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Family Law Section



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Members of the Family Law Section, subscribers and other interested persons are invited to submit articles for consideration for publication in Australian Family Lawyer. The emphasis should preferably be on the practical aspects of family law, family relations and associated areas, although appropriate articles of a broader academic, theoretical or philosophical nature are also encouraged.

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FROM THE KEYBOARD OF THE EDITORS



**JASON
WALKER**

About the author

Jason Walker

Jason Walker joined the Section Executive as the Victorian Solicitor representative in December 2018.

Jason is a partner at Forté Family Lawyers and an Accredited Specialist in Family Law (2005).

Jason is currently a member of the Executive of the Law Institute of Victoria (LIV) and has previously served as the Chair. He has also served on several LIV committees and was a founding member of the LIV Children's Law Specialisation Advisory Committee, which is responsible for assessing and examining candidates for specialisation in Children's Law.

Jason co-convened the Family Law Section's National Family Law Conference held in Melbourne in 2016.

Jason is a fellow of the International Academy of Family Lawyers and a member of Pacifica Congress.

Jason is regularly named in the Doyle's Guide list of Leading Family and Divorce Lawyers (Melbourne) and list of Preeminent Parenting & Children's Matters Lawyers (Victoria).



**TREVOR
MCKENNA**

About the author

Trevor McKenna

Before being called to the bar in 2023, Trevor was a senior associate at Ogilvie Jennings (Doyle's Guide Tier 1 family law firm in Tasmania). During his 15 years as a solicitor, Trevor regularly appeared as counsel in courts and tribunals both at first instance and on appeal.

He has appeared in Doyle's Guide for Tasmania from 2020 to date and is recognised as a leading family lawyer in Tasmania.

Trevor is a member of Malthouse Chambers in Hobart and Svenson Barristers in Melbourne.

Beyond his family law practice, Trevor provides advice and conducts disciplinary litigation under the Legal Profession Act.

Trevor was President of the Law Society of Tasmania for 2020/21 and is a member of several committees and bodies including the Society's CPD committee. Trevor regularly presents and publishes papers on family law and areas that intersect with it.

Welcome to another bumper issue of Australian Family Lawyer.

As you would be aware the Federal Parliament passed the Family Law Amendment (Information Sharing) Bill 2023 and Family Law Amendment Bill 2023 on 19 October 2023.

The latter represents, amongst other things, what will be yet another historic change to Part VII of the *Family Law Act 1975* changing the way we think about parenting matters. As the 1700s author Jonathan Swift famously said “everything old is new again” and in many respects that is true of this Bill because it repeals the notional of ‘equal shared parental responsibility’ and the Court’s consideration of equal time and substantial and significant time.

The editors would like to acknowledge and thank each of our contributing authors. We commend Jacky Campbell’s timely and detailed consideration of the exposure draft of Family Law Amendment Bill 2023 as well as the many helpful and instructive pieces covering almost every facet of day to day practice.

We encourage our readership to consider contributing to future editions. We invite proposals from all practitioners, irrespective of experience as well as from non-lawyers who work alongside family lawyers or within the family law system. We welcome you to get in touch with us should you like to discuss contributing to the next edition of AFL.

FROM THE CHAIR



DI

SIMPSON

About the author

Di Simpson | DDCS Lawyers

Di was admitted to practice in 1993. Di first worked in regional Victoria and Melbourne before moving to Canberra in 1998, where she continued to practise family law with a national firm.

In 2007 she was a founding partner of DDCS Lawyers. Di is an Accredited Specialist and a highly regarded solicitor-advocate who undertakes pre-trial and trial work in the Federal Circuit and Family Court of Australia Divisions 1 and 2.

In Doyle's Guide, Di has been consistently recognised by her peers and is rated as the Market Leader family lawyer in the ACT. Di is the only ACT family lawyer noted as a recommended family lawyer nationally.

She is a member of the Law Society's Family Law Committee, Legal Profession Act and Ethics Committee and a member of the Women Lawyers Association of the ACT.

She regularly presents to students, lawyers, and other professionals about family law and professional development and is actively engaged in mentoring young practitioners.

Legislative Reform

The Family Law Amendment Act 2023 received Royal Assent on 6 November 2023. We now have less than 6 months to prepare for the new parenting framework heralded by that reforming legislation.

The Family Law Section (FLS) has led the way with a live webinar, with NSW solicitor representative Jamie Burreket leading discussion of the parenting reforms with Minal Vohra SC and Melissa Gillies SC. More than 1600 delegates watched the discussion live on 14 November.

While the narrative of *simplification* is attractive, family lawyers must anticipate a period of uncertainty and adjustment as we await guidance from the Courts about the new parenting pathway. We have to unlearn certain language and our reliance upon familiar concepts (presumptions of equal shared parental responsibility, the old objects and principles and 'twin pillars', a child's right to a meaningful relationship) and become familiar with a much shorter "list" of best interest considerations, among other things.

And while we make those adjustments, the work continues in relation to the *Family Law Amendment Bill (No 2) 2023*. The proposed reforms to the property provisions of the Act are substantial and not without complication. While the FLS has long supported the need to improve protections for victims of family violence and to ensure that the courts and the wider family law system remain responsive to and resourced to properly address these complex issues, the changes in this Bill may have unintended and unwelcome impacts.

Creating a clear legislative framework that articulates in what circumstances family violence will be taken into account in property and spousal maintenance cases is important, given the sobering reality that in 80% of cases starting before the Courts, family violence is identified. However this is complex reform and FLS has some reservations that the exposure draft will not achieve the stated goals and may create greater uncertainty, complexity and cost for parties. It is proposed under the draft Bill that family violence may be taken into account when assessing contributions; as a new specific type of contribution (economic or financial abuse); and as to its impact on current or future circumstances. Among other challenges, there is an obvious risk of ‘double dipping’.

In response to the 2019 ALRC final report (and the suggestion of the introduction of a tort of family violence) the FLS had submitted that family violence would be best taken into account when considering the current and future circumstances of a party. It is a position maintained by FLS at this time.

In addition, the proposed application of the Division 12A Less Adversarial Trial principles to all proceedings is not supported by FLS. While it is essential that proceedings are conducted in a way which safeguards parties who have experienced family violence, existing powers under the Act, in the Rules and the Case Management directions can be utilised to achieve that goal.

Jacky Campbell’s piece in this edition provides a wonderful summary of the property reforms proposed in the Bill and some of the challenges these changes might create if implemented.

The first round of consultation by the Attorney-General’s Department with stakeholders is coming to a close. It is expected that the consultation process will continue into the New Year.

Rest, Renewal and Reflection

The FLS Executive met in Canberra earlier this month for our final Executive meeting of the year. It has been a challenging year but the work of the members of the FLS Executive has been remarkable and has been generously given, despite individual pressures and competing obligations.

Apart from the rewards of working closely with outstanding family lawyers on the Executive, one of the other benefits of being Chair is the opportunity to meet family lawyers who live and work in other locations. I am struck by many obvious similarities and commonalities but in particular, hear and observe that family lawyers *are busy and are tired*.

What is this about? Demand for the services of family lawyers, around the country, remains high and practitioners continue to grapple with the pressures of client expectations – soon to be coupled with the added pressures of a changed legislative framework.

While the “new” case management pathway is now more than 2 years old and feels more familiar and positive, there are still some service delivery wrinkles to iron out and opportunities for improvement. I am confident those matters will resolve in time, given the open engagement and interest in feedback, fostered by the Courts.

What else is going on? Is there still an overhang from Covid-19 that sees so many family lawyers struggling to manage large file loads and to meet the demands of modern practice? At the same time, it does seem that cases (certainly those that go to court) are becoming more complex and challenging as the expectations of our clients increase.

With all of this, I wonder how many of us would still advise our younger selves to choose a career in family law?

These reflections are heightened by consideration of the tributes shared (and published in this edition) following upon the deaths of respected family lawyers, Ms Alice McShera, Ms Caroline Teo and Mr Tim Bugg AM. The loss of each of them, for their families, friends and in their communities, no doubt has been heavily felt and is a reminder of the importance of our relationships and connections with each other.

Those considerations, and the benefits of a holiday, may restore us all as we lead into another long summer.

FROM THE COURTS

Federal Circuit and Family Court of Australia



THE HONOURABLE

WILLIAM ALSTERGREN AO

Chief Justice of the Federal Circuit and Family Court of Australia (Division 1) and Chief Judge of the Federal Circuit and Family Court of Australia (Division 2)

At the end of August, the Federal Circuit and Family Court of Australia (Division 1) and (Division 2) ('the Courts') launched three new educational short films centred on family violence.

The Attorney-General for the Commonwealth of Australia, the Hon Mark Dreyfus KC MP, joined me in addressing judicial officers, the national and local profession and other key stakeholders about the importance of confronting family violence, and finding innovative ways to communicate information to the public about this issue. We were also privileged to hear from Tarang Chawla, Commissioner at the Victorian Multicultural Commission and anti-violence campaigner, and Hayley Foster, newly appointed Director of Family Violence, and Access, Equity and Inclusion in the Courts, about the imperative to take action.

Every single day there are cases in our courts, and in every state and territory court system, that involve high risk family violence. It is incumbent upon us – every single day – to consider how we improve our response to family

violence. There is a responsibility upon each of us to do what we can within our areas of responsibility to educate, inform, prevent, and strive to eradicate this terrible scourge on our communities.

In our Courts, we see family violence in both parenting and financial matters. It affects parents, children, extended families and communities. It can occur prior to separation, during separation, and continue after a relationship has broken down. In the parenting matters filed in our Courts, family violence is alleged in 83% of cases. Child abuse in 72% of cases. Drug and alcohol abuse in 55% of cases. These figures are unacceptable.

It needs to be clear to Australian families that our courts know and understand family violence. Our Judges, Registrars, Court Child Experts and Triage Counsellors are experts. We need to communicate clearly what family violence is, and how the Courts will deal with it in a parenting case. We also need to demystify how the voices of children are heard by the Judge deciding who a child will live with or spend time with.

These topics are of such importance that we decided to create short films about them, to help educate and inform the community, and continue to change the conversation about family law. They build on the suite of films the Courts have already created about how separating couples could separate smarter and use dispute resolution when it was appropriate and safe to do so.

The three films are titled as follows:

- What is family violence? ([fcfsa.gov.au](https://www.fcfsa.gov.au))
- How the voice of the child is heard? ([fcfsa.gov.au](https://www.fcfsa.gov.au))
- How the Court process works for parenting cases ([fcfsa.gov.au](https://www.fcfsa.gov.au))

The preparation of these films has been a huge task and is the culmination of the expertise of our Judges and staff, and external experts on the front line such as the Women’s Legal Services and Legal Aid. In total we consulted with almost 30 stakeholders, and on their advice, the films are animated. This has helped to ensure that they are clear, easy to understand and respectful without being re-traumatising. They are also available in Auslan to increase accessibility.

Many of the stakeholders that assisted in the preparation of these films attended the launch event or were able to watch the livestream, including the Women’s Legal Services nationally. I reiterate my sincere thanks to them for their help and input.

The better we communicate, the better the outcomes we will have for Australian families. The more certainty we can create about the legal process, the more we will reduce the stress and difficulty faced by litigants. It also means that the Courts can create clear expectations about the information we need to know, and why it is so very important that we know about family violence. Through early identification, it can be appropriately managed.

These films are another constructive step in our journey to address family violence. This includes initiatives such as Lighthouse, our world-leading risk screening process that ensures family law cases are being managed in accordance with the risks present, and that high-risk families are referred to appropriate support services.

Also in August, the Courts launched the updated Family Violence Plan and Family Violence Best Practice Principles. The Plan and the Principles guide the way the Courts respond to family violence and ensure the physical and emotional safety of litigants. The Courts’ vision under the Family Violence Plan is to be responsive to allegations of family violence, to effectively address family violence in all matters coming before the Courts, to enhance the safety of children and their families, and to provide a safe environment for all court users, judges and staff.

The Family Violence Best Practice Principles set out seven overarching principles, and detail about how each principle is given effect by the Courts, as well as the expectations for court users, legal practitioners and litigants.

1. Family violence is not acceptable
2. Safety is a right and a priority for all court users
3. Parenting matters involving family violence will be identified early and appropriately managed
4. All professionals working in or appearing before the Courts are expected to undertake ongoing training and professional development to ensure that they have a sound and contemporary knowledge of family violence
5. Litigants must have access to specialist and support services, and clear information to assist their full participation in all court processes
6. The Courts must have access to information relevant to safety and risks
7. All litigants have an equal right to access justice, and those experiencing family violence are not to be disadvantaged in the court system

I encourage all practitioners to read both documents which are available on the Courts’ website.

The Courts are committed to doing what we can to reduce the impacts of family violence on vulnerable people and children in our community. I know that is a commitment shared by practitioners in the family law jurisdiction and I am grateful for that unified stance.

I look forward to continuing the conversation regarding family violence. Please share our short films widely, which will help to communicate important information about family violence amongst the broader community.



FROM THE COURTS

Family Court of Western Australia



THE HONOURABLE JUSTICE

GAIL SUTHERLAND

Chief Judge of the
Family Court of Western Australia

Justice Steven Jones SC received his dual commission as a Judge of the Family Court of Western Australia (FCWA) and the Federal Circuit and Family Court of Australia (Division 1) and commenced sitting in April 2023.

Before his appointment to the FCWA, his Honour's eminence in the family law jurisdiction was publicly acknowledged when he was appointed as a senior counsel, having appeared as counsel in over 330 published decisions of our Court.

The Attorney General of Western Australia, the Honourable John Quigley MLA made the following comments during his address at Justice Jones' ceremonial welcome sitting:

Section 11 of the Family Court Act 1997 of Western Australia requires that all judges appointed to this court are persons who, by reason of training, experience, and personality, are suitable persons to deal with the matters of family law. Appointments are merit-based and after an extensive consultation process conducted by the Solicitor General of Western Australia.

It is imperative that the judges of this court

are not only highly experienced family law practitioners, but they also have the appropriate temperament for the role, always being patient, open-minded, courteous, tactful, firm but understanding, compassionate, humble, and practical: quite a list of attributes, which your Honour has in spades. It is only in this way that litigants will feel that their voices have been heard, and that justice has been served, whichever way their dispute may be determined.

As I foreshadowed in my article in the last edition of AFL, Justice Simon Moncrieff retired as a Judge of the FCWA, and the Federal Circuit and Family Court of Australia (Division 1), on his 70th birthday in May 2023, having served since 2009. On behalf of the FCWA, I again wish Simon a long, happy, and fulfilling retirement.

Family Law Section is holding its next bi-annual conference in Perth in October 2024. On behalf of the FCWA, I look forward to welcoming you to the conference, and invite you to take the opportunity learn a little more about the family law system in our state. For those of you who have never appeared in the FCWA and/or may know little about our Court, now is an opportune time to say something about its creation and structure.

The FCWA is not some constitutional anomaly. Rather, following recommendations by the Senate Standing Committee on Constitutional Affairs in October 1974, the original Family Law Bill was amended to make special provision for the states to establish their own Family Courts. In particular: s 41 of the *Family Law Act 1975* (Cth) specifically provided for the Commonwealth Government to make agreements with State governments for the creation of State Family Courts. As the March 2019 Australian Law Reform Commission (ALRC) Final Report into the Family Law System noted¹ it was expected that a number of states would want to establish state-based courts to hearing family law matters. However, Western

¹ Australian Law Reform Commission Report 135 – *Family Law for the Future – An Inquiry into the Family Law System* (Final Report) published March 2019, at [4.88].

