

FOLEY'S | LIST

THINKING OUTSIDE THE POOL SECTION 85A OF THE FAMILY LAW ACT

Author: Johannes Schmidt

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T h i n k i n g O u t s i d e t h e P o o l

Section 85A of the *Family Law Act*

Introduction

Section 85A

1. Section 85A of the *Family Law Act 1975* (“**Act**”) permits the Court to make Orders adjusting property which falls within a settlement made in relation to a marriage. Crucially, this means that the Court has power to adjust property interests which are *outside the matrimonial property pool* available for adjustment under s 79 of the Act, provided that the facts of the case fit within s 85A(1).
2. The section provides as follows:

85A Ante-nuptial and post-nuptial settlements

- (1) *The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.*
 - (2) *In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.*
 - (3) *A court cannot make an order under this section in respect of matters that are included in a financial agreement.*
3. There is limited case law in relation to s 85A.
 4. In this paper, I rely heavily on the first-instance judgment of Cronin J in *Rice*.¹ I was the solicitor for the applicant wife in that case. To the best of my knowledge following extensive research (both in preparing the wife’s case in *Rice* for trial, and again in preparing this paper), there is no earlier reported case in which an application under s 85A was successful, and only a handful of cases where the section was discussed

¹ *Rice v Rice* (2015) 52 Fam LR 618 (“**Rice**”).

at all. *Rice* is particularly interesting because it relates in its entirety to s 85A, as the matrimonial property pool was virtually non-existent.

5. In *Rice*, Cronin J found that s 85A “*is intended to make certain property subject to the orders that could be made under s 79.*”²
6. Unlike s 106B of the Act, s 85A is not directed at ill-intended transactions. There is no requirement of an intention to defeat a claim. So much is clear from the wording of the section. Cronin J confirmed in *Rice* that s 85A is not restricted to being “*a vehicle to claw back assets which had been put beyond the power of the Court.*”³
7. His Honour held that

*“the fundamental question is whether or not parties other than the husband and wife are holding assets which, by virtue of [the subject settlement], the assets [sic] have been put beyond the reach of the Court to such an extent that the Court cannot do justice.”*⁴

No De Facto Equivalent

8. There is no corresponding section in Part VIIIAB of the Act. There is, therefore, no relief of the kind available under s 85A with respect to de facto financial causes.

How s 85A Works

Ancillary Power

9. The section does not confer an independent power upon the Court, but rather an ancillary power to another matrimonial cause.⁵ In other words, there must be some head of power to which the application of s 85A may attach. So much is obvious from the words “*in proceedings under this Act*” in s 85A(1).

Requirements to Fall within s 85A

10. The remainder of s 85A(1) may be broken into the following elements:
 - 10.1. The Court may make an order for the application of the subject property for the benefit of the parties to the marriage, or their children. This is consistent with the Court’s power to adjust property *within the matrimonial pool* for the benefit of the parties’ children, as well as for the benefit of the parties.⁶
 - 10.2. The subject property must have been dealt with by an ante-nuptial or post-nuptial settlement. I discuss what constitutes a “settlement” below.
 - 10.3. The settlement in question must have been “*made in relation to the marriage*”. I discuss this below.

² *Rice* at [83].

³ *Rice* at [82].

⁴ *Ibid.*

⁵ *Greval v Estate of the late Greval; Sandalwood Lodge Pty Ltd (Intervener)* (1990) FLC ¶92-132.

⁶ Act s 79(1)(d).

- 10.4. Any order which the Court makes under s 85A must be just and equitable. These are the concepts of justice and equity with which we are all familiar.

