GREENWAY CHAMBERS

ONCE AND FOR ALL? VARYING OR SETTING FINAL PROPERTY ORDERS

Leah Reid
Greenway Chambers
Level 10, 99 Elizabeth Street Sydney

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1. Under sections 81 and 90ST *Family Law Act 1975* (Cth) ('the Act'), the Court has a duty to make orders under Part VIII and Part VIIIAB of the Act that "as far as practicable, … will **finally determine** the financial relationships between the parties to the [marriage / de facto relationship] and avoid further proceedings between them" (my emphasis).

2. But once the Court makes a "final determination" to alter property interests pursuant to s 79 or s 90SM,[1] it still retains power to set aside or vary those orders under s 79A and 90SN of the Act.[2]

3. Sections 79A and 90SN are remedial sections designed to "overcome miscarriages of justice and certain other specific difficulties and should be construed liberally to effect its intended purpose".[3] Section 90SN is analogous to s 79A. The sections are interpreted in the same way and relevant authorities apply equally.

4. The application of s 79A is not limited to orders made after a contested hearing – it can also apply to orders made by consent.[4]

5. Section 79A is <u>not</u> an alternative to an appeal. If it is alleged there has been an error of law or the Court's discretion has miscarried, the proper course is to appeal pursuant to Part X of the Act (*Badawi & Badawi* (2017) FLC 93-784).

6. Subsections 79A(1) and (1A) provide:

   (1) Where, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, the court is satisfied that:

      (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance; or

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[1] This includes an order dismissing an application for s 79 orders (see *Robson & Robson* (2003) FLC 93-145).
[2] There are of course other ways that the Court has power to vary orders – such as the slip rule (Rule 17.02 of the *Family Law Rules 2004* (Cth)) to correct mathematical errors, or simple mistakes.
[3] *Gilbert v Estate of the late Gilbert* (1990) FLC 92-125.
[4] *Harris v Caladine* (1991) 172 CLR 84.

(b) in the circumstances that have arisen since the order was made it is impracticable for the order to be carried out or impracticable for a part of the order to be carried out; or

(c) a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make another order in substitution for the order; or

(d) in the circumstances that have arisen since the making of the order, being circumstances of an exceptional nature relating to the care, welfare and development of a child of the marriage, the child or, where the applicant has caring responsibility for the child (as defined in subsection (1AA)), the applicant, will suffer hardship if the court does not vary the order or set the order aside and make another order in substitution for the order; or

(e) a proceeds of crime order has been made covering property of the parties to the marriage or either of them, or a proceeds of crime order has been made against a party to the marriage;

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

(1A) A court may, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, and with the consent of all the parties to the proceedings in which the order was made, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

7. The easiest option is obviously if all the parties consent to the order being set aside or varied.[5] This does not require parties to consent to what order should be made in substitution.[6]

8. In the event all the parties do not consent to an order being varied or set aside pursuant to section 79A(1A), then an applicant is required to satisfy the Court of one of the grounds in s 79A(1)(a) – (e).

9. Given the breadth of this topic, this paper will focus solely on subsection (1)(a).

Short history of section 79A

10. Section 79A was introduced into the Act in 1976. In its original form, the Court had discretion to set aside an order and make a substitute order if it was satisfied the original "*order was obtained by fraud, by duress, by the giving of false evidence, or by the suppression of evidence*". There was no power to vary an order.

11. In 1979, section 79A was broadened to include the words "*or any other circumstance*".[7]

[5] There are cases (such as *McCabe & McCabe* (1995) FLC 92-634) which deal with whether a party can give implied consent to the variation or setting aside of an order. Those are beyond the scope of this paper.
[6] See *Bourke v Bourke (No 2)* (1994) FLC 92-479.
[7] *Family Law Amendment Act 1979* (Cth), clause 13.

12. The *Family Law Amendment Act 1983* (Cth) introduced the broad structure and language of s 79A(1) and (1A) as we know it today. The 1983 amendments had the effect of:

    (a) requiring the Court be satisfied there had been a "miscarriage of justice by reason of fraud…" (rather than the order was obtained by fraud etc);

    (b) empowering the Court to vary a s 79 order;

    (c) further broadening the grounds that the Court could set aside or vary an order by introducing subsections (1)(b)-(d); and

    (d) empowering the Court to set aside s 79 orders where all parties consent.

13. The words "(including failure to disclose relevant information)" were inserted by the *Family Law Amendment Act 2000* (Cth) in response to a number of cases that held "suppression of evidence" require more than a mere failure to disclose.