Australia was the only state which elected to do so. The Court was established in 1976 as a court of record² pursuant to Western Australian legislation – now known as the *Family Court Act 1997* (WA). It remains the only state Family Court in Australia.

Aside from its state and federal family law jurisdictions the Court also makes adoption orders and related orders under the *Adoption Act 1994* (WA), and parentage and other related orders under the *Surrogacy Act 2008* (WA). The Court also has limited powers to make family violence restraining orders under the *Restraining Orders Act 1997* (WA) and care and protection orders under the *Children and Community Services Act 2004* (WA).

I have previously likened the FCWA as an institution, its structure, and the way it goes about its business, as a strongly built platform, constructed with interlinking vertical and horizontal beams.

The FCWA is vertically integrated, by which I mean that its Judges, Family Law Magistrates, and Registrars all work together, under the one case management system. Technically, the FCWA comprises two different courts: the Family Court of Western Australia (which is made up of the Judges and Registrars) and the Magistrates Court at 150 Terrace Road, Perth (which is made up of specialist Family Law Magistrates appointed pursuant to the *Magistrates Court Act 2004* (WA)). However, the practical reality is that the Court operates from a single Registry in Perth, forms a single point of entry in Western Australia for litigants needing to access its services, and has always operated as one court. The *Family Court Rules 2021* (WA) and the Case Management Guidelines set up the framework for cases to move between Registrars, Magistrates, and Judges, as required. Such a structure has always given the Court the flexibility to respond and adapt to changed circumstances and better manage its workload.

Our current judicial complement comprises: 6 Judges, 10 Family Law Magistrates, the Principal Registrar, and 5.6 Registrars. All our Judges also hold dual commissions with the Federal Circuit and Family Court of Australia (Division 1).

The Judges’ primary work is hearing and determining trials, as well as appeals from decisions of Family Law Magistrates under the State legislation. The Judges also manage cases which are deemed to be complex.

The Family Law Magistrates also hold dual commissions as Registrars. They each manage a large docket of cases. The Family Law Magistrates, assisted by Family Consultants, intake the new parenting applications through the Child Related Proceedings Lists, which I discussed at some length in my article in the last edition of AFL. The Family Law Magistrates also hear and determine any urgent and/or interim parenting and financial applications and manage the files in their dockets through until settlement or listing for trial. They also hear and determine some trials; and with their Registrar “hats” on – do a small number of conciliation and mediation conferences (particularly during regional circuits).

The five full-time Registrars intake most new financial applications, deal with divorce applications and consent order applications, and along with our part-time Registrar, conduct most of the conciliation and mediation conferences. They are all accredited mediators.

The FCWA is also horizontally integrated, by which I mean that the Court has forged strong links and connections with other Western Australian courts, agencies, and organizations whose clients participate in, or intersect with, the family law system.

Three co-located services operate from the Court’s Registry in Perth. Legal Aid Western Australia has operated a duty lawyer service at the Court since 1982. The Department of Communities has based co-located worker(s) on site since 2009, to facilitate information sharing arrangements. Since 2017, FASS social support workers have also operated on site.

The FCWA has enjoyed formal information sharing arrangements with the Department of Communities and other Western Australian agencies and organisations for many years, underpinned by (1) ss28A and 28B of the *Children and Community Services Act 2004* (WA); and (2) written Memoranda of Understanding. The legislation and Memoranda have enabled the Court to share information with agencies such as the Department of Communities, Western Australian Police, Legal Aid Western Australia, and (through arrangements with the Western Australian Department of Justice) the Magistrates Court of Western Australia and the Children’s Court of Western Australia.

The Court has also enjoyed long standing informal information sharing arrangements with a wide range

² See s 9(2) of the *Family Court Act 1997* (WA).

of organisations and Western Australian Government agencies involved in the family law sector. I regularly host meetings of the Court's Reference Group. The current Reference Group includes representatives from NGOs (such as Anglicare, Centrecare, and Relationships Australia), the Department of Communities, the Department of Health, the Education Department, and the Western Australian Police, and legal services providers (such as Aboriginal family law legal service providers, community legal centres, Legal Aid Western Australia, and the Family Law Practitioners' Association).

In conclusion, the FCWA's long-standing, extended jurisdictional powers and information sharing arrangements have been enormously valuable to Western Australian families who become involved in the family law system, and their children in particular. For those of us who work in the family law system on this side of the Nullarbor, it came as no great surprise that the ALRC's Final Report urged the Australian Government,

as a matter of priority, to explore with state and territory governments, the possibility of encouraging them all to establish state family courts.³

Once again, I look forward to welcoming you to Perth for Family Law Section's conference in October 2024.

³ Australian Law Reform Commission Report 135 – *Family Law for the Future – An Inquiry into the Family Law System* (Final Report) published March 2019, at [4.91].

20TH NATIONAL FAMILY LAW CONFERENCE



NICOLA

WATTS

About the author

Nicola Watts | O'Sullivan Davies Lawyers

20th National Family Law Conference Chair

Nicola joined the Section Executive as the Western Australian representative in November 2016 and was elected Treasurer in June 2021.

Nicola completed a Bachelor of Arts and a Bachelor of Laws at the University of Tasmania and was admitted to practice in 1993, after completing articles in Hobart. After working in Launceston for several years, Nicola moved to Melbourne where she worked exclusively in family law between 1997 and 2013.

Whilst in Victoria, Nicola trained as a Mediator and Collaborative Lawyer. Since moving to Perth she has also trained as an Arbitrator. From 1995 to 2018 Nicola acted as Independent Children's Lawyer in Tasmania, Victoria, and Western Australia. In 2011 Nicola was made Citizen of the Year by the City of Stonnington for her service to youth. She has been recognised by Doyle's Guide as a Leading Parenting & Children's Matters Lawyer in Western Australia.

Nicola moved to Western Australia in June 2013 and joined O'Sullivan Davies in July 2018 and was made a partner in January 2020.

Nicola also sits as FLS Representative on the Council of the Family Law Practitioners Association of Western Australia (FLPA) as well as on the Law Society of Western Australia's Ethics and Professional Standards Scheme sub-committees and the Legal aid WA Review Committee.

In just under a year, we will be welcoming family law practitioners from all over Australia to Perth for the 20th National Family Law Conference.

We already have over 200 delegates registered to attend with a year to go, so if you have not already marked your diaries, now is the time to block out 29 October to 1 November 2024 and make your arrangements to join us next spring.

Our social subcommittee have excelled themselves in putting together a program of events for you to enjoy whilst you are here in Perth.

The Conference will start with the **Welcome Reception** on Tuesday 29 October at the State Reception Centre in magnificent Kings Park and Botanic Garden, where you will watch the sun go down over the city whilst enjoying drinks and canapes.

During the conference each morning we will start the day with **Swan River Strides** where delegates and their partners will be given an opportunity to walk, run or ride around the beautiful Swan River and then join others to have a coffee before starting the day the conference.

On Wednesday and Thursday evening straight after the last session for the day there will be a **Happy Hour** at the Perth Convention and Exhibition Centre for all delegates

Next year our early career lawyers' stream will run on the first day of the conference with an **Early Career Lawyers Function** that night (after happy hour) at the Oyster Bar at the spectacular Elizabeth Quay for all those registered. This will give our early career lawyers an opportunity to meet and spend time with their colleagues from all over the nation and build networks for the rest of their years of practice.

The **Chair's Reception**, an invitation only event for speakers and sponsors, will take place in Hackett Hall a stunning room with a long and fascinating history at the WA Museum Boola Bardip.

We will have a **LGBTQIA + Function** at Connections Nightclub – the longest running LGBTQIA + venue in the southern hemisphere for delegates within the community and allies to unite.

Our **Out of Towners Event** for delegates and their partners will be a progressive dinner in some superb restaurants in Northbridge – a part of Perth known for its eclectic vibe and vibrant nightlife.

Last but not least we will end the Conference with our **Gala Dinner at Optus Stadium**, where you will be treated to the very best venue Perth has to offer and be spoilt with food and beverages from our wonderful state – including a cocktail bar.

And when it is time to hit the dance floor you will be treated to **Hot Dub Time Machine** – a global festival smash who will play songs that you will love and we guarantee we will get every single person on the dance floor for the Best Conference Party Ever!!

We have been delighted with the number of law firms and other organisations who, after the success of the Adelaide Conference, have already committed to sponsor Perth in 2024. Many sponsorship opportunities have already been sold but if you would still like to be involved then please contact Michael Walters at FLS for an updated prospectus at michael.walters@lawcouncil.au.

So don't miss out come to Perth. We can't wait to see you and show you the very best of the West.





20th National Family Law Conference

Wednesday 30 October – Friday 1 November 2024

PERTH CONVENTION AND EXHIBITION CENTRE



Family Law Section



Law Council
OF AUSTRALIA

www.familylaw2024.com.au

IS “FAULT” BACK? PROPOSED PROPERTY REFORMS TO THE *FAMILY LAW ACT 1975 (CTH)*



**JACKY
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About the author

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Jacky Campbell is a founding partner of Forté Family Lawyers and has practised as a lawyer specialising in family law for more than 35 years. Jacky is recognised as a Leading Family Lawyer in Melbourne by Doyle’s Guide to the Australian Legal Market. In 2023 Jacky was recognised as a Leading Family and Divorce Lawyer, a Leading Family Lawyer (High-Value & Complex Property Matters) and a Leading Parenting & Children’s Matters Lawyer.

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Jacky is the consultant editor of Wolters Kluwer/CCH Australian Family Law and Practice and contributing author to Wolters Kluwer/CCH Australian Family Law and Practice to the Property, Spousal Maintenance, Financial Agreements, Maintenance Agreements, Procedure and Precedents tabs. She writes several chapters of the Wolters Kluwer/CCH Australian Master Family Law Guide, including the superannuation chapter and is the author of the family law chapters in the Wolters Kluwer/CCH Australian Master Superannuation Guide and the Wolters Kluwer Australian Family Law & Practice.

The Federal Government has proposed changes to those parts of the *Family Law Act 1975 (Cth)* (FLA) which direct how property settlements between separated couples are determined.

Primarily the proposed amendments aim to clarify the process followed by the courts to determine the parties’ property entitlements and codify adjustments made under case law for family violence, debts and wastage to promote a greater understanding by parties as to their relevance to the assessment of contributions.

The proposed amendments are intended to address the Australian Law Reform Commission’s 2019 Final Report No. 135: *Family Law for the Future - An Inquiry into the Family Law System* (ALRC Report) and elements of the Government Response to the Joint Select Committee on Australia’s Family Law System (JSC).

An Exposure Draft and Consultation Paper covering these and other proposed reforms were released on 18 September 2023. The consultation process ends on 10 November 2023 with the Federal Government expecting that the final version of the *Family Law Amendment Bill (No 2) 2023* will be passed into law early in 2024. It is proposed that most aspects of the Bill will commence 6 months after Royal Assent. In relation to the property reforms, they will only apply to proceedings filed on or after the commencement date (s 24 of Sch 1 of the Exposure Draft).

What does the Exposure Draft cover?

The Exposure Draft contains four schedules:

1. Schedule 1: Property reforms
2. Schedule 2: Children’s contact services

3. Schedule 3: Case management and procedure
4. Schedule 4: General provisions.

This article deals only with Schedule 1 — Property Reforms.

The Consultation Paper also addresses proposed amendments to the FLA about the use of protected confidences. The Attorney-General’s Department seeks to consult further about these. They were included in the Exposure Draft of the *Family Law Amendment Bill 2023 (No 1)*, but not included as part of that Bill when it was introduced to Parliament in March 2023. The Family Law Amendment Bill (No 1) 2023 largely deals with parenting reforms and is expected to be passed by Federal Parliament later in 2023.

Overview of the proposed property reforms

The Consultation Paper explains that the Exposure Draft “proposes significant amendments to clarify and support the framework for making property and financial orders” under the FLA. The amendments are intended to:

- align the decision making principles for property settlement in ss 79 and 90SM with existing case law, with the aim of assisting separating parties, legal representatives and the courts to better understand and apply these principles, and
- introduce family violence as a new factor for consideration when determining property settlement orders, when relevant to the circumstances of the case. The recognition of the effect of family violence within the legal framework is intended to better support parties, both in and out of court, to understand the relevance of family violence to a property settlement.

The proposed property reforms cover:

1. Decision-making framework
2. Just & equitable
3. Family violence
4. Other proposed contributions factors
5. Less adversarial trial process

6. Duty of disclosure
7. Arbitration – not discussed in this article.

Other recommendations in the ALRC Report with respect to property settlements which were largely intended to address the problem of the broad discretion under s 79/s 90SM creating uncertainty and expense for parties, were not adopted by the Exposure Draft. They include:

1. introduce a presumption of equality of contributions during the relationship (Recommendation 12)
2. value assets and liabilities at the date of separation unless the interests of justice require otherwise (Recommendation 13)
3. introduce a presumption of equality of superannuation accrued during the relationship (Recommendation 16), and
4. simplify the process for splitting superannuation including:
 - develop template superannuation splitting orders for commonly made superannuation splits, and
 - when the applicant is suffering economic hardship, require superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services (Recommendation 17).

Curtailing the broad discretion of the courts under s 79/s 90SM was a focus of the ALRC Report. The Consultation Paper acknowledges that it has not adopted this approach.

Decision-making framework

The decision-making framework in the FLA is proposed to be significantly amended “to clarify and support the framework for making property and financial orders.” It will do this by:

- Outlining the principles for decision-making under s 79/s 90SM;
- Re-naming the s 75(2)/ s 90SM factors, sometimes called “future needs” factors, to “current and future considerations”;
- Providing that the effect of family violence can be considered in relation to both the assessment of

contributions and the adjustment for current and future considerations; and

- Providing that financial and economic abuse, debts incurred by one or both of the parties and the effect of wastage can be considered in the assessment of contributions.

The ALRC recommended in its 2019 Report that the FLA should be amended to:

- Specify the steps that a court will take when considering whether to make an order to alter the interests of the parties to the relationship in any property; and
- Simplify the list of matters that a court may take into account when considering whether to make an order to alter the interests of the parties to the relationship in any property. (Recommendation 11).

Recommendation 11 has not been adopted in its entirety. Rather than specifying the steps or pathway which a court must follow, the Exposure Draft lists principles which can be followed in any order. Arguably, this makes the process even more complicated and confusing than it currently is, particularly for litigants, but also for their legal representatives and the courts. The Exposure Draft eschews and even rejects the idea that there is a single pathway or steps that must be followed in all cases. Furthermore, as discussed below, it adds new considerations to the lists of matters that a court must take into account under the existing s 75(2) and s 79(4) (ss 90SF(3) and 90SM(4)).

In the past, the pathway for decision making in property settlement matters has been the subject of debate in the courts and by commentators. Prior to *Hickey & Hickey and the Attorney-General for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143 it was generally accepted that a property settlement was a 3-step process (e.g. Gibbs CJ in *Mallet v Mallet* (1984) FLC 91-507) but *Hickey* (and a number of other cases) added a fourth step: courts were required, after identifying and valuing the property of the parties, assessing contributions and s 75(2) factors, to ask whether it was just and equitable to make the proposed property settlement order.

