



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: B21/2020
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Registry: Brisbane
Document filed: Form 27A - Appellant's submissions
Filing party: Appellant
Date filed: 04 Jun 2020

Important Information

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BETWEEN:

CLAYTON
Appellant
and
BANT
Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

- 10 1. We certify that the submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The principal issue for determination in this appeal is whether a divorce effected in Dubai in the United Arab Emirates ("UAE") precludes the prosecution of applications under the *Family Law Act 1975* (Cth) for property adjustment and spousal maintenance orders by the operation of *res judicata* estoppel, or by what was described by the Full Court of the Family Court as the "Henderson extension" (FC[28], [29], [37]; CAB66, 67.)

Part III: SECTION 78B NOTICE

- 20 3. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*, and considers that no such notice is required.

Part IV: CITATIONS

4. Family Court of Australia (Hogan J.): *Clayton v Bant* [2018] FamCA 736.
5. Full Court of the Family Court of Australia: *Bant v Clayton (No 2)* (2019) FLC 93-925.

Part V: STATEMENT OF FACTS

1. The respondent is an Emerati citizen who lives predominantly in the UAE. The appellant was born in Australia and is an Australian citizen.
2. The appellant was working in Dubai when she met the respondent. The parties were married in Dubai on 15 July 2007 in a Sharia court. They have one child born 3
30 August 2009. They separated in Australia on 5 July 2013 (FC[3] CAB61). Since the

separation the appellant and the child have resided in Australia.

3. As is apparent from J[6]-[9], CA10 and FC[4], CAB61:

(a) the appellant owns personal property and chattels in Dubai;

(b) the respondent owns extensive property in the UAE and in other parts of the world;

(c) the parties own real property in Australia.

4. On 29 July 2013 there were parenting proceedings between the appellant and the respondent in the Family Court of Australia. On that day the appellant amended such proceedings to seek also orders for property settlement and spousal maintenance under the *Family Law Act*.

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5. On 19 November 2013 a judge of the Family Court made final orders in the parenting proceedings and accidentally dismissed the property and spousal maintenance proceedings. This error was rectified on 20 February 2015 by a slip rule order.

6. During the period 22 May 2014 to 18 September 2014 the appellant's solicitors corresponded with the respondent's Australian solicitors in respect of the appellant's intention to seek property settlement. The respondent's Australian solicitors did not respond to that correspondence.

7. On 15 July 2014 the respondent instituted divorce proceedings in the Second Personal Status Family Circuit of the Dubai Court. Those proceedings also sought a waiver (in the sense of extinguishment) of the matrimonial rights of the appellant (FC[5], [34], CAB62, 67). The appellant was not notified of those proceedings until 28 October 2014.

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8. On 2 September 2014 the appellant had instituted divorce proceedings in Australia. On 17 October 2014 the respondent's Australian solicitors advised they did not have instructions to accept service of that application. On 4 December 2014, however, the respondent was served with the appellant's application for Australian divorce, and application for property settlement and spousal maintenance. (AFM6 [18] lines 56-61).

9. On 16 June 2014 the respondent lodged caveats against the title of two properties in New South Wales owned by the appellant, based on an alleged agreement and "contributions to the marriage." (AFM60-67). On 12 December 2014 the respondent commenced proceedings against the appellant in the Supreme Court of New South

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Wales to extend the caveats, claiming an equitable interest in the two properties the subject of the caveats. Those proceedings have been adjourned pending the outcome of the challenge to the exercise of jurisdiction under the *Family Law Act* to be determined by this appeal. The appellant has applied to have those proceedings transferred to the Family Court.

10. On 26 February 2015 judgment was delivered and orders made in the Second Personal Status Family Circuit of the Dubai Court. The Dubai court's decree is relevantly at FC[35], CAB67. A fuller version is at (AFM9-13).
11. The appellant had not sought any order in the Dubai proceedings.
- 10 12. The orders made by the primary Judge were made on an application by the respondent for orders that the proceedings instituted by the appellant on 4 December 2014 be permanently stayed on the basis that the judgment and order of the Dubai court on 26 February 2015:

“amounts to a bar to the same by virtue of the operation of res judicata/cause of action estoppel.”