How s 85A is Applied

11. Cronin J, in *Rice*, summarised the effect of s 85A(2) as follows:

*“If the facts do fit within s 85A, the provision is remedial and Part VIII of the Act applies rather than any other determination according to equitable principles.”*⁷

12. In that case, the property in question (several parcels of farm land, on one of which stood the family home) had been transferred to two of the parties' adult children, who had been joined to the proceedings, with certain rights (including a right of occupation for life) reserved to the parties.
13. His Honour agreed with the submissions made on behalf of the applicant wife that, if the Court found that there was a nuptial settlement in relation to the marriage in satisfaction of s 85A(1), s 85A(2) required that the matter effectively be treated as a s 79 matter as between all four parties.⁸

No Circumvention of Financial Agreements

14. The meaning of s 85A(3) is self-evident: s 85A cannot be used to circumvent the ousting of the Court's jurisdiction by a financial agreement.

A Settlement in Relation to the Marriage

15. In *Rice*, Cronin J observed that a *“nuptial settlement has to create a right, property or interest for at least [one of the parties to the marriage] if s 85A ... is to be applied.”*⁹ Where *“assets originally held by one of the parties to the marriage have been transferred to another person by way of an absolute gift, there is no basis to suggest that there was a settlement.”*¹⁰

Settlement

16. “Settlement” is not a well-defined term. Cronin J discussed its meaning at length in *Rice*.¹¹ The following are some of the matters which his Honour considered:

- 16.1. The definition of “settlement” found in the Settled Land Act 1958 (Vic)

*“includes inter alia, an agreement under which or by virtue of which instrument, any land is charged, whether voluntarily or by way of family arrangement for the benefit of other persons.”*¹²

⁷ *Rice* at [1].

⁸ See, generally, *Rice* at [125] – [160].

⁹ *Rice* at [90].

¹⁰ *Rice* at [83].

¹¹ See, generally, *Rice* at [100] – [117].

¹² *Rice* at [102].

- 16.2. In *Gill*,¹³ a case involving construction of a will, Harvey J found that a personal obligation on a beneficiary to provide board for the deceased's daughters was capable of attracting the intervention of equity. Cronin J concluded that "*Equity will intervene if a settlement requires that intervention.*"¹⁴
- 16.3. Referring to the English decision of *Re Brace*, Cronin J indicated that a merely precatory condition to provide a benefit would not be enough to constitute a settlement.¹⁵
- 16.4. Cronin J referred *Burke v Dawes*,¹⁶ where Dixon J endorsed the word "tenancy" being interpreted "*as ordinarily understood arising out of an agreement under which the person in possession was allowed to occupy in consideration of some kind of rent.*"¹⁷
- 16.5. His Honour found that the "*right of occupation for life*" retained by the wife in *Rice* "*gives rise to an equitable interest under the settlement between all of the parties.*"¹⁸
- 16.6. It did not matter that the wife's right to remain living on the property was inalienable. Cronin J found that there "*was a quasi-contract which created an interest in the land for the wife and the husband despite the transfer of the legal title.*" His Honour contemplated whether the daughters could have sold the property while the husband and wife lived there, and reached the view that they could not.¹⁹
- 16.7. His Honour noted that **many authorities "confirm that the question is whether the registered proprietor's powers of alienation, devising and transmission are restrained by the limitations of the settlement."**²⁰ (My emphasis.) The key element is that **the legal owner's power to deal with the subject property is fettered in some way.** If the transfer to the legal owner was absolute, there is not settlement for the purposes of s 85A.

In Relation to the Marriage

17. Section 85A was discussed in *Kennon v Spry*,²¹ in separate judgments, by Heydon J and Kiefel J (as her Honour then was). The other Justices did not consider it necessary to discuss s 85A in any detail.
18. Heydon J found that the words "made in relation to the marriage" in s 85A(1) could not apply to a trust which was settled 10 years before the parties' marriage.

¹³ *Gill v Gill* (1921) 21 SR (NSW) 400.

¹⁴ *Rice* at [103] – [104].

¹⁵ *Rice* at [105].

¹⁶ *Burke v Dawes* (1938) 59 CLR 1.

¹⁷ *Rice* at [106].

¹⁸ *Ibid.*

¹⁹ *Rice* at [110].

²⁰ *Rice* at [113].

²¹ *Kennon v Spry* (2008) 238 CLR 366 ("**Kennon v Spry**").