The High Court’s decision in *Stanford v Stanford* (2012) FLC 93-495 identified an initial or preliminary step (although the Full Court of the Family Court

of Australia has rejected the use of the term “threshold”). This initial step requires courts to establish that it is just and equitable to alter the legal and equitable interests of the parties at all, before embarking on the rest of the process. The approach taken by the High Court in *Stanford* arguably supported a 5-step process, but the High Court did not expressly comment on the 4-step Hickey approach.

The proposed s 79(2) (and equivalent s 90SM(2)) sets out that the decision-making process consists of the following principles:

1. Identify the existing legal and equitable rights and interests, and liabilities, of the parties to any property.
2. Consider each party’s respective contributions to the property of the relationship (current s 79(4)(a) (d), (f)-(g) (for married couples)/s 90SM(4)(a)-(d) and (f)-(g)) (for de facto couples).
3. Consider the parties’ current and future considerations (current s 75(2) (for married couples); s 90SF(3) (for de facto couples)).
4. Determine whether it is just and equitable to make any order to alter a party’s interest in property (current s 79(2) (for married couples)/ s 90SM(3) (for de facto couples)).

The term “principles” rather than “steps” is used to emphasise that the principles do not need to be approached in any particular order and this is confirmed in a note to s 79(5).

It isn’t obvious how the proposed s 79(2) (and s 90SM(2)) is an improvement on the existing law or how it clarifies the law for litigants. It does not settle the debate as to whether there are 3, 4 or 5 “steps” (with the current s 79(2)/s 90SM(2) being considered at the outset and then possibly again at the end) and the proposed s 79(2)/s 90SM(2) do not set out a pathway but rather a list of 4 “principles” which can be dealt with in any order, so there are no “steps” at all. To an experienced family lawyer it will seem illogical to have the option of starting the s 79/s 90SM process by looking at contributions or current and future considerations, but this is expressly permitted by the note to the proposed s 79(2).

The proposed reforms do, however, remove the cross-referencing between spousal maintenance

provisions and the property settlement provisions so each type of claim has its own separate section in the legislation. This is in accordance with the first part of Recommendation 18 of the ALRC Report.

2. Just and equitable

The Exposure Draft aims to resolve the uncertainty as to how and when the just and equitable principle in the current s 79(2) (proposed s 79(2)(a)) and s 90SM(3) (proposed s 90SM(2)(a)) is addressed. The Exposure Draft clarifies that the court has flexibility about when this question is determined — at the outset, during or at the end of the decision-making process.

The Consultation Paper says that this approach reflects the legal principle from *Bevan & Bevan* (2013) FLC 93-545 that the just and equitable requirement in the current s 79(2) “is not a threshold issue” and while it can be addressed at the outset in the vast majority of cases, consideration of whether it is just and equitable to make property orders “permeates the entire decision making process” (at [62]). The Consultation Paper explains that the existing law is that, prior to making any order under the current s 79 (or s 90SM), a court must make a “positive determination” that it is just and equitable to make an order altering property interests (or a conclusion that such an order is not just and equitable).

Unlike the Consultation Paper, *Bevan* and other Full Court cases, do not use the phrase “positive determination” or anything similar. Instead, the approach taken by Chief Justice Bryant and Justice Thackray in *Bevan* (at [66]) is followed. Their Honours cited the High Court of Australia in *Mallet v Mallet* (1984) FLC 91-507 where Dawson J (at p 79,132) described it as the “overriding requirement”, and said (at [82]) that it is “necessary for it to be shown that the trial judge has expressly, or by clear implication, answered that question in the affirmative.”

The proposed wording appears to be both a change in the law and a watering down of *Stanford*.

Whether the proposed terms of an order are ‘just and equitable’ (the *Hickey* approach) is a different analysis than whether it is just and equitable to make any order at all (*Stanford*). As the note to the proposed s 79(2)/s 90SM(2) makes it clear that the 4 principles can be examined in any sequence, it is unclear whether the notion that the just and equitable principle “permeates” the entire process remains. Guidance is likely to be needed from the courts as to how and when “just and equitable” is to be considered under the proposed amendments. The proposed process may bring about considerable uncertainty, which is contrary to the expressed objectives of the Exposure Draft.

3. Family violence

Currently, family violence rarely impacts the alteration of property interests, and when it does the effect is usually modest. The ALRC report referred to research (para 6.86) to support this conclusion.

Assessing the impact on the victim’s contributions is the approach taken by the courts in cases such as *Kennon & Kennon* (1997) FLC 92-257, rather than the concept of “negative contributions.” The principle in *Kennon & Kennon* is that the effect of family violence can be relevant if there is a course of conduct that made the victim’s contributions within the current s 79 “significantly more arduous than they ought to have been” so there is a “discernible impact” upon the contributions (per Fogarty and Lindenmayer JJ). The full passage is highly relevant when considering the context of the proposed amendments. Their Honours said (at 84,294 – 84,295):

Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party’s contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties’ respective contributions within s 79. We prefer this approach to the concept of “negative contributions” which is sometimes referred to in this discussion. ...

However, it is important to consider the “floodgates” argument. That is, these principles, which should only apply to exceptional cases,

may become common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this Court to fault and misconduct in property matters — a circumstance which proved so debilitating in the past. In addition, there is the risk of substantial additional time and cost.

However, in our view, s 79 should encompass the exceptional cases which we described above. It would not be appropriate to exclude them as a matter of policy because of this risk. It is a matter of common sense for the lawyers involved and, where that may not be sufficient, it is a matter for a firm hand by the Court at an early stage when a case appears to raise those issues.

It is essential to bear in mind the relatively narrow band of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions)

More recently, Justice Aldridge, sitting as the Full Court, expanded on the test in *Kennon* and pointed out that given the prevalence of family violence in today’s society, the relevant conduct is not limited to “exceptional” cases. He said in *Martell & Martell* [2023] FedCFamC1A 71 (at [22], [24]-[26]):

...Unfortunately the prevalence of family violence is wide and artificial barriers to its recognition, such as trying to limit its recognition in property cases to exceptional or narrow cases, has no basis in principle. As I shall endeavour to explain shortly, the focus of the majority’s reasoning was on the nature and quality of the contributions themselves which were not limited by such qualifying adjectives...

For the reasons given, the words “significantly” and “more arduous” are not to be read as

coterminous with “exceptional”. Rather, they arise from the basis of the principle itself which focuses on contributions. If the nature and extent of a person’s contributions are made more difficult or harder so that they should be accorded greater weight, such that they should be taken into account in the determining of the outcome, they have therefore been “significantly impacted” or made “more arduous”. The focus is not on the conduct per se, but on its effects on contributions.

The threshold for recognition is therefore met by conduct which has a discernible effect on the contributions of the other party such that it should be recognised in determining the respective contributions of the parties.

That, in my view, should be the focus and terms such as “exceptional” or “narrow”, or indeed, “onerous” add an unnecessary and unacceptable gloss suggesting that a rare and high level of impact is required and that the violence or its impact must be exceptional. That is not however, what their Honours said. All that was required was a “significant adverse impact” upon a party’s contributions. The word “significant” was used, in my opinion, as describing that the effect must be sufficient to warrant recognition but not imparting some artificial threshold. The effect of the conduct must be such that a greater weight should be given to the contributions.

Under the Exposure Draft, the effect of family violence perpetrated by one party to the relationship on the other party will be an express factor for the court to consider both as part of assessing parties’ contributions (proposed s 79(4)(ca)/s 90SM(4)(ca)) and as part of the current and future considerations (proposed s 79(5)(a)/ s 90SM(5)(a)). The Consultation Paper explains that the court will be able to consider the impact of the conduct on a party’s ability to contribute during the relationship, for example through a reduced ability to engage in paid work and contribute financially. The effect of family violence will also be an overarching factor to be considered as part of the other contributions factors in the proposed s 79(4) (i.e. financial, nonfinancial, homemaking and parenting contributions). Notably, the “effect” of family violence is without any

qualifications, such as the “discernible impact” and “significantly more arduous” tests used in *Kennon* and later cases. Therefore, the proposed provisions do not reflect the existing case law and offers less assistance to self-represented litigants than was the intention.

The proposed “current and future considerations factors” (a renaming of the current s 75(2)/s 90SF(3) factors) will consider:

- a. the effect of any family violence, to which one party to the marriage has subjected the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection ...

This proposed current and future considerations factor has extra emphasis as it has been deliberately added at the beginning of the list, rather than the end. However, none of the current and future considerations factors (or the proposed ones) are intended to carry more weight than any others in the section, but rather their weight depends upon the particular circumstances of each case.

The proposed amendments specify that the court take into account the *effect* of family violence to which one party to the relationship has *subjected* the other party. According to the Consultation Paper, the intention is to prevent consideration of fault by the court and avoid penalising or punishing conduct. However, this intention seems more aspirational than directive. Parties are likely to see adjustments to property settlement outcomes due to family violence through a lens of fault. The proposed wording offers no guidance as to how adding the express consideration of family violence to the assessment of contributions and current and future considerations will impact a property settlement, save that the family violence needs to have had an effect on the party’s contributions and/or their current and future circumstances. The “significantly more arduous than they ought to have been” and “discernible impact” tests in *Kennon* are not reflected in the proposed amendments and may not be applied by the courts when considering the proposed amendments if they are passed as currently drafted.

It is in the context of the prevalence of family violence in society and the matters before the FCFCOA that amendments to the FLA to allow adjustments to be made for family violence have been considered. The proposed amendments

implement recommendation 23 of the JSC in its Second Interim Report tabled on 15 and 16 March 2021:

The committee recommends that the Australian Government amend the Family Law Act 1975 to better reflect the impact of family violence on property settlement.

The ALRC Report did not, however, recommend including family violence as an express contributions or s 75(2) (s 90SF(3)) factor. In relation to family violence in the context of contributions, the ALRC said (para 6.88):

The process of accounting for family violence through the lens of contributions may appear contrived when compared with an approach that focuses on compensating for the harm caused.

Instead, the ALRC recommended that the FLA be amended to provide for a cause of action for harm caused by family violence and that *Kennon* be explicitly reversed (para 7.5 and Recommendation 19). The ALRC’s view was that creating a tort of family violence would remove the evidentiary barriers and confusion because the law of tort would apply, whilst making it clear that claims of family violence could only be made in limited circumstances. Clearly, the Exposure Draft has taken a contrary path.

The ALRC Report refers to research conducted by the Australian Institute of Family Studies (paras 3.87-3.90) that family violence is reported by approximately 60% of separated parents prior to and during separation. The statistics for parenting matters before the court is substantially higher, at 85%. Although the ALRC Report does not refer to family violence statistics in property proceedings, it can be speculated that there are high numbers of litigants in property cases who have been or are exposed to family violence. Justice Aldridge’s statements in *Martell*, rejecting consideration of family violence as only encompassing the “exceptional cases” is likely to be correct, and if the proposed amendments become law, family violence may be relevant to the assessment of contributions in a large number of property settlement disputes between separated couples.

In the “Government Response to ALRC Report 135: *Family Law for the Future – An Inquiry into the Family Law System*” released in March 2021, (at p 22), it was stated:

The Government believes that a tort of family violence may increase conflict and acrimony between parties, with a subsequent impact on children, and have limited applicability due to the need to prove loss or damage. Additionally, the tort may be costly and result in lengthy hearings, potentially causing delays in the resolution of family law property matters. Consultation with key stakeholders has indicated a lack of support for this recommendation.

The Government does not appear to be concerned that its approach may have the same effect as introducing a tort. Furthermore, the floodgates may be, as foreshadowed in *Kennon*, opened by the broadening of the number of cases in which family violence can potentially be a factor in the outcome of property settlements. It is likely that legal costs will also increase as affidavits will be longer, particularly for trials; more lay and expert witnesses will be called; cross-examination will take longer; more self-represented parties will need Legal Aid to cross-examine the affected family member if intervention orders are in place; and cases will be more difficult to settle by consent. There could also be an increase in the number of intervention orders sought and a higher percentage of contested intervention order applications. Some of these matters were discussed in the ALRC’s Discussion Paper “Review of the Family Law System: Discussion Paper (2018) (at 3.114-3.121).

The ALRC in the Discussion Paper described the *Kennon* test (at 3.111) as “relatively strict” but in its Final Report (at 1.39) referred to the uncertainty of the *Kennon* test:

There remains uncertainty too about the application of the decision of the Full Court of the Family Court in *Kennon & Kennon* in which it held that courts were able to adjust a party’s property interests in circumstances where the court determined that family violence had made the contribution of the person who experienced violence more difficult. The precise way in which the test was framed has made it difficult for later courts to apply. In any event, the legal principle

on which this decision was based has been a matter of much academic conjecture and it is difficult to articulate the jurisprudential basis of the test. Further, as there is no legislative recognition of the relevance of family violence to the division of property, unrepresented litigants are in a different position to those who have sought legal advice and have been made aware of the possibility of running a ‘Kennon’ case.

As the intention is that family violence could be relevant to *both* contributions and future considerations there is considerable potential for doubling-up, which is recognised in the Consultation Paper which states:

It is possible that the same conduct could be relevant to the assessment of contributions and current and future considerations. The proposed amendments do not curtail the court’s discretion in making these assessments and to respond to the wide variety of factual circumstances that come before it.

This is unlike the existing law where if a matter is considered relevant to the assessment of contributions under the current s 79(4), such as a financial resource, it cannot then be considered again under s 75(2). If family violence can be considered twice, the impact of the family violence on the outcome of the s 79 process could be greater than its current impact under *Kennon*. Does this also mean that other matters, such as a financial resource or wastage can also be considered more than once?

4. Other proposed contributions factors

In addition to the effect of family violence, three other new contributions factors are proposed: the effect of financial economic abuse, the effect of any wastage, and debts.

The proposed s 79(4)(ca) – (cd) (s 90SM(4)((ca)-(cd)) sets out all 4 of the proposed contribution factors, including family violence which is discussed above:

(ca) the effect of any family violence, to which one party to the marriage has subjected the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c); and

(cb) the effect of any economic or financial abuse to which a party to the marriage has been subjected by the other party; and

(cc) the effect of any wastage, by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them; and

(cd) any debts incurred by either of the parties to the marriage or both of them...

or minimise the effective value or worth of matrimonial assets; or

(b) where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.

Economic and financial abuse

It is unclear how much overlap there will be between family violence and economic or financial abuse. The Consultation Paper recognises there will be at least some overlap, but the intention is to “make expressly relevant the effect of this type of abuse, including coercive controlling behaviours” and capture a broad range of conduct including controlling or denying access to money, finances or information about money and finances, and also undermining a party’s earning potential, for example, by limiting access to employment, education or training.

A preferable approach may have been to review the current definition of “family violence” in the current s 4AB(1) and, possibly expand on the examples in s 4AB(2) to ensure that they encapsulate financial and economic abuse. Listing it as a separate factor to family violence suggests that “family violence” does not include economic and financial abuse, and this may have unintended consequences for other aspects of the FLA. Greater assistance would be given to self-represented litigants by placing a definition of family violence in Pts VII, VIIIAB and VIIC, even if it is repeated.