J[1], CAB9.
13. The primary Judge found against the respondent and refused to grant a stay in respect of the appellant's claim for settlement of property (J[193]-[195], CAB45-46) but would have found in favour of the respondent on the question of spousal maintenance, if satisfied that the Dubai court had dealt with the issue, but found that it had not
20 (J[196], CAB46).
14. In the Full Court it was held that the Dubai decree finally determined the financial consequences of the marital breakdown, and also that Article 62.1 of the United Arab Emirates Federal Law No 28 of 2005 concerning personal status offered the appellant a remedy to obtain an adjustment of property as between the parties and that not having done so, the appellant's claim was barred by the operation of the “Henderson extension” (FC[26]-[29], CAB66). (The Henderson extension is referred to at FC[24], CAB65).
15. The Full Court also held that the “Henderson extension” operated to prevent the
30 appellant from bringing the spousal maintenance proceedings in the Family Court (FC[36]-[38], CAB67-68).

Part VI: ARGUMENT

16. The appeal turns, it is submitted, on the resolution of three issues:

(a) First – see Grounds 1 and 2 CAB81– whether the claims the appellant seeks to agitate in the Family Court in respect of settlement of property have merged and been finally determined in the Dubai decree by the application of principles of *res judicata* estoppel or an extended version of the same.

(b) Secondly – see Ground 3 CAB82– whether the Dubai decree finally determined an application for alimony such that there is nothing left to agitate by way of a spousal maintenance application under s75(2) of the *Family Law Act 1975*.

10 (c) Thirdly, whether in the circumstances, the proceedings for settlement of property and spousal maintenance should have been stayed.

17. *The Dubai proceeding and the relevant law of the UAE.* It was accepted in the courts below that the relevant applicable law in the UAE is Federal Law No 28 of 2005 concerning Personal Status from which the primary Judge extracted the legal principles that applied in the parties’ divorce in Dubai: [FC9], CAB62. The primary Judge received (translated) evidence of that law. The Law is set out in full at AFM17-59.

18. The evidence before the primary Judge was that:

20 “Marriage is a formal contract, with documented provisions including a dowry that the husband must pay his wife on marriage, and which will often include a deferred dowry that the husband must pay to his wife on divorce or on her demand.”

Expert Report of Mary Barton, Annexure C to her affidavit of 5 June 2015 paragraph 11: AFM15 lines 45-50 [11].

19. In the present case the dowry provided for by the marriage contract was AED100,000 payable to the applicant on marriage and AED100,000 on death or divorce. A copy of the marriage contract is at AFM8.

20. The only right to seek property adjustment in Dubai is that provided for in Art. 62.1 of the Personal Status Law which states (FC[14], CAB64):

30 “A woman having reached the age of full capacity is free to dispose of her property and the husband may not, without her consent, dispose thereof; each one of them has independent financial assets. If one of the two participates with the other in the development of a property, building a dwelling place or the like, he may claim from the latter his share therein upon divorce or death.”

21. As is apparent from Art 62.1 the claim must be one in respect of property in which each party participated. It does not relate to other property.

22. Further, the evidence established that the property must be within the jurisdiction, the Memorandum of Agreement/Disagreement between the parties' experts stating: (AFM70 lines 12-22)

“Question 4: What are the sources of jurisdiction, if any, for a court in Dubai to exercise jurisdiction with respect to property, whether movable or immovable, outside the territorial jurisdiction of the Emirate?”

10 [answer] Agreed – no jurisdiction with respect to property outside the territorial jurisdiction of the Emirate.”

23. *The proceedings commenced in Australia.* The applicant seeks to agitate property settlement proceedings in Australia under s79 and interim proceedings for spousal maintenance under s75(2) of the *Family Law Act*.

24. That Act makes provision for alteration of property interests in s79(1). The considerations to be taken into account are set out in s79(2), s79(4)(a),(b) and (c) and s75(2). The Act also recognizes that the jurisdiction may be exercised in relation to parties who have divorced under the law of an overseas country: see s79(1B)(ba).

20 25. The jurisdiction is not ancillary to divorce. It is not necessary for parties to be divorced (or even separated) before orders can be made for property settlement and spousal maintenance.¹

26. The Australian jurisdiction is extra-territorial² and *in personam* and provides to a court exercising jurisdiction under the Act a wide discretion to adjust the legal and equitable interests of parties in property.