14. I pause to note that the threshold of "failure to disclose relevant information" is arguably lower than the threshold of "non-disclosure of a material matter" necessary to set aside a financial agreement or termination agreement pursuant to s 90K(1)(a) or 90UM(1)(a) *Family Law Act 1975* (Cth), which were also inserted into the Act by the *Family Law Amendment Act 2000* (Cth).

Who has standing to apply?

15. An application under s 79A can be made by "a person affected by an order". In the majority of cases, this is one of the parties to the proceedings. However, sub-s 79A(4) - (7) make it clear that an application can also be made by:

    (a) a creditor of a party to the proceedings (including the Commissioner of Taxation) if the creditor *may* not be able to recover their debt;

    (b) the trustee in bankruptcy, if a party to the marriage was bankrupt when the s 79 order was made or became bankrupt after the s 79 order was made;

    (c) the trustee of a personal insolvency agreement if a party to the marriage was debtor subject to a personal insolvency agreement when the s 79 order was made, or after the s 79 order was made.

Section 79A(1)(a) – "a miscarriage of justice"

16. The authorities[8] make clear that when determining an application under s 79A(1)(a), the Court must engage in a four-step process:

    (a) firstly, considering whether a ground (fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance) has been established;

    (b) secondly, considering whether the existence of that ground amounted to a miscarriage of justice;

[8] *In the Marriage of Patching* (1995) 18 Fam LR 675; and *In the Marriage of Prowse* (1994) 18 Fam LR 348.

(c) thirdly, considering whether the court in its discretion should vary or set aside the order; and

(d) if discretion ought be exercised, finally, considering whether the court should make another order under section 79.

The provisions of s 79A(1)(a) only apply to circumstances in existence at the time when the original s 79 order was made or before the original order was made and not to circumstances occurring afterwards.[9] Conversely, subsections 79A(1)(b)-(d) only apply if circumstances have arisen since the order was made.

17. The applicant bears the onus of establishing there has been a miscarriage of justice and also that it is appropriate for the Court to exercise the Court's discretion to vary the original orders or set aside the original orders and consider making further orders under s 79. (*Prowse & Prowse* (1995) FLC 92-557).

18. Unlike in parenting matters where the Court may be more willing to hear a *Rice & Asplund* argument as a threshold issue, the general rule is that the Court will determine s 79A application at the same time as any consequential s 79 application (*Patching & Patching* (1995) FLC 92-585). In *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* (2018) FLC 93-824, Strickland J noted with some criticism the difficulties that arose because the trial judge bifurcated the hearing.

19. The fresh s 79 application is determined at the date of the hearing and not at the date of the original orders (*Fickling & Fickling* (1996) FLC 92-664).

Step 1 – "fraud"

20. For the purposes of the provisions of s 79A, fraud requires "conscious wrongdoing or some form of deceit".[10] This is somewhat different from the classic definition of fraud in *Derry v Peek* (1889) 14 App Cas 337 at 374 which included mere recklessness as to whether a representation was true or false.

21. In *Taylor v Taylor* (1979) 5 Fam LR 289, the High Court compared the words "by the giving of false evidence" and the word "fraud" and said:

> There is no reason to read "false" in s 79A as meaning "wilfully false", particularly since fraud is separately mentioned in the section.

22. In the context of s 79A, there are few cases where a party alleges fraud. That may be because false representations or omissions tend to be a failure to disclose relevant information, and it is more easily made out under the ground of "suppression of evidence". However, it is somewhat useful to consider some of the case law in relation to setting aside agreements on the basis of fraud. In the context of considering a husband's application to revoke the Court's approval of a maintenance agreement pursuant to section 87, the Full Court held in *In the Marriage of Green and Kwiatek* (1982) 8 Fam LR 419 that fraud need only be an inducing factor, it need not amount to a material or overriding inducement. In that case, the wife had failed to disclose her interest in a business.

[9] *Molier and Van Wyk* (1980) 7 Fam LR 18; see also *In the Marriage of Holland* (1982) 8 Fam LR 233.
[10] See *In the Marriage of Kokl* (1981) 7 Fam LR 591 at 598; and *Byrne v Byrne (*1965) 7 FLR 342 at 343

Step 1 – "giving of false evidence"

23. Unlike fraud, the giving of false evidence does not require any dishonesty or wrongdoing (see the High Court's comments in *Taylor v Taylor*, set out in 21 above).