Wastage

The proposed contributions factor of the effect of wastage is intended to codify the current approach set out in *Kowaliw & Kowaliw* (1981) FLC 91-092 (at 76,644), namely:

As a statement of general principle. I am firmly of the view that financial loss incurred by the parties in the course of the marriage ... should be shared by them (although not necessarily equally) except in the following circumstances:

(a) where one of the parties has embarked upon a course of conduct designed to reduce

Currently, wastage is usually considered under ss 75(2)(o) or 90SF(3)(r), but it is proposed that wastage will instead be a contributions factor. The proposed s 79(4)(cc) (and s 90SM(2)(cc)) looks at “the effect of any wastage, by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them”, which is not a codification of *Kowaliw* and is arguably far wider. There is no definition of “wastage” in the Exposure Draft. Examples of wastage given in the Consultation Paper include:

- allowing a person to live in the parties’ property rent free for a year
- excessive gambling, and
- undermining the profitability of a business or investment, for example, by intentionally or recklessly undermining the goodwill of a business or damaging its reputation.

Add-backs of wasted property as notional property are not popular among judges. In cases such as *Trevi & Trevi* (2018) FLC 93-858 the Full Court of the Family Court said that add-backs were “the exception rather than the rule” (at [28]). It will likely be more difficult for the courts to limit claims of wastage when the FLA expressly allows them to be considered as a contribution factor. Of course, they may not be successful, but claims which are likely to be unsuccessful still clog up the courts.

Presumably the use of parties’ funds on legal costs, which is not given as an example of wastage, will still be allowed as an add-back of “notional property” so that the parties still bear their own costs as required by s 117(1). It may, however, be more difficult to claim that other add-backs to the property pool be made in dollar terms rather than as a percentage along with other contributions factors, or for wastage to be considered as a factor under the existing s 75(2)(o) and 90SF(3)(r), when wastage is expressly referred to as a contributions factor.

Debts

Another proposed contributions factor concerns the

parties’ debts. The current s 75(2)(ha) (and s 90SF(3)(i)) (proposed s 79(5)(k)/s 90SM(5)(k)), requires the consideration of debts in a shopping list of factors which are relevant to the determination of a property settlement so far as they are relevant by virtue of s 79(4)(e)/s 79(4)(e). The current 75(2)(ha) (s 90SF(3)(i)) states that the court take into account:

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.

The proposed provision that debts incurred by either of the parties or both of them can be considered as a “negative” financial contribution to the property pool (as explained in the Consultation Paper) is intended to be consistent with current case law. According to the Consultation Paper, the court will “continue to exercise its broad discretion in considering debt, including how and when a debt was incurred (that is, before, during or after the relationship), who incurred the debt and who it is owed to, and whether it was incurred with the awareness and/or consent of the other party to the relationship.” Interestingly though, the case law is clear that “negative” financial contributions are not recognised under the FLA (e.g. *Kennon*; *Murphy J* in *Watson & Ling* (2013) FLC 93-257 (at [33])).

It seems likely that the existing s 75(2)(ha)/s 90SF(3)(i) will overlap with the proposed s 79(4)(cd)/s 90SM(4)(cd), but there is no clarity as to what this means. Debts can also be taken into account in the identification and of existing legal and equitable rights and interests, and liabilities, of the parties to property (proposed s 79(2)(a)/s 90SM(4)(a)). As a result, debts may be relevant to a consideration of the first 3 principles in the proposed s 79(2)/s 90SM(2), and it seems possible that it could be dealt with 3 times.

For example, a loan may have been incurred by a party to purchase speculative shares which have reduced in value or a tax debt incurred by one party failing to lodge tax returns. That loan or tax debt might be considered:

1. When identifying the existing legal and equitable rights and interests, and liabilities of the parties – whether it reduces the net property available for alteration or is the party who incurred solely liable for it;
2. In the assessment of contributions - the other party may argue that even if the loan or tax debt is in the balance sheet, it should be taken into account as a contributions factor in their favour, and against the party who incurred it;
3. In the assessment of the parties’ current and future considerations, if one party is solely liable for the loan or tax debt, they can argue for an adjustment in their favour so as to give them sufficient property that the creditor can recover the debt.

5. Less Adversarial Trial process

Part 2 of Schedule 1 of the Exposure Draft contains amendments to establish “Less Adversarial Trial” (LAT) processes for conducting property or other non-child-related proceedings. The amendments are modelled on, and adapt, the existing LAT processes for child-related proceedings under Division 12A, Part VII of the FLA.

Recommendation 20 of the ALRC Report recommended extending ss 69ZX and 69N to property proceedings. However, the Government considered that a separate legislative scheme would be clearer for courts and parties and would enable the proposed provisions to be better tailored to non-child related proceedings.

The Exposure Draft proposes 3 principles that will apply to LAT processes for non child related proceedings and underpin the operation of the proposed Division. The principles set out in the proposed s 102NE(2) are:

1. the court is to actively direct, control and manage the conduct of the proceedings
2. the proceedings are to be conducted in a way that will safeguard the parties to the proceedings against family violence, and
3. the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

The Consultation Paper explains that an intentionally broad approach is proposed in relation to the scope of proceedings that are defined as “or other non-child-related proceedings” and to which the proposed Division will apply. The proposed Division will apply to all proceedings where the court is exercising jurisdiction under the FLA, other than child-related-proceedings (defined in s 69ZM), where it may be beneficial.

6. Duty of disclosure

The Exposure Draft contains amendments to establish the disclosure requirements for separated parties with “financial or property matters”, which are defined widely in the proposed s 71B(7) for married couples (and s 90ROI(7) for de facto couples) of the FLA. So, rather than the duty of disclosure being only in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* as is currently the case, the duty will also be in the FLA.

Recommendation 25 of the ALRC Report was that the FLA “be amended to clearly set out the disclosure obligation of the parties and the consequences for breach of those obligations”.

The proposed duty will be located in Part VIII of the FLA to apply to property and financial disputes arising from the breakdown of a marriage. Part VIIIAB which applies to property and financial disputes for de facto relationships, and Part VIIC which applies to superannuation matters for de facto relationships in Western Australia.

The purpose of the change is to make the disclosure obligations more prominent and visible to users, legal practitioners and other advisers. The proposed s 71B(1) in Pt VIII (and s 90RI(1) in Pt VIIIAB and s 90YJA in Pt VIIC) states:

Each party to a proceeding relating to financial or property matters of a marriage has a duty to the court and to each other party to give full and frank disclosure, in a timely manner, of all information and documents relevant to:

- (a) for a party to the marriage — the issues in the proceeding that relate to financial or property matters of the marriage; or
- (b) for any other party to the proceeding — so much of the party’s financial circumstances as are relevant to the issues

in the proceeding that relate to property or financial matters of the marriage.

There will be new obligations on legal practitioners and family dispute resolution practitioners (FDRPs) to inform parties about the duties, explain the potential consequences of the party not complying with the duties and encourage the party to take all necessary steps to comply with the duties, thus supporting the intended aim of facilitating early disclosure (proposed s 71B(1)).

Although the first part of Recommendation 25 has been adopted, the latter has not. The proposed amendment aims to ensure that parties are advised of their duties of disclosure at an early stage by placing an obligation on FDRPs (who are often not legal practitioners) to explain legal obligations to parties. This doesn’t seem fair to FDRPs, nor compliant with State laws constraining non-lawyers from giving legal advice e.g. s 10 *Legal Profession Uniform Law* (NSW). There are exemptions from the prohibition on engaging in legal practice in, for example, s 10 *Legal Profession Uniform General Rules 2015* (NSW), but these do not extend to FDRPs.

A better course may be to create an obligation on FDRPs (and legal practitioners) to give parties a court issued brochure explaining the duty, such as the obligation created by Part III FLA.

The proposed duty of disclosure in financial and property matters to married parties will apply:

- from the start of the proceeding and continue until the proceeding is finalised (proposed s 71B(1) (s 90RI(1) for de facto couples);
- when the parties are “preparing to commence proceedings” (proposed s 71B(3)). However, for de facto couples, s 90RI(5) is worded differently and does not apply to parties “preparing to commence proceedings”, only once they have commenced. This distinction is due to the Constitutional limitations arising from the referral of State powers over parties whose de facto relationship has broken down.

Currently, the Pre-Action Procedures within the Rules require parties to give disclosure as part of the Pre-Action Procedures (Sch 1, Pt 1, Item 4). The Pre-Action Procedures seem to apply in similar circumstances to s 71B(3). Rule 4.01 of the Rules provides that “...before starting a proceeding,

each prospective party to the proceedings must comply with the pre-action procedures.” There is no distinction between de facto couples and married couples.

The Consultation Paper’s explanation for the distinction in the Exposure Draft is:

The proposed amendments would apply the disclosure duty in financial and property matters to parties when they are preparing to commence proceedings, supporting the early resolution of disputes. Currently, the pre-action procedures within the Family Law Rules require parties to give disclosure as they prepare to file with a court. Parties may complete facilitative dispute resolution processes at this time in an effort to resolve their dispute without needing to commence proceedings.

The proposed duty would not apply in the context of facilitative dispute resolution processes unless the parties are preparing for proceedings or the court has referred parties to these processes. There would be practical and constitutional limitations associated with such an expansion. The new practitioner obligation to inform parties about the duty (detailed below), would support early disclosure.

This distinction seems likely to confuse parties and their legal practitioners, particularly as no definition of “facilitative dispute resolution processes” is given. Anecdotally, legal practitioners generally interpret the disclosure obligations in the Pre-Action Procedures of the Rules as arising from when the legal practitioner starts communicating with the other party or their legal practitioner with the objective of negotiating a settlement through correspondence, a private mediation, family dispute resolution (FDR) or a round table conference. Some of these processes may be caught by “facilitative dispute resolution processes”, although the limitation is not in the Exposure Draft. If the FLA’s proposed duty of disclosure does not apply in these circumstances, then it seems unlikely that the current obligation in the Pre-Action Procedures of the Rules can have broader application and apply to parties who are not “preparing to commence proceedings”.

The inconsistency between to whom the disclosure obligation applies under the FLA and under the Rules

seems likely to create confusion. The Consultation Paper does not acknowledge that the proposed change may have the unintended effect of reducing compliance with the duty of disclosure the Pre-Action Procedures if parties are not “preparing” to commence proceedings, or the difficulty of who will assess (and when) that “preparations” are underway and how this is defined. This is likely to create a separate (and new) area of dispute.

Conclusion

The intentions of the Exposure Draft as described in the Consultation Paper, are arguably not met; in particular, there is less clarity as to the pathway to determine a property settlement than under the current s 79/s 90SM. As it is proposed that there will be more, not fewer, factors to consider than under the existing s 75(2)/s 903F(3) and s 79(4)/s 90SM(4) the property settlement process has not been simplified. Although attempts have been made to “align the decision-making principles for property settlement in ss 79 and 90SM with existing case law” by codifying the existing case law, the proposals do not incorporate the existing tests which have been developed over decades, such as in *Kowaliw* (over 40 years old) and in *Kennon* (over 25 years old) and cases which have followed them, suggesting that the courts will be at large to develop new guidelines rather than follow the current ones, and that parties may believe that such claims can be made in a broader range of circumstances.

The proposed amendments are intended to simplify the FLA and increase its usability and accessibility, providing a clearer guide to parties negotiating out of court settlements. Instead, it appears likely that if these proposed changes are legislated, the law will be more complex, the courts will have more discretion, and it will be more difficult to settle matters by consent. Whilst family violence and wastage are behaviours to be discouraged and there ought to be consequences where appropriate, the current drafting creates uncertainty, and the prospect of unintended consequences. It seems likely that more frequent allegations of fault will be made (and denied), in the hope of obtaining a greater share of the property pool, leading to the possibility of increased legal costs and increased pressures on the court system.

Editors:

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FAMILY LAW: TAX ISSUES IN FAMILY TRUSTS



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Hadi specialises in taxation and commercial disputes. Hadi has represented taxpayers, tax agents and the Commissioner of Taxation for over a decade in debt recovery proceedings, Part IVC proceedings and Family Law proceedings where the Commissioner has intervened.

Hadi's taxation expertise spans State and Federal taxes including Duties, Land Tax, Division 7A, CGT, GST, capital/revenue, trusts and Part IVA. Hadi also specialises in charities law and has advised and appeared in matters regarding the registration of charities and has particular expertise in respect of the classification of 'public benevolent institutions'.

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Prior to joining HWL Ebsworth Lawyers, Hadi practised as a barrister at the Victorian Bar for 9 years advising and appearing for a broad spectrum of clients in his areas of expertise.

A. Introduction

Taxation issues will regularly arise in the family law context, especially in those cases that involve the division of property. Providing the correct advice to clients at the earliest opportunity is crucial to ensuring that the outcome that the client is expecting to receive at the conclusion of the family law dispute is not railroaded by taxation issues that were not foreseen or properly dealt with from the outset.

Testamentary trusts have been commonly used for centuries to hold assets the income from which is distributed to one or more beneficiaries, such as a surviving spouse or children, during their lifetimes, and the corpus or capital subsequently to others. The last half of the twentieth century saw an explosion in the use of inter-vivos trusts to hold assets and carry on businesses.

This paper will discuss the use of trusts and the interplay with the tax and family law legislation. The paper will then provide practical tips for resolving tax issues that may arise in a family law dispute, including the scenario where the Commissioner of Taxation intervenes in the dispute so as to recover a tax debt owed to him by one or both parties to the marriage.

B. Trusts and their Use in the Family Law Context

Since a trust is a relationship under which the owner of property (the trustee) holds it subject to fiduciary

obligations in favour of others, the beneficiaries,¹ there is enormous flexibility in determining the nature and extent of those obligations. In commercial contexts two broad categories of trusts have evolved:²

1. the discretionary trust under which the trustee owes obligations to a class of persons (which frequently included other trusts and companies), none of whom had any proprietary interest in the income or capital (or whose interest might be defeated by the trustee's exercise of a power of appointment). The principal attraction of these trusts is the flexibility in the allocation of income or capital between the beneficiaries over the life of the trust and are commonly used by a family to hold assets or carry-on businesses (hence the frequently used term, Family Trust) or where the family derives income from businesses or assets it controls, either alone or in conjunction with outside parties.
2. the unit trust in which the obligations of the trustee to the beneficiaries are fixed by reference to the number and type of units they hold in the trust.

It is not uncommon for families for asset protection reasons, to establish separate, generally discretionary, trusts for each business and property they acquire and, where there are third party interests, separate unit trusts the units in which will be held by separate trusts. These discretionary trusts are often beneficiaries of each other so that income and capital can readily flow between them (eg a trust with deductible losses may become presently entitled to the income of another trust so as to enable those losses to be offset against the assessable income).

Not surprisingly the use of trusts gives rise to numerous issues. These include the rights of particular beneficiaries to capital or income (or more particularly the control that particular persons may have over that income or capital – for example by controlling the trustee), the application

of legislation, such as the *Family Law Act 1975* (the FLA), taxing legislation, superannuation legislation such as the *Superannuation Industry (Supervision) Act 1993* and the *Corporations Act 2001* to the income or capital of the trust.

Whilst there has been some standardisation in drafting, each trust ought to be treated as unique and its terms individually ascertained. As is frequently put – “Read the Deed”. Once the relevant provisions have been ascertained, the second task is generally to construe the legislation to determine precisely to what it applies and then apply it to the ascertained rights or other aspects of the trust.³ As cases such as *Kennon v Spry*⁴ and *Re Richstar Enterprises Pty Ltd*⁵ demonstrate concepts such as “property” or an “interest in property” may have very different ambits depending on the particular statute.