30 27. *Proceedings before the Full Court of the Family Court of Australia in relation to property settlement.* The Full Court was of the view that the thrust of the challenge before it was that the primary Judge erred in concluding that the law of Dubai did not allow for redistribution of the parties' assets, and erred in holding that the Dubai proceedings left open the question of adjustment of property interests which could be considered in the Australian proceedings. [FC13], CAB64. It was held that the primary Judge's error arose from seeking an exact analogy between the provisions of s79 of the *Family Law Act 1975* and the law of Dubai: FC[28], CAB66.

¹ *Stanford v Stanford* (2012) 247 CLR 108 at 117, [25]-[34].

² *Family Law Act 1975*, s. 31(2).

28. *Res judicata and estoppel in relation to the claims for property settlement.* As is apparent from *Tomlinson v. Ramsey Food Processing Pty Ltd* (2016) 256 CLR 507 at 516, [20], *res judicata* involves a decision settling for the future a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons. The rights and obligations “merge” in the final judgment.
29. But the Dubai court made no order dealing with the property of the parties or either of them. Nor could it have made any order in respect of any property outside the UAE. And in respect of property within the UAE, the only claim which might be made was one which fell within Art 62.1.
30. In short the case was not one where *res judicata*, as referred to in *Tomlinson* at [20], was available.
31. Nor was the form of estoppel described in *Tomlinson* at [22] as “cause of action estoppel” available. Here there was no assertion in the Family Court of a claim which had been determined by the judgment in Dubai. Nor again was the form of estoppel described in *Tomlinson* at [22] as “issue estoppel” available. There was no relevant ultimate issue of fact or law decided by the Dubai court necessarily involved in reaching its judgment.
32. The Full Court at FC[29], CAB66 also placed reliance on the third form of estoppel referred to in *Tomlinson* at [22], namely “*Anshun estoppel*” or the “extended principle” in *Henderson v. Henderson*³. But that form of estoppel does not apply unless the claim or issue in respect of which the estoppel is contended to operate:
- “was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding.”⁴
33. It could hardly be unreasonable “in the context of that first proceeding” for the appellant not to seek property settlement of the kind provided for by s. 79 of the *Family Law Act* when the Dubai court could not make any order in respect of property outside the UAE, and where in respect of property within the UAE, the only power was in circumstances to which Art 62.1 applied.

³ (1843) 3 Hare 100; 67 ER 313.

⁴ *Tomlinson* 256 CLR and 518, [22].

34. The Full Court, at FC[24], CAB66, referred in support of its views on Anshun estoppel, to a passage from *Henderson v. Henderson*. The passage, however, does *not* support the Full Court's conclusion that the estoppel contemplated by it was applicable. In this regard:

- (a) the estoppel will not arise unless the "given matter ... becomes the subject of ... adjudication by a court of competent jurisdiction";
- (b) the quoted passage on two occasions makes it clear that the matter or point which it is sought to make the subject of the estoppel must be one which might have been brought forward as part of the context in the first proceeding.

10 Here, for the reasons referred to above in paragraphs 29 and 33 neither of those requirements was satisfied.

35. A great deal of the Full Court's reasoning is based on the proposition at FC[18], CAB64 that the foundation of res judicata involved there being the "same cause of action" and that the primary Judge had found (FC[19], CAB64) that:

"... the cause of action here is the financial consequence to the parties arising from the breakdown of the matrimonial relationship."

36. What the primary Judge had actually said, however, was that⁵ it was uncontroversial that for the claim to be made out, it must be established that the decision relied upon as the foundation for the claim (the Dubai decree):

- 20 (a) was judicial;
- (b) was in fact pronounced;
- (c) the court or tribunal had jurisdiction over the parties and the subject matter;
- (d) was final and on the merits;
- (e) determined the same question as raised in later litigation; and
- (f) the parties to the later litigation were the parties to the earlier litigation.

37. At FC[19], CAB64 the Full Court had noted that the determination of "the identity of the cause of action" as referred to in paragraph 36(e) above required a consideration of the underlying factual situation.

⁵ J[179], CAB43.

38. The Full Court, however, did not examine the underlying factual situation, whereas the primary Judge did. After identifying the elements of *res judicata*, her Honour went on to apply the elements to the facts (J[180]-[196], CAB43-46. In doing so she paid careful attention to *whether the decision determined the same question as raised in later litigation* (see from J[185]).

39. The conclusions which the primary Judge reached are at J[191]-[194], CAB45:

10 “191. I accept that the law of Dubai provides that divorce is a dissolution of the marriage contract between the parties to it and that there are clearly defined parameters to the type of claim that may be made: these are alimony and maintenance for the support of children of the marriage.

