Introduction

Principal focus in Family: Through the use of contemporary examples, students investigate the legal nature of family relationships and the effectiveness of the law in achieving justice.

In the areas of separation, divorce and property settlements consider the following Themes and challenges that need to be incorporated throughout the topic:

- changes to family law as a response to changing values in the community
- the role of law reform in achieving just outcomes for family members and society
- the effectiveness of legal and non-legal responses in achieving just outcomes for family members

Property Settlements

Background

Family Law courts (and those exercising Family Law Court jurisdiction) make property settlement orders usually when a couple divorces in accordance with Section 79 of the Family Law Act 1975 (Cwlth). The property settlement is guided by two principles.

Firstly, the “contribution” made by both parties to the marriage, and these may be financial and non-financial contributions. (see In the Marriage of Kemp where the court ruled that a wife’s non financial contribution in staying at home, looking after children and performing domestic duties was equal to that of her husband’s financial contribution gained by employment in the workforce)

Secondly, the court will look at the “future needs” of the parties. A spouse may need to be retrained to enter the workforce if, for example, they have spent years at home, raising children.

Courts usually start with the view that matrimonial assets should be split equally between the parties. Courts then make adjustments to the share provided to each party based on who the children “live with” and other relevant factors.

However, no legal ruling will cover all matrimonial property settlements. In Stanford & Stanford [2011] Family Court of Appeal; Full Court 208 – 21/10/2011 the Full Court had to
deal with a growing issue, problems associated with an ageing population. In this case, the parties were of a considerable age. Both had children to former spouses. They were now "separated" but this was due to the wife's frail health and her need to live in a nursing home. The husband still lived in the matrimonial home. The wife's children applied to the Family Court to have the matrimonial home sold so that the wife could receive adequate health care. The Magistrate originally ruled that the wife should receive $612,931 and this would result in the husband having to sell the family home. The husband appealed the decision to the Full Court.

The issue for the court to determine was as follows. Did the court have the authority to make a court ruling on a property settlement if the couple were still married but physically separate? It also needed to consider other options such as whether a spousal maintenance order could have solved the problem, without requiring the sale of the matrimonial home? Further, had Her Honour, in her original judgment, provided adequate reasons to show that her decision was just and equitable? The result was that the appeal was allowed, so that the matter had to be re-examined by the Magistrate, but it appears that the Family Court can make a property settlement order in a situation like this.

**NOTE:** The period for seeking special leave to appeal to the High Court has not expired.

**Questions**

1. **What factors are considered by the Family Court when making a property settlement?**

2. **Explain why the inclusion of “non financial contributions” as a relevant consideration, so important in promoting equitable property settlements?**

3. **Outline the facts in Stanford & Stanford [2011]. How is it different to a property settlement following a divorce?**

4. **How effectively did the Magistrate’s original ruling provide justice to both the aged husband and his wife?**

5. **Apart from selling the property and dividing the proceeds what other options could the Magistrate have explored to resolve this issue?**

6. **Provide other case law examples that deal with property settlements and court orders. (for example, In the Marriage of O’Dea 1980. This case may also be referred to O’Dea & O’Dea).**