In the Family Law context, the most frequent issues involving trusts concern the distribution of trust property or the conferral on one party of control of a trust which retains property. The trust may own the property or be a beneficiary of any number of trusts (or chains of trusts) which own property and the tax issues may arise in relation to: (1) previously accruing tax debts, (2) tax which be subsequently assessed in relation to previous periods, (3) the transfer of trust property and (4) the unwinding of existing arrangements, such as loans, which may have tax consequences.⁶

These issues are complex and, especially in the case of large numbers of related trusts and companies may be highly specific to the particular family group. There is not sufficient scope to canvass them in detail but, instead this paper merely paints a landscape of the issues that practitioners need to consider from the outset to determine how best to protect their clients' interests including by identifying existing and

1 *Aussigolfa Pty Ltd v Commissioner of Taxation* [2018] FCAFC 122, [138-139] and [203-206].

2 There are also variants such as hybrid trusts (which are essentially unit trusts where the trustee has a power of appointment over income or capital which it can exercise in favour of entities which are not unit holders (but are generally related to unit holders)).

3 *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

4 (2009) 238 CLR 366.

5 (2006) 233 ALR 475.

6 There are also other issues beyond the scope of this paper. These include the division of superannuation entitlements of each party (and the transfer of assets between superannuation funds), the ability of the Family Court to take into account property of a trust of which a party is a mere object (*Spry*) in determining the division of the parties' property (including trusts which were established by the party's parents, grandparents or others) and section 106B of the FLA which allows the Court to set aside transactions designed to circumvent the operation of that Act.

potential tax issues and determining the best way to deal with property held by trusts.

C. The Tax Legislation

Interface with the FLA

The Court’s power to make orders in relation to the property of the parties is to be found in s 79(2) of the FLA which requires the just and equitable division of property. The Court does not however determine any tax issues which may need to be taken into account.⁷ In essence the Court will take into account the quantum of the tax, the circumstances under which it arises, the likelihood of the tax ever being payable in allowing it as a deduction as a debt in determining the net value of the parties’ property or in taking it into account in determining each party’s fractional interest in the property.⁸ The parties each need to consider what tax issues to ventilate in the family law proceedings as a means to resolve the dispute and how this can be done.

Division 6 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) and subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997* (ITAA 1997) set out the statutory scheme for the taxation of the ‘net income of a trust estate’.

The net income (excluding net capital gains, franked distributions and franking credits) is assessed to the trustee under s 99A (or in a limited range of cases, s 99) save to the extent that it is included in the assessable income of a beneficiary under s 97 of the ITAA 1936 (or, if the beneficiary is under a legal disability, to the trustee under s 98).

Capital gains and franked distributions are also assessed to the trustee save to the extent that they are assessed to the beneficiaries under s 115-225(2) (capital gains) and s 207-35 (franked distributions and franking credits) of the ITAA 1997.

7 Although pre-existing tax disputes before the Federal Court may be cross-vested in the Family Court I know of no cases where this has been done and, in any event, tax disputes only become apparent as a result of the Family Court proceedings.

8 *Rodgers v Rodgers* [2016] FamCAFC 68; *Rosati v Rosati* (1998) FLC 92-804 (*Rosati*).

Patent pre-existing tax liabilities

The question of pre-existing tax liabilities ought to be relatively simple to deal with. Provided that the obligation of disclosure is properly being complied with by the parties, then the quantum of these liabilities should be readily ascertainable. Whether they are regarded as liabilities pertaining to one party to the marriage or whether they are a joint spousal liability will be dictated by family law principles and authority.⁹

Latent pre-existing tax liabilities

Pre-existing tax liabilities that have not crystallised because of, as an example, the failure to lodge tax returns fully disclosing the taxpayer’s assessable income are more problematic. Since the Commissioner will generally not be time barred in issuing assessments (or amended assessments under s 170 of the ITAA 1936), it is essential for each party to do its due diligence at the outset of the family law dispute so as to ascertain that all taxation assessments have been issued, or in the event they have not, for all documentation to be lodged with the ATO so that any tax payable may be accounted for. Failure to do this may mean that either or both parties may be subject to significant tax liabilities (including penalties and ‘interest’) not taken into account in determining the division of the property.

Frequently the trusts are controlled by only one of the parties. It is therefore in the best interests of the other to have the tax position ascertained possibly by an audit. It is also in the interest of the other party because not only is he/she under an obligation to make full and frank disclosure of the relevant financial circumstances but also because any tax debts will reduce the net value of the property (and hence the amount that he/she may be ordered to pay).

Future tax liabilities (eg existing division 7A loans, ultimate realisation of assets retained in the trust)

Since the corporate tax rate, 27.5% for “base rate entities” (and 30% for passive income), is less than the maximum individual tax rate, 45% (including levies), companies are often presently entitled to the income of a trust. Often this entitlement is not actually paid to the company but is retained by the trust as an unpaid present entitlement or a loan.

9 See, eg, *Johnson v Johnson* (unreported) 31 March 1999 at para 20.5 to 20.7; (1999) 26 Fam LR 475; [1999] FamCA 369 (Ellis, Kay and Dessau JJ).

Division 7A of the ITAA 1936 is a long-standing provision which assesses payments, loans or the forgiveness of debts given to shareholders and their associates (including trusts) as dividends. Unsurprisingly, therefore, Division 7A may apply to loans provided by companies to trusts.

However, division 7A won't apply if the loan satisfies the requirements of section 109N (which provides for payments of interest and principal). Hence such loans are common. However, especially in the case of loans or financial accommodation by corporate beneficiaries, interest and principal need to be paid and, in the absence of other sources of funds, this is generally done by the company paying a dividend to the trust. As was the case in *Rosati* (see fn 9 above), if one party retains the trusts and companies there may be a future liability to tax in respect of that dividend. Alternatively, there may be an immediate liability if the structure is wound up as part of the property orders.

The capital gains tax (CGT) regime contained in Parts 3.1 and 3.3 of the ITAA 1997 includes any capital gain made by a taxpayer when a CGT event happens to a CGT asset in its assessable income. Gains and losses made on CGT assets acquired before 19 September 1985 are disregarded. In the case of trusts, the capital gain is included in the assessable income of the beneficiaries to which it is attributed or assessed to the trustee under sub-division 115-C of the ITAA 1997. A CGT event will probably happen at some time to each CGT asset retained by the trust.

A party may also make a capital gain if he/she disposes of an interest in a trust. In this regard while the interest of an object of a power of appointment may not be an interest in a trust for some purposes,¹⁰ it is still a CGT asset and its renunciation may give rise to a capital gain. It can be argued that the better view is that it would not because, in the circumstances of a property settlement its value is nil (because there is no real expectation that the trustee would exercise its discretion in favour of that

beneficiary).

Tax liabilities arising from family law orders

Orders made by the Court resulting in the making of payments or the transfer of property may result in a capital gain being assessable. The negative tax implications have been ameliorated by the rollover provisions contained in subdivision 126-A of the ITAA 1997 but these provisions do not apply where the payment or payment would be otherwise assessable, for example if made by a company, either as a dividend or deemed dividend under section 44 or division 7A respectively of the ITAA 1936.¹¹

In the case of distributions made by trusts:

1. the trustee may make a capital gain or capital loss if it disposes of an asset; and
2. the recipient, if a beneficiary, may be assessable under section 99B of the ITAA 1936. Alternatively, the other party may be assessable under this section if the payment or transfer satisfies an obligation imposed on him/her. Subdivision 126-A provides a rollover if as a consequence of a Court Order either party or a trust or company would otherwise make a capital gain on transfer of a CGT asset to a party. In essence the capital gain is disregarded and the cost base of the transferor becomes the cost base of the transferee. Its effect is to defer any capital gain until a CGT event happens to the asset in the hands of the recipient (which is a potential tax liability that ought to be addressed before Orders are made).

The application of the rollover where the transferee is a company or trust has been considered by the Full Court of the Federal Court in *Ellison v Sandini*.¹²

In that case, the Husband was ordered to transfer some shares to the Wife. After the orders were made but before the transfer was effected, the Wife asked the Husband to transfer the shares to a trustee company of hers. The Husband agreed to do so.

The majority (Siopsis and Jagot JJ) decided that the rollover didn't apply whilst the trial judge and Logan J decided that it did. An application for special leave to the High Court was rejected, not because the High Court thought this was an issue that did not need to be determined, but because the way the

¹⁰ TD 2003/28.

¹¹ Prior to 2014 it was generally accepted that payments made by a company pursuant to a Court order were excluded from Division 7A by section 109J. However the Commissioner changed his attitude in Taxation Ruling TR 2014/5. The issue has yet to be judicially determined.

¹² *Ellison v Sandini Pty Ltd* [2018] FCAFC 44.

case was run meant that it wasn't the appropriate vehicle for so doing.

A corollary of such a transaction is that if the transferee is a trust and the asset is the main residence of the party controlling the trust he/she will not be entitled to the main residence exemption when the trust subsequently sells the asset.¹³ In the recent case of *Mingos*,¹⁴ the Court decided the question as to whether a discretionary beneficiary of a trust had an ownership interest in a dwelling owned by the trust.

The taxpayer and his family lived in the dwelling in question for many years. It was originally held on trust for the taxpayer, but in 2006 it was transferred into his name and he then transferred it to his wife. A few years later the marriage broke down. As part of the divorce settlement, the Federal Magistrates Court ordered the taxpayer to pay just over \$2m to his wife, in return for the transfer of the dwelling to the taxpayer "or his nominated entity". The property was in fact transferred to a nominated entity, a company (Lemnian) that was the trustee of a discretionary trust (the Lemnian Trust). The company was controlled by the taxpayer and his brother. The transaction was financed by a bank loan secured by a mortgage over the property.

When the property was later sold, the capital gain was distributed to the taxpayer who was a beneficiary of the Lemnian Trust. The taxpayer contended he was entitled to the CGT main residence exemption as he had an ownership interest in the property. He argued that title to the property had been transferred to Lemnian solely in order to obtain the bank loan and that the property was owned by him beneficially pursuant to a sub-trust. The ATO disagreed.

The primary judge held that the taxpayer did not have an ownership interest in the property. The taxpayer's appeal was unanimously dismissed by the Full Federal Court.

The evidence was against the taxpayer. Emails showed that the bank was prepared to advance the

funds on the basis of the property remaining in the taxpayer's name (subject to obtaining a mortgage over the property) and that it was the taxpayer's former accountant and tax agent who instructed that title to the property should be in the name of the Lemnian Trust. There was also evidence, including signed accounts and the trust's tax return, showing that the property was treated as an asset of the trust.

The Full Federal Court also held that the lower Court's order in the family law proceedings did not confer upon the taxpayer a full equitable interest in the property; and the taxpayer did not have an absolute entitlement to the property as against Lemnian (if he had an absolute entitlement, s 106-50 of the ITAA 1997 would have deemed the sale of the property to be done by the taxpayer).

Other issues

Ongoing income – section 97

Property Orders may not be made for a number of years after the marriage has broken down. During that time the family group will frequently be controlled by one party and, while assets will be valued, there may be a difference between the valuation dates and the final division of the property. In the meantime, the trusts will derive income and the issue will be who is entitled to that income and how will it be taxed.

The amounts to be assessed to a beneficiary under s 97 or s 98 of the ITAA 1936 are determined by reference to its "present entitlement" to the income of the trust estate (other than franked distributions and capital gains) as at 30 June.

A beneficiary will be presently entitled to a share of the income of a trust estate to the extent that it has an indefeasible, absolutely vested, beneficial interest in possession in that income and must be able to demand immediate payment of it.¹⁵

If the income of the trust is less than its net income (calculated under s 95 of the ITAA 1936) the amount to be included in the assessable income of the presently entitled beneficiary will be more than the

¹³ *Mingos v Commissioner of Taxation* [2019] FCAFC 211.

¹⁴ [2019] FCAFC 211.

¹⁵ *FCT v Whiting* (1943) 68 CLR 199. Care must therefore be taken to ensure a tax-free maintenance payment is not replaced by an assessable present entitlement.

amount payable to him/her by the trustee.

Ongoing capital gains and franked distributions

Like income, these need to be taken into account under subdivision 115-C and 207-D of ITAA 1997 respectively (especially where the capital gain or franked distribution results from Orders made by the Court.

Capital distributions – section 99B

Section 99B of the ITAA 1936 provides that any distribution from a trust which is not otherwise assessable is assessable unless it falls within a limited range of exclusions. The most important of these are capital distributions (unless made out of amounts which would not be assessable if derived by a resident taxpayer) and amounts which have been included in the assessable income of the beneficiary or assessed to the trustee.¹⁶ It is arguable that this section could apply to distributions paid out of the discount component of capital gains attributed to other beneficiaries or retained by the trustee. The better view is that it ought not to be but obviously care must be taken with the precise orders made.

Carried forward losses and net capital losses

Trusts within a group may have current year or carried forward losses which, subject to the operation of Schedule 2F to the ITAA 1936, may be deductible or capital losses or net capital losses which may offset capital gains made by other trusts in the group and thereby reduce the amount of tax payable. These need to be taken into account but the value to be attributed to them will depend on factors such as when they are likely to be taken into account, if at all.

D. Dealing with the Commissioner

Disclosure options

Voluntary disclosure

If a transaction your client has entered into or any part of their affairs attracts tax consequences that have not been properly reported, an option may be

for your client to make a voluntary disclosure to the ATO. This will clarify your client's tax liability so that it can properly be taken into account when deciding how the matrimonial pool is to be divided amongst the parties. Making a voluntary disclosure to correct mistakes or omissions made in the past will usually attract interest and penalties, but these are likely to be reduced as a result of your client coming forward.

Private rulings

If there is uncertainty as to whether and how a tax liability applies to a set of facts and circumstances, your client can apply to the ATO for a private binding ruling (PBR). The PBR is not law but it does bind the Commissioner as to how to treat a certain transaction for tax purposes.

Your client is not obliged to agree with the PBR and can treat a transaction differently for tax purposes. This is likely to lead to audit activity by the ATO, however, given the transaction will have been placed on the ATO's radar and deviating from its conclusions is unlikely to go unnoticed.

Settlements

Your client should also consider whether any settlement entered into will have any tax consequences. The main areas of concern in this regard are capital gains tax (CGT) and GST. One should give particular attention to the relevant rollovers in the CGT regime and to ensure that any transfer of property from one party to another is framed in such a way so as to have the relevant rollover apply.

Tax indemnities

It is almost certain that orders in s 79 proceedings will contain indemnities in one form or another, including tax indemnities. A tax indemnity is a promise to pay or to look after a debt whether known or, more commonly, not yet crystallised. Indemnities should ensure they contain the obligation to both indemnify and pay. Indemnities may be an effective way to protect a party's interests in the face of uncertainty.

Indemnities are not foolproof and should be supported by security or the retention of funds in escrow pending the resolution of tax issues to

¹⁶ It is an incredibly broad provision see *Traknew Holdings Pty Ltd v Commissioner of Taxation* (1991) 91 ATC 4272; *Howard v Commissioner of Taxation* (2012) 206 FCR 329; [2012] FCAFC 149.

mitigate the difficulties in collection or the risks of bankruptcy. Given the often adversarial nature of family law proceedings, consideration should also be given to joint indemnities so as to give the receiver of an indemnity a disincentive to engage in unwarranted whistleblowing behaviour to the Commissioner.