192 I accept that the law of Dubai contains no provision for the redistribution of assets or property of the parties to the marriage contract on the breakdown of the marriage or divorce, other than as is prescribed within, or by the terms of, the marriage contract. I accept that the law of Dubai is such that there is no provision for the alteration of property interests in property owned by the parties to a marriage other than in respect of jointly owned property within the jurisdiction where a civil claim is raised by one of the parties, supported by evidence of payment of funds used to purchase the property so as to displace a presumption of joint ownership.

20 193. I accept the submission that it is unnecessary that the legal regime for divorce in Dubai be identical to the legal regime for divorce in Australia; what is necessary is that the proceedings in Dubai dealt with the same subject matter. I consider that the causes of action determined by the Dubai proceedings are the divorce of the parties in Dubai and the financial consequences associated with divorce according to the law administered in Dubai – which I consider to be limited to the issue of the deferred dowry and alimony.”

30 194 I consider that the issues dealt with in the Dubai proceedings and by the Dubai divorce do not include the issue of the existence of a party to a marriage’s right to claim property from the other party because such a right does not exist in Dubai: the law of Dubai does not accord to parties any rights to seek property settlement or adjustment orders of the kind prescribed by s 79 of the Act following separation or divorce; their only right is to seek orders in relation to property within the jurisdiction in which each have invested.”

40. The Full Court at FC[20], CAB65 appears to rely on observations in *Henry v. Henry* (1996) 185 CLR 571 at 591-2, particularly the last sentence there quoted. Reliance on that passage, however, should not govern the present case. In this regard:

- (a) The observation in that sentence is qualified by the word “ordinarily”. If it went further the requirement for an “underlying controversy with respect to the marital relationship would often not be satisfied⁶.
- (b) The passages in *Henry v. Henry* which follow that quoted by the Full Court at FC[20] do not support the use made of it by the Full Court.

41. In relation to paragraph 40(b) above, *Henry v. Henry* was, like this, a stay case. The matters which were treated as relevant to the grant or refusal of a stay included at 592.8:

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“As well it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties’ controversy.”

and at 592.8-593.2:

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“Other considerations include the order in which the proceedings were instituted, the stage which they have reached and the costs that have been incurred. It will also be relevant to consider the connection of the parties and their marriage with each of the jurisdictions and to have regard to the issues on which relief might depend in those jurisdictions. Moreover, it will be relevant to consider whether, having regard to their resources and their understanding of language, the parties are able to participate in the respective proceedings on an equal footing. The list is not exhaustive. Rather, the question whether Australia is a clearly inappropriate forum is one that depends on the general circumstances of the case, taking into account the true nature and full extent of the issues involved.”

42. The present case, it is submitted, was one where a stay of the proceedings for settlement of property should not have been granted without consideration of the matters referred to in paragraph 41. The only reference to the re-exercise of discretion is in FC[40], CAB68.

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43. The Full Court did not proceed to analyse the judgment in *Henry* but in parenthesis linked it to another decision of the Full Court in *Caddy and Miller* (1986) FLC 91-720 where, in the *res judicata* context the cause of action was identified as the ‘settlement of the property of the parties consequent upon the dissolution of their marriage’. *Caddy and Miller* is distinguishable from the present case on the basis that the judgment of the Superior Court of California was delivered after a full hearing which comprised adjustment of all of the property of the parties (including Australian property).

⁶ As in *Stanford v. Stanford*, fn 1 above, or cases in relation to the care of children.

