v Selen* [2013] FamCAFC 39; *Wentworth v Hamilton* [2014] FamCA 533, *Ruane v Bachman-Ruane* (Accrued Jurisdiction) [2012] FamCA 369

14. Individual State Jurisdictions

- Domestic Violence
- Children
- Medical Procedures
- Professional responsibilities and obligations

15. Court Processes

- Steps to include:
 - Interim hearings
 - Conciliation conferences
 - Trials
- Anticipated length of time
- Likely costs (financial or otherwise)

16. Alternative to Court Processes

- FDR (parenting matters)
- Mediation
- Arbitration
- Collaborative practice
- Agreements:
 - BFA or consent orders (financial matters)

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- Orders or parenting plans (parenting).

Schedule 5

Related Legislation and Regulations

Legislation and other Materials

This is not necessarily an exhaustive list. Candidates will be assessed on the law as it stands on the date of assessment.

Commonwealth Legislation

- *Child Support (Assessment) Act 1989* (Cth)
- *Child Support (Registration and Collection) Act 1988* (Cth)
- *Child Support Legislation Amendment (Reform of the Child Support Scheme – Initial Measures) Act 2006* (Cth)
- *Child Support Legislation Amendment (Reform of the Child Support Scheme – New Formula and Other Measures) Act 2000* (Cth)
- *Child Support (Assessment) Regulations 1989* (Cth)
- *Child Support (Registration and Collection) Regulations 1988* (Cth)
- *Child Support Reform (New Formula and Other Measures) Regulations 2007* (Cth)
- *Family Law Act 1975* (Cth)
- *Federal Circuit Court of Australia Act 1999* (Cth)
- *Marriage Act 1961* (Cth)
- *Superannuation Industry (Supervision) Regulations 1994* (Cth)

Related Procedures Family Court

- *Family Law Rules 2004* (Cth) (as amended)
- *Family Law Regulations 1984* (Cth)
- Practice Directions including:
 - No.1 of 2017 - Conduct of appeals
 - No.2 of 2017 - Digital Court File
 - *Principal Registrar’s Notification January 2008* – consent parenting orders and allegations of abuse
 - No. 1 of 2007 – Omnibus Practice Direction
 - No 9 of 2004 Victorian and Queensland Registries: Medical Procedures Application

- No. 6 of 2003 – Divorce applications to be filed in Federal Magistrates’ Court Federal Circuit Court.
- *Federal Court and Federal Circuit Court Regulation 2012 (Cth)*
- *Federal Circuit Court Rules 2001 (Cth)*
- *Family Law (fees) Regulation 2012 (Cth)*
- Federal Circuit Court Practice Direction No 2 of 2008 Family Dispute Resolution - Applications for orders under Part VII of the *Family Law Act 1975 (Cth)*; No 2 of 2017 Interim Family Law Proceedings (1 January 2018); No 1 of 2016 Consent Orders in proceedings involving a federal tribunal; No. 1 of 2019 – Judicial Mediations in Family Law Matters
- Federal Circuit Court Information Notice 2011 – Communicating with Judges’ Chambers
- Federal Circuit Court e-filing: filing by electronic communication pursuant to rules 2.07A and 2.07B of the *Federal Circuit Court Rules 2001 (Cth)*:
 - Divorce Application;
 - Initiating Application (Family Law);
 - Response to Initiating Application (Family Law); and
 - Supplementary documents.

New South Wales Legislation

- *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*
- *Children and Young Persons (Care and Protection) Act 1998 (NSW)*
- *Duties Act 1997 (NSW)*
- Legal Profession Uniform Law and *Legal Profession Uniform Law Application Act 2014 (NSW)*
- *Property (Relationships) Act 1984 (NSW)*
- *Status of Children’s Act 1996 (NSW)*
- *Suitors Fund Act 1951 (NSW)*
- *Surrogacy Act 2010 (NSW)*
- *Victims Rights and Support Act 2013 (NSW)*

Queensland Legislation

- *Child Protection Act 1999 (QLD)*
- *Domestic and Family Violence Protection Act 2012 (QLD)*
- *Duties Act 2001 (QLD)*

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- *Legal Profession Act 2007 (QLD)*
- *Property Law Act 1974 (QLD)*
- *Status of Children Act 1978 (QLD)*
- *Surrogacy Act 2010 (QLD)*

South Australian Legislation

- *Children and Young People (Safety) Act 2017 (SA)*
- *Family Relationships Act 1975 (SA)*
- *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*
- *Legal Practitioners Act 1981 (SA)*
- *Stamp Duties Act 1923 (SA)*

Victorian Legislation

- *Assisted Reproductive Treatment Act 2008 (Vic)*
- *Births Deaths and Marriages Registration Act 1996 (Vic)*
- *Children Youth and Families Act 2005 (Vic)*
- *Duties Act 2000 (Vic)*
- *Family Violence Protection Act 2008 (Vic)*
- *Legal Profession Uniform Law Application Act 2014 (Vic)*
- *Personal Safety Intervention Orders Act 2010 (Vic)*
- *Property Law Act 1958 (Vic)*
- *Relationships Act 2008 (Vic)*
- *Status of Children Act 1974 (Vic)*

Western Australian Legislation

- *Family Court Act 1997*
- *Family Court Rules 1998*
- *Family Provisions Act 1972*
- *Restraining Orders Act 1997*
- *Surrogacy Act 2008*
- *Adoption Act 2008*
- *Evidence Act 1906 (WA)*
- *Interpretation Act 1984 (WA)*
- *Legal Profession Act 2008 (WA)*



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- *Legal Profession Regulations 2009 (WA)*
- *Duties Act 2008 (WA)*
- *Transfer of Land Act 1893 (WA)*
- *Property Law Act 1969 (WA)*

Related Guidelines

- Australian Solicitors Conduct Rules and relevant legislation in States and Territories
- Ethical Guidelines
- Family Court and Federal Circuit Court, *Family Violence Best Practice Principles* (2015)
- Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for lawyers doing Family Law Work* (2nd ed) (Note: These are currently under review)