The Commissioner as a party

Payment of unpaid tax

The Commissioner can intervene in family law proceedings if he is a creditor to a party to the marriage so that he can protect his interests in recovering his debt.¹⁷ The ultimate question for your client is: do you invite the gorilla in or do you wait for him to come knocking?

Another scenario that may arise is that one spouse might whistle blow on the other spouse to the Commissioner which might then lead to intervention by him. The Court can also refer cases to the Commissioner if it is obvious that there is an unresolved tax issue, remembering that the parties have to swear to a financial statement that lists all assets and liabilities which should include an estimate of any potential tax liability.

A recent trend has emerged where the Commissioner is more likely to intervene in family law proceedings if one or both of the parties to the marriage have a tax liability. The reason for that is simple – the powers the Court has and the breadth of orders it can make means that the Commissioner can recover his debt more quickly in that forum. As a party to the proceedings the Commissioner is entitled to apply for any order which the Court is empowered to make in the proceedings.¹⁸

The Commissioner will have visibility of what the matrimonial assets are, and he will argue that the tax debt should be paid first and then after that is done, if there is anything left, the parties can fight over who gets what.

This is based on a line of authority that suggests that even if the tax debt is owed by one party to the marriage, insofar as the parties were living together when the tax debt arose, then both parties should share in the responsibility of paying it. This is more commonly known as “taking the good with the bad”.¹⁹

Sometimes, the party that owed the tax debt might support the Commissioner’s involvement in the case. Take the following example: Husband and Wife in property proceedings in the Family Court. Husband owes tax debt. Assets are all in the Wife’s name.

- **Scenario A:** Commissioner doesn’t intervene. Court orders that the Wife retain 60% of the assets, and the Husband 40%. The Husband knows he is liable to a tax debt and that the Commissioner is going to come knocking soon. Has to pay any tax from the 40% he received and any other money he makes in the future.
- **Scenario B:** Commissioner intervenes. The Court orders that before any property is divided, the tax debt is to be paid. The Husband has succeeded in indirectly making the Wife responsible for paying a portion of the tax debt.

Access to documents and the *Harman* undertaking

The Commissioner has wide powers to obtain information and evidence. However, insofar as the Commissioner wishes to rely on information or evidence that has been adduced in family law proceedings for the purposes of raising assessments and/or for any other proceedings, then he is limited by the rule known as the *Harman* undertaking.²⁰

The *Harman* undertaking prevents documents produced in litigation from being used for any purpose other than the litigation. A key rationale for the *Harman* undertaking is the desirability of encouraging full and unreserved discovery of documents before trial.

17 *Family Law Act* s 79(10), 92.

18 *Dougherty v Dougherty* (1987) 163 CLR 278 at 296 (Brennan J). For a recent case where the Court decided that the Commissioner can press ahead with his s 79 application even if the Husband and Wife purport to abandon their own, see *Cao v Trong* [2018] FamCA 460.

19 *Eg Zdravkovic and Zdravkovic* (1982) FLC 91-220; *Kowaliw and Kowaliw* (1981) FLC 91-092 at [76,644-4] (Baker J); *Trustee of the Property of G Lemnos, a Bankrupt & Lemnos* (2009) FamCAFC 20 at [242], [244], [246] (Thackray and Ryan JJ); *Bowne v Green* [1999] FamCA 148 at [41], [44] (Full Court); *Johnson v Johnson* (unreported) 31 March 1999 at para 20.5 to 20.7; (1999) 26 Fam LR 475; [1999] FamCA 369 (Ellis, Kay and Dessau JJ).

20 *Hearne v Street* (2008) 235 CLR 125 at [96].

That being said, a party can apply for release from the *Harman* undertaking. As the undertaking is given to the Court, only the Court may release a party from its obligation pursuant to it.²¹ Special circumstances will need to be shown by the party seeking release from the undertaking, which the authorities have said would include ‘the likely contribution of the document to achieving justice in the second proceeding’,²² competing consideration of public interest and the interests of justice.²³ It is likely that the Commissioner will succeed in an application for release from the *Harman* undertaking given he is fulfilling a public function (the protection of the revenue) which is very much in the public interest.²⁴

E. Conclusion

Tax issues will always be a consideration in the resolution of a family law dispute. The earlier that this is canvassed and dealt with, the better the stead that your client will be held in. It will most often be desirable to have tax liabilities crystallised at the outset so as to properly reflect the financial position of each party.

Various considerations will need to be taken into account to determine whether to engage with the Commissioner of Taxation in a family law dispute and whether he should be invited to intervene. If he intervenes on his own motion, it will still be necessary to determine the level of engagement and cooperation the parties have with him.

Any favourable resolution of a family law dispute will depend on ironing out tax issues and having them resolved as between the parties, including the Commissioner.

21 *Crest Homes Plc v Marks* [1987] AC 829, 854; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576.

22 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, 225.

23 *Minister for Education v Bailey* (2000) 23 WAR 149.

24 See, eg, *Deputy Commissioner of Taxation v Karas* [2012] FCA 258.




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“VALUE TO OWNER”



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Philip was first called to the Bar in 1996 and took silk in 2012. He has had a diverse practice with his current focus being on Family Law and Tax litigation and Alternative Dispute Resolution. Philip has been recognised as a leading Queensland senior counsel in Doyle’s Guide in the areas of Family Law and Tax.

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Introduction

The concept of “value to owner” in the Family Law context relates to the value of an asset of a party to be considered in determining any adjustment to be made to the interests of property pursuant to the *Family Law Act 1975 (FLA)*.

The concept received significant attention in the authorities, particularly between 1983 and 2000. The concept is often referred to in discussions with clients and valuers and in submissions to the court. Despite this, the experience of the authors is that the meaning and relevance of the concept is not well understood in practice.

This paper looks at the historical development of the concept, particularly through decisions of the courts administering the FLA, what the concept means and when it applies, and suggests some practical considerations for practitioners in relation to the application of the concept.

Historical development of concept

In a proceeding for property adjustment under the FLA, where the parties do not agree on the value of a particular asset within the pool, the court must determine the value of that asset as part of its determination as to whether, and if so what, orders be made.

For assets such as real property where there is a ready market this is relatively straight forward: evidence of value is obtained by engaging a property valuer who will have regard to the features of the property and comparable sales in forming an opinion as to the market value of the real property.

The basis for determining the market value of an asset was laid down in *Spencer v Commonwealth*¹ (*Spencer*) as being the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling but not anxious to sell.²

In *Dunbar and Dunbar*³, in adopting the test in *Spencer* the Full Court held that

[t]he object of any valuation exercise is to establish what a willing but not anxious purchaser would be prepared to pay and a willing but not anxious seller would be prepared to accept [emphasis added].

However, the court was not in that case considering a dispute as to the appropriateness of adopting a market value. Rather, the issue there was whether it was correct for the trial judge to take a mean of the values asserted by two experts.

An early case in which difficulties with the application of the *Spencer* approach to the value of shares in a family company held by one of the parties in Family Law proceedings was that of *Hull & Hull*⁴, a decision of Justice Nygh. In that case, his Honour was considering the issue of the value of the wife’s shareholding in a family company over which her mother had effective control by virtue of the Articles of Association. Whilst the wife’s mother had the voting power and control over the company, the wife had virtually the whole of the equity capital. His Honour found that the scheme of the Articles of Association was clearly designed for the wife to have eventual control over the company. Relevantly, there was no ready and available market for the sale of the wife’s shareholding. In those circumstances, his Honour held that it would be artificial to adopt the *Spencer* basis of valuation, as that can be applied only where there is a ready and available market. His Honour recognised that the question of valuation was essentially a matter for the trial judge. Rather than adopt a value for the shareholding, his Honour treated the shares as being a financial resource available to the wife.

Approximately a year later, in mid-1984, Justice Nygh considered a similar issue in the matter of *Bowman & Bowman*⁵. In that case, the husband and wife had shares in a family company comprising both

A and B class shares in which their children also had B class shares. His Honour was required to consider both the method of valuation and the attribution of value to the different classes of shares. The approach adopted by his Honour was not based on the *Spencer* approach.

In late 1984, the Full Court handed down its decision in *Reynolds & Reynolds*.⁶ That was a farming case in which the husband’s family conducted a farming business through a family partnership and a company controlled by the husband’s parents. The husband had a significant shareholding in the company. The trial judge had found that the husband’s shareholding in the company had a substantial value even though the realisable value of those shares was much less because of the control of the husband’s parents as directors of the company. In grappling with this issue, the Full Court observed (at 394):

We are doubtful, however, whether valuation methods which have been developed for commercial purposes are entirely appropriate for the purposes of family law. The present commercial or capital value of shares in a proprietary company may not reflect their value to the spouse, who either has control after divorce or who stands ultimately to benefit from them or control them after the death of generous parents, as appears to be the case here.

The Full Court agreed with the trial judge’s description of the shares as having “an indefinable but substantial value available to him through but subject to the dynastic control of his parents while they live”. It found that it was open to his Honour on the evidence to make that finding and to view the shares as valuable property, realizable in the future by the husband, distant though that future may be. The Full Court found that the shares could not be regarded as a financial resource as they were the husband’s property alone. Despite this, it was held that the potential future value of the shareholding to the husband must be taken into account under section 75(2)(o) of the FLA as that was a fact or circumstance which the justice of the case required to be taken into account.

In 1989, in *Sapir v Sapir (No 2)*,⁷ Justice Young in the Supreme Court of New South Wales was applying section 79 of the FLA pursuant to cross-vesting

1 (1907) 5 CLR 418.

2 *Hull & Hull* (1983) 9 Fam LR 241 at 246 per Nygh J.

3 (1987) 11 Fam LR 901 at 911 per Evatt CJ, Ellis and Kay JJ.

4 (1983) 9 Fam LR 241.

5 (1984) 9 Fam LR 619.

6 (1984) 10 Fam LR 388.

7 (1989) 13 Fam LR 362.

legislation. The wife had a 48% interest in family companies. The classes of shares which the wife held were subordinate in rights to the shares held by her parents who had governing directorship rights. The evidence available to his Honour included two expert reports, one which valued the shares to the wife and the other which valued the shares based on what they would be worth to an independent third party. After canvassing earlier authorities, his Honour accepted that he should adopt the basis of valuation being the value of the shares to the wife, not their commercial value or their value to a hypothetical purchaser. The approach adopted by the valuer was summarised by his Honour in the following terms (at 364):

His basic philosophy was that the only foreseeable purchaser of the wife’s shares would be her parents and they would not be worried about the fact that they were buying a minority holding. Accordingly, a reasonable person in the position of the wife would accept a small discount on the asset value of the shares so as to have cash now, but there would be a figure below which she would not go but she would rather wait for her parents to pass on rather than part with the shares now.

In December 1990, Baker J delivered the decision in *Turnbull & Turnbull*.⁸ One of the key issues in that case was the value of the husband’s shares in two family companies. In approaching the valuation issue, his Honour held (at 78,738-9):

It is not appropriate in the context of Family Law proceedings to value shares in private family companies on the basis of what a hypothetical purchaser may pay for them. Similarly, it is quite inappropriate to adopt the approach taken in the revenue and resumption cases.

...

I am satisfied therefore in the context of proceedings under the Family Law Act that when a judge is determining the value of shares held by a party in a family company, he must look at the reality of the situation and value the shares on the basis of their worth to the shareholder.

Turning to the facts of the present case, the husband’s shares can only be valued, in my view, on the basis of their worth to the husband in the context of the Turnbull family as a whole.

The parties had agreed that the net assets of each company, as at the date of the trial, were worth \$4.565 million and \$1.758 million respectively. The husband’s father held the position of Governing Director in respect of both companies and had the right to control their affairs. Further, there was a restriction on the ability to transfer the shares held by the husband. In relation to the first company, his Honour found that the husband’s father held an intention that it remain in the husband’s ownership, whether by way of an equity shareholding or as a beneficiary of a trust. On the basis of this, his Honour discounted the value of the shares by 5%. In relation to the other company, the husband had a 1/5th interest as did each of his four sisters. In those circumstances, his Honour adopted a discount rate of 10% in view of the fact that he would ultimately have to deal with his sisters.

In mid-1995, the Full Court (Ellis, Finn and Joske JJ) in *Marriage of Georgeson*⁹ dismissed an appeal by the husband. The wife was a minority shareholder in a family company controlled by her parents and one of her three sisters. Valuation evidence from an accountant was led by each of the parties as to the value of the wife’s shareholding. Each of the accountants agreed that the most appropriate method of valuing the company was the net tangible assets method and they agreed that the proportionate interest of the wife before discounting was \$1,070,000.

Relevantly, the wife was in a position where she could not obtain the benefit of the full proportionate value of her shares for at least 22 years. Further, control would pass to the wife’s sister, who was younger than the wife, and the wife may get no value even when her sister assumed control. The evidence was that the wife had received value of \$300,000 over a period of 13 years but it was found that a number of items to which such value related had no nexus with the shareholding. It was found that the wife was an employee of the company and had never had any position of management and had never played or would likely play any role in the management of the company. Further, her continued involvement was found not to be essential for the good of the shareholders and she had no ability to

8 (1991) FLC 92-258.

9 (1995) 19 Fam LR 302.

determine or influence whether dividends or interest were paid. It was found that her father was in control of the company and he made decisions in relation to the affairs of the company of which the wife played no part and in some instances had no notice of.

The wife’s accountant proposed that the value be determined on the basis of a 5% annual discount rate until the time that the wife could realise her interest in the shares, namely 22 years hence. This produced a value of \$365,940. By contrast, the husband’s accountant contended that a simple discount rate of 15% should be applied to the value of the shares at the time of the hearing which produced a value of \$909,500. In all the circumstances, the trial judge adopted the evidence of the wife’s accountant. In dismissing the appeal, the Full Court held (at 317-8):

There is no fixed rule as to the proper method of valuation of shares in Family Court proceedings although in some circumstances a particular methodology may be preferable... Whilst an expert may thus suggest an approach as being appropriate in a particular case, before accepting it, the court must come to its own conclusions as to whether that approach is appropriate in the circumstances...

...

When one has regard to the significant disadvantages attaching to the shares of the wife referred to by both accountants and to the probability that there is not and never will be an open market for those shares, considerable support is provided for the application of a substantial discount well above the 15% referred to by [the husband’s accountant]. Indeed, in our view, an approximate flat discount rate of 65% would be more appropriate.

In early 1996, the Full Court (Ellis, Baker and Warnick JJ) in *Marriage of Harrison*¹⁰ again dismissed an appeal the grounds of which in part related to a valuation of shares in privately held companies. The shares were held by the husband and constituted a minority interest in relation to each company. The evidence of value was given by accountants on behalf of each of the parties which amounts were not materially dissimilar. The trial judge found that the values of the parcels of shares

should be discounted by 5% and 10% respectively on the basis that they were minority holdings. The trial judge rejected the submission advanced on behalf of the husband that, notwithstanding the valuation evidence led by him, the shares should be attributed no value because they were not able to be realised. The trial judge did so on the basis that the submission ignored the benefits which accrued to the husband through the ownership of the shares including, amongst other things, the right to receive dividends which had been substantial in the past. The Full Court quoted the following finding made by the trial judge which it regarded as significant (at 328):

I am satisfied in the context of proceedings under the Family Law Act that when a judge is determining the value of shares held by a party in a family company, she or he must look at the reality of the situation and value the shares on the basis of their worth to the shareholder. In this case, the husband’s shares can only be valued on the basis of their worth to him in the context of the Harrison family as a whole. That worth is substantial.