24. The applicant is required to provide material that affirmatively shows that relevant information at the hearing was false (*Wilson v Wilson* (1967) 10 FLR 203).

25. False evidence given innocently may be less likely to move the Court to exercise discretion to set aside or vary the order.

Step 1 – "duress"

26. There is no case law to indicate that duress as used in s 79A is different from duress at common law.[11]

27. In *In the Marriage of Kohl* (1981) 7 Fam LR 591, duress was said to mean "the compulsion of a person by physical or mental harm".

28. However, in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 45-46, McHugh JA held:

> In my opinion **the overbearing of the will theory of duress should be rejected**. **A person who is the subject of duress usually knows only too well what he is doing**. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress. (emphasis added)

29. In *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 ('***Karam***'), the NSW Court of Appeal (Beazley, Ipp and Basten JJA) held that duress at common law requires proof of threatened or actual unlawful conduct. At [66], their Honours said:

> The vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by **treating the concept of "duress" as limited to threatened or actual unlawful conduct**. The threat or conduct in question need not be directed to the person or property of the victim, narrowly identified, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Amadio*. (emphasis added)

[11] In *Thorne & Kennedy* (2017) 350 ALR 1, the majority noted at [23] that in the context of an application to set aside a financial agreement, no oral submissions were advanced as to whether the principles of unconscionable conduct at common law and equity differed from the statutory prohibition against unconscionable conduct.

30. *Karam* was followed by the Full Court in *Kennedy & Thorne* [2017] FamCAFC 11 who said at [71] that:

> The correct test is whether there is "threatened or actual unlawful conduct", and not the test identified by her Honour. There needed to be a finding that the "pressure" was "illegitimate" or "unlawful".

31. On appeal in *Thorne & Kennedy* [2017] HCA 49 ('***Thorne & Kennedy***'), the plurality of the High Court held at [29] that it was "not necessary to address the arguments in favour of or against the conclusion of the New South Wales Court of Appeal that duress at common law requires proof of threatened or actual unlawful conduct".

32. Justice Nettle noted at [70]-[71] that *Karam* had been followed without demur, although in obiter his Honour was somewhat critical of the decision.[12] However, his Honour went on to say at [73] that "there would need to be detailed argument and deep consideration of the ramifications of departing from Karam before this Court would contemplate that course".

33. So *Karam* remains good law for the time being, but perhaps not for long.

34. Regardless, for the purpose of an application under section 79A(1)(a), illegitimate or improper <u>lawful</u> conduct is likely to be captured under the umbrella "any other circumstance" provided it amounts to a miscarriage of justice. For this reason, family law practitioners should be cautious when reading s 79A case law on duress that pre dates *Thorne & Kennedy.*

35. There are not many cases where s 79 orders have been set aside because of threatened or actual unlawful conduct. In *Pompidou & Pompidou* [2007] FamCA 879 (a pre-*Thorne & Kennedy* s 79A case), Justice Brown set aside consent orders, finding that the wife signed the consent application because she was too scared to do otherwise, the husband having threatened to kill her if she did not co-operate.

<u>Step 1 – "suppression of evidence (including failure to disclose relevant information)"</u>

36. Rule 13.04 of the *Family Law Rules 2004* (Cth) and Rule 24.03 of the *Federal Circuit Court Rules 2001* (Cth) provide that parties to financial proceedings are obliged to provide full and frank disclosure in relation to their financial circumstances.

37. Family law practitioners will be familiar with Part J and L of an Application for Consent Orders which requires each party to sign a Statement of Truth declaring:

> Apart from column 1 of Parts H and I (if included) the matters stated in this application that are within my personal knowledge are true and all other facts are true to the best of my knowledge, information and belief and the orders sought are supported by evidence.
>
> …
>
> I have no interest in property, superannuation, or a financial resource which is not described in column 2 of Part H. Where I give any estimate in this application it is based on knowledge, information and belief and is given in good faith.

[12] *Thorne & Kennedy* [2017] HCA 49 at [70].

38. Disclosure is central to the Court's ability to make a just and equitable order altering property interests. It is therefore unsurprising that a failure to provide full and frank disclosure can ground an application to vary or set aside property orders.