44. The rights pursued under s79 of the *Family Law Act* are quite distinct from those adjudicated upon in the Dubai judgment. Under the *Family Law Act*, it is not necessary for parties to be divorced (or even separated) before orders can be made for property settlement.⁷ The Australian jurisdiction is extra-territorial⁸ and *in personam* and provides to a court a wide discretion to adjust the legal and equitable interests of parties, taking into account a range of factors. The facts necessary to ground the claim under s79 are distinct and the rights it provides are simply not available according to the laws of Dubai, where very limited rights arise from the marriage contract ancillary to divorce.
- 10 45. A judgment under s79 of the *Family Law Act* would not conflict with the judgment of the Dubai court.
46. It was not possible, in the Dubai proceedings, for the appellant to plead or rely on the facts necessary to support her application under s79 of the *Family Law Act*. It was not from any negligence, inadvertence, or accident that the claim was omitted as part of the appellant's case or that she did not bring forward her "whole case" in Dubai. Rather, the law of Dubai did not permit her to do so.
47. As the primary Judge found, the law of Dubai makes no provision for the redistribution of assets or property of the parties to the marriage contract consequent on the breakdown of the marriage or divorce and the law of Dubai is such that there is
20 no provision for the alteration of property interests in property owned by the parties to a marriage other than in respect of jointly owned property within the jurisdiction where a civil claim is raised by one of the parties, supported by evidence of payment of funds used to purchase the property so as to displace a presumption of joint ownership: J[192], CAB45.
48. There was no opportunity for the appellant to recover in the former suit what she seeks to recover in the second.
49. *Alimony or spousal maintenance – was it heard and determined.* The respondent argued before the Full Court that, in concluding that the question of alimony had not been determined by the Dubai court, thus leaving it to be litigated in the Australian proceedings, her Honour had confused the cause of action with the outcome. FC[33],
30 CAB67.

⁷ *Stanford v Stanford* (2012) 247 CLR 108.

⁸ S31(2) *Family Law Act* 1975.

50. The respondent had been unsuccessful in his request to drop off the appellant's 'marital rights.' (FC[34], CAB67. The Dubai decree in this regard recorded (CAB67):

"As for his request to drop off her deferred dowry and her alimony, this subject is untimely. On top of that, the other party did not demand them and hence there is no need to make reference to them in the text ..."

51. The decree had been translated from the Arabic language. No issue was taken with the translation.

52. When asked what does the decision determine, there was some disagreement between the parties' experts as to its meaning. Thus Ms Barton, the respondent's expert, said
10 (AFM16 lines 47-57):

"74. Question (16) What issues does the decision determine?

75. The decision determines the status of the marriage and dissolves it and the respondent, Ms [Clayton] is to repay the Dowry of 100,000/- Dirhams, payable and due on Execution of the Judgment (following the mandatory one month Appeal period). The decision also determines the costs of the case and requires Ms [Clayton] to pay the charges and the fees and 400/- Dirhams of the attorney's fees."

whereas Mr Edge was of the view (AFM78 lines 49-53) that:

20 "the decision clearly mentions and considers the issue not of repayment of dower/dowry but instead of waiver of the deferred dower/dowry (together with maintenance but decides against making any order on either for the reason that the claims were not pursued by the claimant."

53. The difference in view is not presently material.

54. The Dubai court described the husband's application as "untimely". It is submitted that that usage suggests that the issue (at least of alimony) was left to be decided at some future time if there was a need to do so. The words "on top of that" simply indicate that the resolution of the issue was also untimely because no application had been made by the appellant.

55. There was nothing to suggest that a future claim for alimony was precluded by the
30 decree.

Part VII: ORDERS SOUGHT

1. Appeal be allowed with costs.
2. That Orders (2), (3) and (4) pronounced by the Full Court of the Family Court of Australia on 7 November 2019 in Appeal No. NOA 89 of 2018 in that Court be set aside.

3. That the appellant's Third Amended Initiating Application filed on 3 November 2016 be remitted for hearing in the Family Court of Australia at Brisbane.

Part VIII: ESTIMATE FOR HEARING

The appellant estimates that two hours will be required for the presentation of the appellant's oral argument.

Dated: 4th June 2020

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Signed

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B 21 of 2020

ON APPEAL FROM THE FULL COURT OF THE FAMILY COURT

BETWEEN:

Clayton
Appellant

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and

Bant
Respondent

Index to Annexures to Appellant's Submissions

No.	Description of Document	Date	Page
1	Section 31 (2) Family Law Act 1975		14
2	Section 75 (2) Family Law Act 1975		15
3	Section 79 (1) (1B) (4) (a) (b) (c) Family Law Act 1975		18
4	Article 62.1 of the Personal Status Law of the United Arab Emirates Federal Law no 28 of 2005		24

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AustLII

Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 31 Original jurisdiction of Family Court

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FAMILY LAW ACT 1975 - SECT 31

Original jurisdiction of Family Court

(1) Jurisdiction is conferred on the Family Court with respect to:

(a) matters arising under this Act or under the repealed Act in respect of which matrimonial causes are instituted or continued under this Act; and