The Full Court then went on to say (at 328):

In our opinion the trial judge correctly interpreted the law as it stands in relation to the value to be placed upon interests in family companies. Revenue and taxation cases... have little relevance to the value which a court, exercising jurisdiction under the Family Law Act, places upon such interests. The value to be ascribed to shares in a family company must be a realistic one, based upon the worth of the shares to the party himself or herself. That was clearly the approach which the trial judge took, and therefore no error, in our opinion, can be demonstrated.

In 1997, Warnick J (who had been a member of the Full Court in *Harrison*) gave judgment in *Ramsay v Ramsay*.¹¹ A central issue in that case was the value of the husband’s 22.73% shareholding in a family company. The remaining shares were held by his parents, his sister and another company. On the evidence there was no real prospect of the husband gaining control of the company in the future. The wife contended that the shares should be valued on

¹⁰ (1996) 20 Fam LR 322.

¹¹ (1997) FLC 92-742.

a net asset backing basis. The husband contended the value should be nil on the basis that the shares could not be sold to a stranger. Evidence was given by expert accountants on behalf of each of the parties.

On the facts of that case, his Honour preferred the evidence of the expert accountant for the husband who valued the shares based on a capitalisation of income stream rather than on a net asset backing basis. The matters relied on for this by the expert and which were accepted by his Honour were, in summary, the lack of control, the history of distributions, the fact that all profits were distributed to family members, the absence of an intention to sell, the absence of an intention to liquidate and the understanding that the company would continue to pay out its profits by way of dividends.

Approximately one year later in 1998 (although not reported for 3 years), Warnick J gave judgment in *AJW v JMW*.¹² As in *Ramsay*, a central issue was the value to be attributed to the husband’s minority shareholding in a company. Also like *Ramsay*, evidence of an expert accountant was led by each of the parties in relation to the issue, Mr Calabro for the husband and Mr Flynn for the wife. The husband held one third of the ordinary shares with his two brothers holding the remainder. The husband’s mother was a permanent Governing Director and the husband and one of his brothers were directors also. Thus, there was uncertainty about the corporate structure, future control and inheritance matters. The company was an investment company holding shares in related companies which themselves were investment companies. Notwithstanding the differences in stated approach by the experts, the value contended for by the experts for the husband’s interest in the company and which was adopted by his Honour reflected a discount of some 60% to the net asset backing value of the shares held by the husband.

This case is notable because it highlighted the

confusion in language by the experts in relation to the concept of “value to owner” and the task they were to perform. It is useful to quote the summary of findings as set out in the headnotes to this decision prepared by the CCH Family Law editors:

1. The debate between the accountants is beset by a degree of confusion, largely due to the terminology used, and a failure to adapt definitions appropriately into the field of property division in family law.
2. The objective of the valuations should be to assess the value of the shares to the husband That is so whether there were “special benefits” or not, though if there were special benefits, they must be valued in achieving the objective. However, the use of the term “value to the owner” in family law property cases, should not be dependent on the existence of special benefits, but rather, be as descriptive of the objective of the valuation exercise.
3. The use by Mr Flynn of the term “value to the owner” as a methodology was confusing, particularly when used in contrast to the methodology of “fair market value”. It was incorrect to adopt, as Mr Flynn did, the concept of “value to the owner” only because of satisfaction that there was no market for the shares, and therefore no “fair market value”.
4. On the other hand, the selection by Mr Calabro of the hypothesis of “fair market value” as the objective, given the nature of the case, created its own confusion. Where there is a market for shares, market value may well be the same as “value to the owner” ...But where there is no market, it is something of a “non-sequitur” to seek to ascertain “market value” as the objective of the valuation.
5. The mischoice of “fair market value” as the objective of the valuation may lead the valuer to adopt a methodology which may suit the situation where there actually is a market,

¹² (2002) FLC ¶93-103.

but which may not wholly suit a circumstance where there is no market.

6. Mr Flynn’s approach assumed that the husband would be in a position to realise his shareholding upon the death of his mother and that assumption in turn involved a series of assumptions as to the way in which the other shareholders would act at that time. Those assumptions involved speculation which was not an appropriate field for opinion evidence by accountants.
7. Valuations which take a set of possibilities or even probabilities and assert a valuation based upon them as if they were certainties and therefore the only proper basis of valuation, exacerbate litigation.
8. **Parties and the court would be better assisted by the recognition of a range of possibilities in the future, and a range of valuations, to match, leaving it to the court, on the facts established before it to apply the relevant value, or if the facts lead to no certainty, merely to accept the parameters in the exercise of its discretion. Commonly, such parameters could be provided by a jointly engaged accountant,** who would not be under the pressure, which currently seems to arise, upon unilaterally engaged valuers, to present the opposite of the contentions presented by the expert on the other side, in an endeavour to “balance the ledger” of arguments. [Emphasis added]

In 2000, the Full Court (Finn, Kay and Barlow JJ) in *Taylor & Taylor & Taylor*¹³ summarised the principles that had been established by the authorities as to how a trial judge should approach the task of valuing property of the parties as follows:¹⁴

- 24.1. The determination of valuation issues “...is essentially a matter for the trial Judge” (*Hull and Hull* (1983) FLC 91-360 at 78,410).
- 24.2. The determination of valuation issues may be

assisted by evidence of expert witnesses. The purpose of such evidence is to enable the trial Judge to form his or her “...own independent judgment on the matter by the application of the appropriate principles” (*Lenehan and Lenehan* (1987) FLC 91-814 at 76,142).

- 24.3. A trial Judge must satisfy himself or herself, by means of the application of proper principles, that he or she has arrived at an appropriate value. If that value “...happens to be different to the values ascribed to the relevant property by the valuers called in evidence, this in itself does not affect the validity of the Judge’s finding...” provided that proper principles have been applied (*Borriello and Borriello* (1989) FLC 92-049 at 77,558).
- 24.4. The determination of the value of property involves a determination of the most appropriate method of valuation, which determination in turn depends on a number of factors. In the case of shares, those factors include “...the purpose for which the valuation is made, the nature of the shareholding, the character of the company’s business, its capacity to earn profits and the net value of its assets” (*Mallet and Mallet* (1984) FLC 91-507 per Gibbs CJ at 79,121).
- 24.5. It is the shareholding of the party, as opposed to the assets of the company, which must be valued (*Gamer and Gamer* (1988) FLC 91-932 at 76,743).
- 24.6. **Whilst the primary test is that of a hypothetical prudent purchaser (*Gamer and Gamer* (1988) FLC 91-932 at 76,743), it is the case that for the purposes of Family Law, “...the present commercial or capital value of shares in a proprietary company may not reflect their value to the spouse, who either has control after divorce, or who stands ultimately to benefit from them, or control them after the death of generous parents” (*Reynolds and Reynolds* (1985) FLC 91-632 at 80,111).**

¹³ [2000] FamCA 308.

¹⁴ As cited in *Aitken v Murphy* [2013] FamCA 3 at [404].

24.7. In proceedings under the Family Law Act, “...the value to be ascribed to shares in a family Company must be a realistic one, based upon the worth of the shares to the party himself or herself” (*Harrison and Harrison* (1996) FLC 92-682 at 83,087; see also *Turnbull and Turnbull and Others* (1991) FLC 92-258 at 78,738). [Emphasis added]

Although there have been a number of single judge decisions applying the concept, other than *Wender & Wender*¹⁵ where the Full Court was constituted by Strickland J dealt with below, there have been no subsequent Full Court decisions dealing with matters of principle in relation to the concept of “value to owner”.

Meaning

Value to owner is a standard of value, it is not a method of value. It is the objective of the valuation exercise. The objective of “value to owner” is to be considered in contradistinction to the objective of “market value”.

The concept of “value to owner” considers the worth that ownership of an asset may have for the ‘owner’, i.e. party to the proceeding.

While the authorities which consider “value to owner” reject market value on the basis that it is not ‘realistic’, there is no accepted definition of “value to owner”. In a recent decision of *Gare & Farlow*,¹⁶ the following was suggested by Forbes J:

180. The “value to owner” approach to valuation is intended to capture the reality of the situation by bringing to account any special or additional economic benefit which is conferred upon the business owner by his or her control of the shareholding. It is intended to include within the value any commercial, financial or other advantage which accrues to the owner which might not necessarily be available to any hypothetical third party purchaser. Such benefits might include the right to receive profits or dividends, the flexibility and autonomy of self-employment, control and ownership of business assets, the

use of a company car, use of the company for contribution to household expenses and bills, the use of a loan account, the ability to tax plan and so on. There may be other benefits such as security of tenancy due to a special relationship with a landlord or the ability to expend funds in a way which benefits other family members. A valuation which assumes a negligible or only net asset value because the business is “unsaleable” is artificial because it ignores the reality of benefits which accrue to the owner.

181. ...The value to owner approach on the other hand considers risk from the perspective of the existing owner and assumes that the party wishing to hold on to the asset will do so in good faith and seek to maximise the value that could be obtained in a hypothetical sale. Value to owner might reasonably assume a notional sale of the business to the existing owner at its highest realistic value. [footnotes omitted]

The concept of “value to owner” says nothing about the method by which the value of an asset is to be determined. The methodology used when the objective of the valuation exercise is either “value to owner” or “market value” may well be the same. In relation to shares in a company, the methodology to be used in either case may involve the capitalisation of earnings or a determination of the net asset value.

When “value to owner” applies

As an objective in determining the value of an asset for Family Law purposes, arguably “value to owner” applies in all cases. However, it is not referred to in the vast majority of cases. It may be assumed that this is because the market value of an asset, where a market exists, represents its value to the owner.

The authorities show that express recognition of the objective of “value to owner” arises most commonly in cases where the asset the value of which is being considered is a minority shareholding, usually in a family company, and the sale of which is either restricted or prohibited by the terms of the applicable Constitution. The concept is also able to be applied in respect of interests in professional partnerships.

15 [2017] FamCAFC 48.
16 [2023] FedCFamC2F 109.

Some notes of caution/curiosity

At least two cases have highlighted how the concept of “value to owner” has been attempted to be applied inappropriately.

In *Aitken v Murphy*,¹⁷ one of the matters in dispute was the valuation of a business and trust. The business had been established by the respondent prior to the commencement of the relationship and was operated through a trust. The strength of the business was found to be very much the personal reputation, experience and knowledge of the respondent and his operational control. There was no challenge to the position that the business was financially very successful, that it afforded a superior standard of lifestyle to the respondent and that it would most likely, almost certainly, continue for the foreseeable future subject to the continued effort and motivation of the respondent. Evidence as to value was given by a single expert business valuer. He provided evidence as to the value of the business on the basis of the capitalisation of future maintainable earnings and separately it’s worth to the owner. Those values were approximately \$1,735,000 and \$2,098,000 respectively, a difference of \$363,000 between the two. Curiously, the valuer was not required for cross examination.

Submissions were made on behalf of the applicant that, as the business was to be retained by the respondent and the respondent was its sole owner, it was appropriate to include in its value the benefits of control and sole ownership and thus its “true value to its owner”.

This was rejected by Young J who found that there was no tangible benefit to the respondent of owning the business beyond the present value of its future maintainable earnings, that is its fair market value. It was found that no value could be afforded to a level of satisfaction that an owner might receive “from going about doing his business”.

In *Wender & Wender*,¹⁸ Strickland J was considering an appeal where the trial judge had accepted a valuation by an expert accountant of a professional practice conducted by the husband. That valuation

was said by the expert to be on the basis of “value to the owner”. The basis for the valuation was to assess the value of the income stream assuming the practice had a limited life (or at least the husband would operate the practice for a limited period) and then attempt to sell the practice. The expert proceeded on the basis of the husband’s evidence that because of his age and health, he would only work for five years more.

The valuation produced on that basis was substantially less than the market value of the business based on a capitalisation of future maintainable earnings, evidence of which had been provided by another expert. It was found that there was a relevant market for the business and there were no benefits to the husband that may not be available to third party purchaser that needed to be taken into account. As Strickland J observed, the major flaw in applying the concept of “value to the owner” in that case was that the value arrived at was less than the market value and that the husband could simply sell the business for its market value and achieve far more than the “value to the owner”.

One case which highlighted a matter of some curiosity in this area was the decision of Cronin J in *Ledarn & Ledarn*.¹⁹ In that case there was a business the value of which had been agreed at the commencement of the final hearing to be worth \$8 million. Each of the parties contended that they should retain the business as part of the final orders. When the wife’s case was opened, she contended that the business was worth \$10 million to her and that she would take it at that value.

Cronin J queried whether this constituted bargaining by the wife and, even if it was, whether it distracted attention from the proper functions of the court. He went on to find (at [80]):

In my view, it probably was bargaining or trying to make the wife’s position more attractive but the value is still something for the Court to decide on the evidence. Here, the “offer” would have the effect of making more money available to the husband if the wife satisfied the other issues that enabled the Court to decide she should retain the business. In my view, it is important to examine how the value of something affects the just and equitable outcome.

17 [2013] FamCA 3.

18 [2017] FamCAFC 48.

19 [2013] FamCA 858.

After canvassing the relevant authorities in relation to “value to owner”, his Honour held:

84. Whichever value a trial judge ascribes to the shares in a company, the value must be realistic having regard to what the person who is retaining them intends to do with them. Here, there is no question that the wife intends to retain the business and to continue to make money from it.

85. It is possible to conceive of a situation therefore where the value to one party is quite different to another. The fact that both valuers agreed on a value may also be irrelevant if the methodology they used is designed to take into consideration that the hypothetical purchaser is contemplating continuing to trade rather than a winding up or a sale of a business. Whilst the usual concept of value for market disposal purposes can be and usually is the appropriate figure, in my view, that ought not be applied here because it is not the wife’s intention to sell and she clearly indicates that this business is worth much more to her than that hypothetical value ascribed by the valuers. What is important is that the value is just and equitable to both parties (see the observations of Mason J in *Mallet and Mallet* [1984] HCA 21; (1984) 156 CLR 605).

His Honour then concluded (at [86]) that if the just and equitable outcome was that the wife should retain the business (not because she was the highest bidder) then the value she ascribed to the business was the appropriate value to be used in determining the orders to be made.

Key practical considerations

In discussing the principles after canvassing the relevant authorities, Warnick J in *Ramsay* made a number of observations (at 83-999) when considering the application of the concept of “value to owner” to a minority shareholding. These observations remain apposite and provide practical guidance in the application of this concept. Adapting these observations to assets generally:

a. a question to be answered in each case, and as to which expert evidence may be admissible, is

whether there is a market for the asset;

- b. if there is a market, evidence of the market value is highly likely to be relevant, even if there is no intention to sell;
- c. it is however, unhelpful for valuations to focus on the lack of a market in establishing a value to the owner. Any allowance for lack of realisable value is best made by the Court, in all the circumstances of the case, particularly the presence or absence of other assets which are disposable;
- d. in cases where there are no realisable assets, the lack of market value of the asset will usually be critical, not only to the “division” of property, but perhaps even more so, to the orders made;
- e. if, on the facts of the case, in relation to a minority-owned interest there is any prospect of the minority owner gaining control, the question of the probabilities of that event is likely a question for the Court. If that is so, all that a valuer ought be concerned with is the value to the party if he/she gains control, as well of course as the value if the party remains a minority owner;
- f. similarly, if there is any issue about them, questions of the probabilities of particular benefits being received by an owner in the future, are likely best left to the Court, but again a valuer ought assess the value of the asset, both on the basis that the benefit is received and that it is not.