39. In *Suiker & Suiker* (1993) FLC 92-436 ('***Suiker***'), the Full Court said:

> 241. In our opinion, the necessity for full and frank disclosure of financial matters to the court and the other party are basic to the process of the court and the fundamental aims of the financial legislation contained in s 79 of the *Family Law Act 1975*.
>
> 242. It is implicit in these passages that the consent to an order must be informed consent. The consent to the order is itself part of the judicial process on which the Court places reliance. If that consent is based on misleading or inadequate information, then there may be, in our opinion, a miscarriage of justice either by reason of the "suppression of evidence" or by reason of "any other circumstance".

40. In *Barker & Barker* [2007] FamCA 13 ('***Barker***'), the husband had received (and rejected) an oral offer to purchase a property a few weeks before the parties signed consent orders. A few weeks after the consent orders were made, the husband sold the property for substantially more than the value provided to the Court. The offer (and the eventual sale price) was substantially higher than a valuation of the property that was obtained by the parties that formed part of the basis of the parties' property settlement. The Full Court found that a party is under an obligation to disclose the existence of a relevant offer, and indeed under an even greater obligation to disclose in circumstances where the offer is higher than the valuation and that party is to retain the property.

41. In *Lane & Lane* [2016] FamCAFC 53 ('***Lane***'), the parties entered into consent orders in 2003. The wife sought to set those orders aside on the basis that his interest as a beneficiary of a trust was of considerable value. The husband put 'not known' as the value of his interest in a trust. He alleged the wife knew about the existence of at least some of the assets in the trust because she had worked in the husband's business for over a year. The Full Court found at [50]:

> It was argued for the wife that by swearing that the value of the Trust was unknown to him, the husband misled the court about the value of his assets, failed to give full and frank disclosure and knowingly permitted his application to be determined on a factually erroneous basis and thus impugned the integrity of the judicial process. We agree. …we are satisfied that before his Honour the wife established the husband had suppressed evidence of real significance and his Honour should have found accordingly.

42. The Full Court dismissed the husband's argument that the wife knew of the Trust's assets, and that it was necessary for the wife to show that she was induced into entering into the consent orders as a result of the husband's representations. The Court found that the trial judge should have focused on whether the suppression of that evidence impugned the integrity of the court process.

43. The Full Court went on to say at [139]:

> …suppression of evidence must "amount to wilful concealment of matters which it was [the party's] duty to put to the Court" and that "the ground is not

> available to a party who simply fails to give relevant evidence either by choice or inadvertence …'[t]o withhold facts is not to reveal them or suppress them'". (footnotes omitted)

44. In *Anderson v Anderson* (2000) FLC 93-016, the parties entered consent orders which provided for a property to be sold. The husband believed the property was worth $200,000, but he did not obtain a valuation. The wife obtained a valuation which determined the property was worth $165,000, but the wife doubted the comparisons upon which the valuation relied. Crucially, the wife instructed her solicitors not to rely on the valuation and not to disclose it to the husband because it was "fundamentally flawed". The property eventually sold for $100,000. The husband sought to have the orders set aside.

45. Justice Chisholm held that the wife's valuation was the subject of legal professional privilege, and said at [29]:

> … It does indeed seem logical that if a person has a privilege in relation to a document, and thus can elect whether it becomes evidence or not, failing to disclose the document, whatever else it might be, cannot be characterised as "suppression of evidence". The contrary conclusion would effectively destroy the privilege in its operation to such documents.

<u>Step 1 – "any other circumstance"</u>

46. The phrase "any other circumstance" is not to be read *ejusdem generis* (of the same kind) with the preceding words; namely, fraud, duress, suppression of evidence or the giving of false evidence, and should be given its "wide natural meaning".[13] With that in mind, at first blush, the phrase can seem incredibly broad.

47. However, in *Clifton & Stuart* (1991) 14 Fam LR 511, the Court stressed that:

> ...the words "any other circumstance" are not of unlimited scope but governed by the words "miscarriage of justice". It also elucidates the proposition that "justice means justice according to law", that is, it **relates to the integrity of the judicial process.** (emphasis added)

48. That narrow approach was widened somewhat by the Full Court in *Suiker & Suiker* (1993) 17 Fam LR 236, who made it clear that the:

> …expression "judicial process" [used in *Clifton & Stuart*] can refer to **a variety of matters and circumstances which had an influence on the outcome of the litigation.** It is neither necessary nor desirable to attempt to define the matters which may amount to a miscarriage of justice by reason of any other circumstance in the relevant sense. (emphasis added)

49. As discussed above, given the High Court's discussion in *Thorne & Kennedy*, it is likely that unconscionable conduct and undue influence would also be captured under "any other circumstance".