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(aa) matters arising under this Act in respect of which de facto financial causes are instituted under this Act; and

(b) matters arising under the *Marriage Act 1961* in respect of which proceedings (other than proceedings under Part VII of that Act) are instituted or continued under that Act; and

(c) matters arising under a law of a Territory (other than the Northern Territory) concerning:

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(i) the adoption of children;

(iv) the property of the parties to a marriage or either of them, being matters arising between those parties other than matters referred to in the definition of *matrimonial cause* in subsection 4(1); or

(v) the rights and status of a person who is an ex-nuptial child, and the relationship of such a person to his or her parents; and

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(d) matters (other than matters referred to in any of the preceding paragraphs) with respect to which proceedings may be instituted in the Family Court under this Act or any other Act.

(2) Subject to such restrictions and conditions (if any) as are contained in section 111AA, the regulations or the standard Rules of Court, the jurisdiction of the Family Court may be exercised in relation to persons or things outside Australia and the Territories.

Note: Division 4 of Part XIII¹AA (International protection of children) may affect the jurisdiction of the Court.

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AustLII

Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 75 Matters to be taken into consideration in relation to spousal maintenance

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FAMILY LAW ACT 1975 - SECT 75

Matters to be taken into consideration in relation to spousal maintenance

(1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

(2) The matters to be so taken into account are:

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(a) the age and state of health of each of the parties; and

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and

(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and

(d) commitments of each of the parties that are necessary to enable the party to support:

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(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:

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(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

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(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

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(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

10 (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and

20 (n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(naa) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:

30 (i) a party to the marriage; or

(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

40 (iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

50 (p) the terms of any financial agreement that is binding on the parties to the marriage; and

(q) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage.

(3) In exercising its jurisdiction under section 74, a court shall disregard any entitlement of the party whose maintenance is under consideration to an income tested pension, allowance or benefit.

60 (4) In this section:

"party" means a party to the marriage concerned.

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Commonwealth Consolidated Acts

FAMILY LAW ACT 1975 - SECT 79 Alteration of property interests

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FAMILY LAW ACT 1975 - SECT 79

Alteration of property interests

(1) In property settlement proceedings, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or

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(b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

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(d) an order requiring:

(i) either or both of the parties to the marriage; or

(ii) the relevant bankruptcy trustee (if any);

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

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(1A) An order made under subsection (1) in property settlement proceedings may, after the death of a party to the marriage, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(1B) The court may adjourn property settlement proceedings, except where the parties to the marriage are:

(a) parties to concurrent, pending or completed divorce or validity of marriage proceedings; or

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(ba) parties to a marriage who have divorced under the law of an overseas country, where that divorce is recognised as valid in Australia under section 104; or

(bb) parties to a marriage that has been annulled under the law of an overseas country, where that annulment is recognised as valid in Australia under section 104; or

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(c) parties to a marriage who have been granted a legal separation under the law of an overseas country, where that legal separation is recognised as valid in Australia under section 104;

on such terms and conditions as it considers appropriate, for such period as it considers necessary to enable the parties to the marriage to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings.

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(1C) Where the period for which a court has adjourned property settlement proceedings as provided by subsection (1B) has not expired and:

(a) divorce or validity of marriage proceedings are instituted by one or both of the parties to the marriage; or

(ba) the parties to the marriage have divorced under the law of an overseas country and the divorce is recognised as valid in Australia under section 104; or

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(bb) the marriage is annulled under the law of an overseas country and the annulment is recognised as valid in Australia under section 104; or

(c) the parties to the marriage are granted a legal separation under the law of an overseas country and the legal separation is recognised as valid in Australia under section 104;

a party to the first-mentioned proceedings may apply to the court for the hearing of those proceedings to be continued.

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(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

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(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

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(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and

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(d) the effect of any proposed order upon the earning capacity of either party to the marriage; and

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

(f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and

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(g) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage.

(5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in property settlement proceedings, a court is of the opinion:

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(a) that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to:

(i) the property of the parties to the marriage or either of them; or

(ii) the vested bankruptcy property in relation to a bankrupt party to the marriage;

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if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to:

(iii) the property of the parties to the marriage or either of them; or

(iv) the vested bankruptcy property in relation to a bankrupt party to the marriage;

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the court may, if so requested by either party to the marriage or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the marriage or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

(6) Where a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:

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(a) any of the property of the parties to the marriage or of either of them; or

(b) any of the vested bankruptcy property in relation to a bankrupt party to the marriage.