19. Kiefel J found that a settlement made in relation to the marriage might involve:

*“A disposition of property for the purposes of regulating the enjoyment of settlement property ... [but] it is necessary that it provide for the financial benefit of one or other of the spouses. It may imply some kind of continuing provision for them.”*²²

20. In *Anison*,²³ Hogan J summarised what her Honour apparently considered to be the most important elements of Kiefel J’s reasoning in *Kennon v Spry* with respect to the words “in relation to the marriage” in s 85A(1), as follows:

“a) s 85A (1) was intended to have a wide operation to property held for the benefit of the parties on a settlement and to which they have contributed and it is intended to apply to settlements whether they occur before or during marriage; and

b) the essential requirement of the section is that there be a sufficient association between the property the subject of a settlement and the marriage the subject of proceedings; and

c) s 85A (1) does not require that a settlement made prior to marriage be directed to the particular marriage at the point it is made and it is sufficient for the purposes of the section that the association of which it speaks (“made in relation to”) be present when the Court comes to determine the application of the property settled under s 85A (1).”²⁴

21. Whilst Kiefel J was part of a majority with respect to the balance of the appeal in *Kennon v Spry*, there was no majority view with respect to s 85A. The question of whether a settlement which pre-dates the marriage can be a settlement “in relation to the marriage” remains unsettled.

22. *Rice* sheds no light on this, as the settlement in that case was made some 30 years after the parties married.

Where Might s 85A Apply?

23. The dearth of reported s 85A cases means that there are almost no examples of scenarios which clearly fall within the section.

24. On the other hand, s 85A is a potentially powerful weapon in the family lawyer’s armoury, which may be used to access property outside the pool as we know it.

25. I expect that the most common potential application of s 85A may be in relation to trust property which cannot be said to be the property of a party in the usual application of s 79.

²² *Kennon v Spry* at 437, as set out in *Rice* at [120].

²³ *Anison & Anison and Anor* [2015] FamCA 973 (“**Anison**”).

²⁴ *Anison* at [69].

26. However, it is clear from *Rice* that the term “settlement” encompasses more than a formally established trust. The settlement in that case was a “quasi-contract” which arose primarily out conversations between the husband, the wife and the daughters.
27. I have no answers beyond the *Rice* scenario, but, to my mind, the following questions are interesting:
- 27.1. Where the husband and wife place property in a trust of which their children are the corpus beneficiaries, but the husband and wife are income beneficiaries only, would that trust constitute a settlement for the purposes of s 85A?
- 27.2. In the following scenario,²⁵ is the trust a settlement *in relation to the marriage*? Is the home subject to adjustment under s 85A?
- 27.2.1 The matrimonial home, originally bought for the parties as a wedding gift by the wife’s parents, is subject to a mortgagee sale after the husband’s business venture fails.
- 27.2.2 The wife’s mother establishes a family trust of which the parties’ children, but not the parties, are the beneficiaries. The wife’s mother funds the acquisition of the home by the new trust from the mortgagee to enable the family to continue to live there, but to protect it from further risk associated with the husband’s future ventures.
- 27.2.3 The wife’s mother is the appointor of the trust. There is a corporate trustee, of which the wife and the wife’s mother are the directors and shareholders.
- 27.2.4 The family continues to live in the home for the remainder of the marriage.
- 27.2.5 At the time of trial:
- 27.2.5.1 the husband and wife are the directors and shareholders of the corporate trustee;
- 27.2.5.2 the wife is the substituted appointor of the trust; and
- 27.2.5.3 the wife continues to live in the home with the adult children.
28. Perhaps, some 34 years after s 85A was inserted into the Act, its time to shine will finally arrive.

²⁵ From a real case. The wife contended that the home was outside the pool. The husband contended that the home was in the pool, but did not plead s 85A, and had not joined the children to the proceedings. The children went on affidavit to assert their rights under the trust. The matter ultimately settled on the morning of the first day of the trial.