50. The Court recognises that parties often settle for a variety of reasons. In *Holland & Holland* (1982) FLC 91-243, the Full Court said:

[13] *Byrne v Byrne* (1965) 7 FLR 342.

> Agreement to a consent order which may not adequately reflect a party's entitlements under s 79 does not, of itself, show that there has been a miscarriage of justice. There may be cases where the order consented to is so far outside the ambit of what is just and equitable that the court may infer that a party has acted under duress, in ignorance or as a result of incompetent advice.

51. That sentiment was echoed by the plurality of the High Court in *Thorne & Kennedy* who said at [56] (in relation to financial agreements) "…*it can be an indicium of undue influence if a pre-nuptial or post-nuptial agreement is signed despite being known to be grossly unreasonable*".

52. Some 'other circumstances' that have amount to a 'miscarriage of justice' have included:

    (a) orders made in the absence of a party (*Allesch v Maunz* (2000) 26 Fam LR 237);
    (b) failing to give a third party notice that a property order may impinge on their rights (*Semmens v Commonwealth of Australia and Collector of Customs (SA)* (1990) FLC 92-116); and
    (c) failure to disclose a verbal offer higher than the valuation (*Barker*).

53. The High Court even suggested in obiter in *Magill v Magill* [2006] HCA 51 that if a husband became aware of a paternity fraud after s 79 orders were made, that may amount to a miscarriage of justice by reason of "any other circumstance".

54. Importantly for practitioners, in *Clifton & Stuart*, the Full Court held that the incompetence of a legal representative will not amount to a miscarriage of justice by reason of "any other circumstance" unless it was so bad it was effectively equivalent to no representation at all (or was perverse), or affected the judicial process or the fairness of the trial (not the fairness of the result[14]).

<u>Step 2 – establishing a miscarriage of justice</u>

55. Once a party has established a ground, they must show it amounted to a "miscarriage of justice". The quotes in *Clifton & Stuart* and Suiker set out at 47 and 48 are apt.

56. A party may be able to establish a miscarriage of justice in respect of a consent order, if a party's consent was for any reason not a true consent.[15]

57. In relation to the nexus between non-disclosure and setting an order aside, Brandon LJ in *Livesey v Jenkins* [1985] AC 424 (cited with approval by the Full Court in *Barker*) warned "[p]arties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them…".

<u>Step 3 – the Court's exercise of discretion</u>

[14] See also *In the Marriage of La Rocca* (1991) 14 Fam LR 715.
[15] *In the Marriage of Holland* (1982) 8 Fam LR 233.

58. It is not sufficient to merely show a miscarriage of justice. A party also has to satisfy the Court that it is appropriate to exercise discretion to vary or set aside the order.

59. The exercise of discretion is not an examination of the merits of the original decision, although in cases where the order was made by consent, the merits of the original order may be significant.

60. In *Taylor v Taylor* (1979) 5 Fam LR 289, Mason J said:

> What s 79A(1) does is give the court a discretion to set aside an order when it has been obtained by false evidence. In such a case the court will be **extremely reluctant to exercise its discretion in favour of setting aside the order unless something more appears** than that false evidence has been given and procured the order. The importance of bringing an end to litigation and the evil of allowing cases to be retried on the same evidence are powerful deterrents against setting aside a judgment whenever it appears that it has been obtained by false evidence without more. (emphasis added)

61. The Court is bound to take into account the following factors:

(a) It is in the public interest, and the interest of parties that litigation be final (*Taylor v Taylor*). As set out above, sections 81 and 90ST establish that it is the duty of the Court as far as practicable make orders to finalise the financial relationship of the parties; and

(b) It is in the public interest, that parties who have been the primary contributors to their own financial troubles in the way the husband has been in the case, should not be allowed to relitigate matters with a view to getting themselves out of those troubles. (see Mason J in *Taylor v Taylor,* considered by Gee J in Rohde v Rohde (1984) FLC 91-592, and quoted by the Full Court in Scribe & Scribe (2006) FLC 93-302 in relation to the wife's failure to seek independent legal advice)

(c) The circumstances must not be rectifiable by other means (see *In the Marriage of Simpson and Hamlin* (1984) 9 Fam LR 1040 and *In the Marriage of Prowse* (1994) 18 Fam LR 348).

62. In *In the Marriage of Prowse* (1994) 18 Fam LR 348*,* the Full Court affirmed the trial judge's decision to refuse to exercise discretion. The Full Court quoted (with tacit approval) Strauss J where he said the circumstances that might justify the exercise of discretion included:

> …lack of any or any proper representation or advice, concealment by the husband or ignorance by the wife of relevant financial matters, pressure on or undue persuasion of her, or unequal bargaining power on her part, and no doubt there my be many other such circumstances.