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(7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the marriage, have regard to any change in the financial circumstances of a party to the marriage that may occur by reason that the party to the marriage:

(a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or

(b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;

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but nothing in this subsection shall be taken to limit the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the marriage.

(8) Where, before property settlement proceedings are completed, a party to the marriage dies:

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(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

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(ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the marriage or either of them; or

(iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and

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(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(9) The Family Court, or a Family Court of a State, shall not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:

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(a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar of the Family Court, or a Registrar or Deputy Registrar of the Family Court of that State, as the case may be;

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

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(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

(10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the **subject marriage**):

10 (a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

(aa) a person:

(i) who is a party to a de facto relationship with a party to the subject marriage; and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;

20 (ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

(b) any other person whose interests would be affected by the making of the order.

(10A) Subsection (10) does not apply to a creditor of a party to the proceedings:

30 (a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or

(b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.

(10B) If a person becomes a party to proceedings under this section because of paragraph (10)(aa), the person may, in the proceedings, apply for:

40 (a) an order under section 90SM; or

(b) a declaration under section 90SL;

in relation to the de facto relationship described in that paragraph.

(11) If:

50 (a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before it is finally determined, the party became a bankrupt; and

60 (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings; and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

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(12) If a bankruptcy trustee is a party to property settlement proceedings, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

(13) The court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances.

(14) If:

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(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage (the **debtor party**):

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(i) when the application was made, the party was a debtor subject to a personal insolvency agreement; or

(ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

(c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and

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(d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

(15) If the trustee of a personal insolvency agreement is a party to property settlement proceedings, then, except with the leave of the court, the party to the marriage who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

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(16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

(17) For the purposes of subsections (11) and (14), an application for an order under this section is taken to be finally determined when:

(a) the application is withdrawn or dismissed; or

(b) an order (other than an interim order) is made as a result of the application.

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FEDERAL LAW No. 28/2005

10 Issued on 19/11/2005 Corresponding to 17 Shawal 1426 H. **ON PERSONAL STATUS**

We, Khalifah Bin Zayed Al Nahyan, President of the United Arab Emirates State,
Pursuant to the perusal of the Constitution; and:

Federal Law No. 1/1972 on the Jurisdiction of the Ministries and the Powers of the
Ministers and its amending laws;

20 Federal Law No. 10/1973 on the Federal Supreme Court and its amending laws;

Federal Law No. 6/1978 on the establishment of Federal Courts and the transfer of the
jurisdictions of the local courts in some of the Emirates to these Federal Courts and its
amending laws;

Federal Law No. 17/1978 on Organization of the cases and procedures of appeal in
Cassation before the Federal Supreme Court and its amending laws;

Federal Law No. 3/1983 on the Federal Judicial Authority and its amending Laws;

30 The Penal Law issued by Federal Law No. 3/1987;

The Civil Transactions Law issued by Federal Law No. 5/1985 and its amending laws;

Federal Law No. 22/1001 on Notary Public and its amending laws;

The Law of Evidence in Civil and Commercial Transactions, issued by Federal Law No.
10/1992; The Law on Civil Procedures, issued by Federal Law No. 11/1992;

40 Federal Law No. 21/1997 on Fixing the Dowry in the Contract of Marriage and its

Expenses; and Acting upon the proposal of the Minister of Justice and Islamic Affairs and
Wakfs, the approval of the Council of Ministers and ratification of the Federal Supreme
Council; We have promulgated the following Law:

GENERAL PROVISIONS**Article 1**

50 1- The present Law shall apply to all facts occurring subsequent to the coming into force
of its provisions.

It shall retrospectively apply to divorce attestations and divorce lawsuits that have not
received final settlement.

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provided it does not exceed a one-year alimony payable to those in similar condition. The judge may order that it be paid by installments depending on the degree of solvency or insolvency of the husband. In assessing the amount thereof, the prejudice sustained by the wife shall be taken into consideration.

Article 141

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1- Should the husband die and the wife is in her retractable divorce waiting period, she passes to the widowhood waiting period and the lapsed period shall not be taken into account.

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2- Should the husband die while the woman is in her waiting period for repudiation or rescission, she shall complete it and is not bound by the death waiting period unless repudiation took place during the last illness, then the longest of the two periods shall be taken into account.

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