63. In *Lane,* the Full Court held the trial judge was entitled to take into account the following factors in refusing to exercise discretion to set aside the orders:

(a) the wife knew of the existence of the Trust and the husband's role in it and that at least one asset of significance was held by the Trust, although the wife did not know the value of the husband's interest in the Trust;

(b) the extent of the wife's knowledge and her tacit acquiescence to the exclusion of the Trust value from the agreement;

(c) the wife had worked in the husband's professional business for 12 to 18 months;

(d) the wife had sought legal advice about the agreement contained within the consent orders before she signed them and she had expressed a reluctance to seek further advice because she did not want to have a further argument with the solicitor about valuing the holding company of the Trust;

(e) the wife did not assert that she entered into the orders in reliance on any representations made by the husband and the wife did not enter into the consent orders because of the husband's representations of the assets or because of what she understood of the assets.

64. Where there has been incomplete disclosure, it seems the Court will readily set aside orders.[16]

65. The Court can exercise discretion to vary or set aside the original order. The power to vary is a power to change part of an existing order only. The choice between setting aside or varying an order depends on the degree of intervention.[17] The time that has elapsed from the original order may present practical difficulties relevant to whether the order should be set aside rather than merely varied.[18]

Step 4 – another order under s 79

66. If the Court forms the view that it should set aside the original s 79 and made a fresh order, it is required to consider all the factors under s 79(4) and s 75(2).[19] These are determined at the time of the hearing, not at the time of the original order.

An alternative in specific cases - review a registrar's decision

67. In the alternative, in respect of consent orders that were made by a Registrar, parties can seek to review the Registrar's decision.

68. Rule 18.08 of the *Family Law Rules 2004* (Cth) sets out the time within which an application for review is to be made, namely 28 days.

69. Rule 1.14 provides that a party can apply to the Court to seek an extension of a time that is fixed under the Rules. The granting of an extension of time is discretionary. The fundamental issue is whether an extension of time is necessary to enable the Court to do justice between the parties.[20] In that context, it is usually necessary to explain any delay in bringing the application.

70. In *In the Marriage of Prowse* (1994) 18 Fam LR 348, the husband had re-ordered his property affairs and the Court found that he would incur substantial prejudice which could not be compensated for by an order for costs. That was a relevant factor to refusing an extension of time.

[16] *In the Marriage of Suiker* (1993) 17 Fam LR 236.
[17] *Simpson & Hamlin* (1984) FLC 91-576.
[18] *Trustee of the bankrupt estate of Lasic & Lasic* (2009) FLC 93-402.
[19] *In the Marriage of Parker* (1983) Fam LR 323.
[20] See *Gallo v Dawson* [1990] HCA 30; *In the Marriage of Tormsen* (1993) 18 Fam LR 232.

71. Rule 18.10 sets out the power of the Court on review, which is by way of a hearing de novo.

Some words of warning and some practical advice

72. Despite what your clients may think (or hope), there is no basis for relief merely because a property order is unfair or inequitable (or the client has changed their mind). There must be a miscarriage of justice.

73. Unlike entering into a financial agreement, a party is not required to have legal representation to enter into consent orders. However, if you are drafting proposed consent orders and the other party is self represented, you should provide sufficient time for the self represented opponent to consider the proposed orders, and encourage your client to provide financial disclosure supporting the assertions in the Application for Consent Orders, even if the other party does not request it. (See *Waterman & Waterman* (2017) FLC 93-762)

74. An application under s 79A should particularise the facts, matters or circumstances of the claim. It is not sufficient to seek an order "pursuant to s 79A(1)(a)".

75. Many s 79A claims are met with a response seeking summary dismissal. Familiarise yourself with the relevant sections, rules[21] and case law in respect of summary dismissal, and advise your client in respect of their potential liability for costs. As always, the starting position under s 117 *Family Law Act* is that each party bears their own costs, but the Court can make a costs order it considers 'just' taking into account whether a party is wholly unsuccessful and the conduct of the proceedings (e.g. if the Court determines the application was vexatious or an abuse of process).

Leah Reid

Greenway Chambers

12 February 2020

[21] See section 45A *Family Law Act,* rule 13.10 *Federal Circuit Court Rules* and rule 10.12 of *Family Law Rules*.