What flows from this is that the issue of the objective of the valuation of a particular asset should be considered carefully at the time when evidence is to be gathered.

In circumstances where, as is now usually the case, a single expert is to be engaged, careful consideration needs to be given to the instructions to that expert. The factors that might be said to be relevant to the value of an asset to its owner, particularly where there is no market available for its sale, need to be identified and the valuer needs to be instructed to proffer alternative opinions as to value that reflect findings that may be made by the court at the final hearing.

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1 July 2024

RE-EVALUATING THE MARKET VALUE CONCEPTS IN FAMILY LAW VALUATIONS



**DR HUNG
CHU**

About the author

Dr Hung Chu CFA

Dr Hung Chu is the Senior Technical Director of Lonergan Edwards & Associates Limited, a leading specialist valuation firm in Australia. Dr Chu completed his doctoral degree in Finance from the University of Technology, Sydney (graduated on Chancellor's List for Exceptional Scholarly Achievement in PhD research).

Dr Chu has been responsible for numerous assignments and complex litigation matters for both public and private companies in Australia. In addition to his practical experience, Dr Chu has also been a regular contributor to the professional literature in the area of valuation and its practical implications for various tax and commercial matters. He has published 36 technical papers in various academic and practitioners' journals. Dr Chu is a co-author of the valuation book "Valuations for Tax Controversies", published by Wolters Kluwer.

Abstract

Valuation complexity which arises from the application of the *Spencer* market value concept in a family law context has been the subject of ongoing debate and the focus of much family law litigation. This article focuses on the conceptual valuation issues associated with recognising and allowing for the key person's future personal exertion in assessing the 'market value' of their equity in the subject business owning entity in a family law context.

A mechanistic application of the market value concept set out in *Spencer v The Commonwealth* [1907] 5 CLR 418 ('Spencer's case') and a mechanistic assessment of the notional proprietor's salary without having a proper regard to the specific family context in which the valuation exercise is undertaken may result in the non-proprietor spouse receiving an excessive share of the value of the asset pool in a property settlement.

Introduction

In many family law cases, one of the spouses is the principal and key person of a business.

For family law purposes, the valuation context often assumes:

- the key person will continue to own the business and be the key person after the marriage

dissolution,

- the value of the key person's equity in the entity owning the subject business is part of the matrimonial asset pool, but
- the future personal exertion of the key person after the marriage dissolution should not be part of the matrimonial asset pool.

The standard of value typically applied in valuing the key person's equity in the subject entity is market value. The definition of 'market value' in the well-known and widely-accepted sense recognised in Spencer's case ('Spencer market value') is the price that would be negotiated in an open and unrestricted market between a *hypothetical* knowledgeable, willing but not anxious buyer and a *hypothetical* knowledgeable, willing but not anxious seller acting at arm's length within a reasonable time frame.

Valuation complexity which arises from the application of the Spencer market value concept in a family law context has been the subject of ongoing debate and the focus of much family law litigation.

This article focuses on the conceptual valuation issues associated with recognising and allowing for the key person's future personal exertion in assessing the 'market value' of their equity in the subject business owning entity in a family law context.¹

Without properly allowing for the factual continuation of the key person's involvement in and ownership of the equity in the business and the benefits of their future personal exertion on the performance of the business after the marriage dissolution, the 'value' of the key person's equity and hence the 'value' of the matrimonial asset pool for property settlement may inadvertently include part of the value of the key person's future personal exertion. This inadvertent valuation outcome would generally be regarded as being an inequitable outcome for family law purposes.

In re-evaluating the application of the market value concept in a family law context, it is useful to recognise and (re)consider the following issues:

- what really depends on the key person?

- what is its value impact?
- has the key person dependence changed across the developmental stages of the business?
- the nature and composition of a fair financial return for the key person's past and future personal exertion?
- what is the key person's age and health?
- is the 'market' remuneration based notional proprietor's salary conventionally used in assessing 'maintainable earnings' appropriate for determining the 'value' of the key person's equity in a business for family law purposes, taking into account the key person's continued involvement and personal exertion in the business beyond the marriage dissolution?

Key person dependence

There are various aspects to key person dependence, some of which may have more significant implications in some cases than in others:

- expertise: the key person typically has specialised skills, knowledge or experience. If the key person leaves, it may be difficult and/or more expensive to replace them.
- customer and supplier relationships: the key person is typically responsible for creating/building and subsequently maintaining relationships with important customers and/or suppliers. The absence of the key person could lead to disruptions in, or a deterioration of, those relationships and adversely impact the earnings of the business.
- founder's mentality: the key person typically possesses what is referred to as a 'founder's (or proprietor's) mentality'. The key elements of the founder's mentality documented in empirical research² include:
 - substantially higher level of personal engagement and greater motivation/ability to solve customers' problems and provide high quality customer services.
 - front line obsession – the founder's greater motivation to interface with key suppliers and customers, understand and meet

¹ The author previously published (with a co-author) an article on a related subject ('Demystifying the Key Man value concept' *Australian Family Lawyer* Summer 2007-2008).

² Chris Zook, 'Founder led companies outperform the rest – here's why' (Article, 24 March 2016) *Harvard Business Review* <<https://hbr.org/2016/03/founder-led-companies-outperform-the-rest-heres-why>>.

their needs to meet and exceed their expectations.

- owner's mindset – avoiding any tendency to become complacent.

Nature of the business

In an uncomplicated business, say, a metal bashing business, the level of key person dependence is much less than that in a highly specialised business. For less complicated businesses, a reasonably competent operator should reasonably be able to replicate the incumbent proprietor's performance. Thus, a notional 'market' salary of a reasonably competent operator should reflect the notional proprietor's salary ('NPS'). It is not only conventional valuation practice, and but also is correct in valuation principle, to allow for a NPS at commercial market rates if the actual salary package is below (or above) market.

In contrast, in a highly specialised professional services business with a highly motivated outstanding professional or technically skilled proprietor, a reasonably competent operator could not do or has the same level of motivation and founder's mentality to do what the incumbent operator does. In addition, a highly skilled operator, even if a very high calibre person could be hired, they could not just take over the business and continue to operate it without a 'settling in' period of many months, and possibly years.

Thus, for highly specialised professional services businesses, the realistic notional proprietor's salary to create/incentivise the same level motivation, founder's mentality and firm specific knowledge should be much higher. For this type of business, NPS for the high achieving principal/key person is not a notional 'market' salary/remuneration for just another 'average' similarly qualified employed principal. The realistic NPS may contain an element which is over and above the conventional 'market' remuneration based NPS, which needs to be assessed from a valuation perspective on a case-by-case basis.

This NPS differential may also vary significantly depending on the developmental stage of the business.

Developmental stage

In family law valuations, a fair NPS should take into account the development stage of the business. Depending on the nature of the underlying business, the composition of the fair NPS may vary over time as the business moves across its developmental phases.

For a small early-stage professional services business, the NPS largely comprises a high, but nevertheless 'pure' notional 'market' salary/remuneration to incentivise the proprietor (or some notional replacement) to 'create/build' the business and create 'assets' (e.g. enhancing reputations and growing the customer base).

Over time, personal exertion and years of experience may pay off to the point where the value becomes more and more vested in intangible assets e.g. goodwill and customer relationships, and to some degree, some notional replacement employee can continue to 'exploit' the goodwill already developed. Thus, the notional 'market' salary/remuneration for the proprietor may be different to that in the early stages of the business' life.

However, in the case of a highly specialised professional services business, the motivation and founder's mentality of the high achieving principal/key person may remain inextricably linked to both the creation of the intangible assets (goodwill, customer relationships etc.) and the subsequent exploitation of these intangible assets.

The essential point is that assessing the correct NPS in a family law valuation context should be idiosyncratic, not just formulaic.

Valuation complications

The Spencer market value concept is assessed based on a hypothetical agreed sale value of the equity/business between a hypothetical buyer and a hypothetical seller. At a practical level, this is equivalent to a hypothetical change of ownership/control. However, this is generally counterfactual in a family law valuation context where the proprietor (factually) continues to work as the key person and owner of the business beyond the marriage dissolution.

For simpler businesses, NPS is generally easier to assess and assessing business value for family law purposes is less prone to upward distortions

However, for complex businesses, upward valuation distortions for family law purposes can arise from the fact that:

- NPS of reasonably competent operator based on a conventional remuneration exercise understates realistic NPS based on a proper consideration of the contribution to business value of the key person's continued involvement and personal exertion based on business specific and incumbent owner specific characteristics.
- in a Spencer's case hypothetical sale by a hypothetical buyer, the (factual) continued contribution from the key person/incumbent proprietor may be subtly 'assumed away'.
- profit multiples derived from actual 'comparable sales' possibly overstate those applicable to a subject business in a family law context. This is due to actual 'comparable' sales reflecting economies of scale in operating costs (including remuneration costs) or other commercial benefits etc. realisable, in many cases, by a large industry 'aggregator'. For example, a large acquirer of a small highly specialised architectural practice with a high-profile architect could retain the existing customer base and exploit it at a much cheaper commercial costs while still generating the same level of revenue/attractive forces by replacing the skills and goodwill of the incumbent principal with its portfolio of similarly well-known architects and corporate reputation (plus the use of a non-compete covenant). However, in a family law context, there is no factual change of ownership nor contemporaneous acquisition of the underlying business at the time of the marriage dissolution to justify allowing for the benefits from an actual sale/acquisition, 'assuming away' the contribution of the continued involvement and personal exertion of the key person/incumbent proprietor and adopting a NPS not reflecting such a factual contribution.

The consequences of these distortions are:

- business value for family law purposes risks being significantly overstated in many cases. Spencer's "market value" assessed based on profit multiples derived from actual 'comparable sales' may reflect a notional immediate monetisation of the customer base of the underlying business

and other intangible assets in a notional sale to a larger acquirer/aggregator. This embedded context (which is often unrecognised) is inconsistent with the factual continuation of personal exertion of the incumbent proprietor in exploiting the existing assets of the underlying business beyond the marriage dissolution,

- a non-proprietor spouse may receive an excessive share of asset pool assessed based a mechanistic use of Spencer market value concept and a mechanistic remuneration exercise without having a proper regard to the specific family context in which the valuation exercise is undertaken. The distorted valuation outcome of such mechanistic uses is to inadvertently allow the non-proprietor spouse to receive a share of the business value reflecting the proprietor's future personal exertion beyond the dissolution of the marriage.

Conclusion

It is necessary to recognise and, where applicable allow for the distinction between a specific valuation context for family law purposes and a hypothetical Spencer market value context focusing on a hypothetical sale/transfer of ownership.

Assessing a fair NPS to assess the value of a business in a family law context, particularly for a highly specialised business with a high achieving key person/incumbent proprietor is a valuation question (rather than a pure remuneration question) because this exercise needs to allow for business specific and key person/incumbent owner specific value contributions and, where appropriate, the development stage of the business.

A lot of the confusion between litigating parties and valuation practitioners could be either avoided or resolved once the above conceptual issues are set out and understood.

ENFORCEMENT IN FAMILY LAW, *STINSON & GOLDSMITH* [2022] FEDCFAMC 1F 524 “A MOST UNFORTUNATE CASE”



**ANGELO
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About the author

Angelo Bistolaridis
Dispute Resolutionist

Angelo Bistolaridis was admitted into practice as a solicitor in 2014 and has worked predominantly in the area of Family Law and Wills & Estates litigation. Between the period 2020 and 2023, Angelo was appointed a Registrar and then Judicial Registrar of the Federal Circuit and Family Court of Australia. In his role, Angelo worked in the Discrete Property List, Financial Only List and Enforcement list as well as undertaking mediations and family dispute resolution conferences. Angelo is a registered AIFLAM Arbitrator as well as a casual lecturer at Western Sydney University where he has taught in the Family Law and Advanced Family Law subjects.

Angelo graduated from the University of Technology, Sydney with a Bachelor of Laws and Bachelor of International Studies, as well as a Graduate Certificate in Legal Practice. Angelo studied at the University of Bologna in Italy as part of his International Studies degree. He presently works in dispute resolution at Myra Aris & Co.

The Hon Justice Carew in her ex-tempore Judgement in *Stinson & Goldsmith* [2022]¹, opens with the words: “This is a most unfortunate case”². Her Honour was dealing with the type of Application that we as family lawyers never do very well – Enforcement. If ever there was a type of application to which one could apply the words “most unfortunate” it would have to be an enforcement application.

For Mr Stinson (“the Husband”) and Ms Goldsmith (“the Wife”), their saga is important reading for those of us who, from time to time, are called upon to effect someone’s entitlement where all other avenues of negotiation have fallen by the wayside. The case deals with the important question: when is something a substantive right capable of enforcement, and when is something a “machinery provision” – an order designed to effect a substantive order - capable of alteration without effecting a substantive right?

The Background

These parties were not strangers to litigation; their case, reached two contested final hearings (the second being a rehearing) and an appeal on 3 separate instances between 2018 and 2023. The facts were these:

1. Carew J made final property orders on 23 July

¹ *Stinson & Goldsmith* [2022] FedCFamC1F 524.

² *Ibid* at [1]

2021³. The final property orders required, *inter alia*:

17. That within 60 days of the date of this Order the parties transfer to the husband all their right, title and interest in **Property E**... [property E was used to operate the Husband’s business].
 18. ... contemporaneously with the transfer of **Property E**... the husband refinance into his sole name the joint EE Bank loan.
 19. That in default of order 18 ... the parties to forthwith do all things necessary to sell **Property E** ... with the net proceeds of sale paid to the husband.
 20. That the husband pay to the wife within 60 days of the date of this Order the sum of \$602,415.
 21. That in default of the husband complying with paragraph 21 herein the husband shall transfer... **Property D** to the wife free of encumbrance and the wife is to pay the husband within a further 60 days the sum of \$447,585.
2. On 20 August 2021, the Wife filed a Notice of Appeal in relation to the 23 July 2021 orders and served it on 1 September 2021.
 3. The Husband sold two investment properties and made arrangements to borrow the balance so as to effect the 23 July 2021 orders – the orders required him to pay the Wife by 21 September 2021. After being served the Notice of Appeal he sought consent from the Wife to stay that part of the orders referred to above.
 4. On 13 September 2021, the Wife refused the request for a stay and on 17 September 2021, the Husband filed for an urgent stay application which was listed on 1 October 2021 despite a request for the Application to be listed prior to 21 September 2021. It is of note that the Wife refused a request for the parties to jointly contact the chambers of Carew J directly on 20 September 2021 to list the proceeding before

Her Honour prior to 21 September 2021.

5. By 1 October 2021, when the stay application was heard, the Husband was already in default – Carew J reserved her decision and on 8 October 2021, before a decision was given, the parties entered into a consent order to stay the above orders on certain conditions.
6. On 30 June 2022, the Appeal was dismissed.
7. On 4 July 2022, the Husband sought to arrange settlement with the Wife pursuant to final orders and the Wife suggested settlement within seven days in response.
8. On 6 July 2022 the Husband proposed a settlement on 15 July 2022.
9. On 8 July 2022, the Wife sought to rely on the previous default of the Husband (from September 2021) and pressed for sale of Property E, transfer of Property D and payment to him of the sum required under Order 22.
10. On 15 July 2022 the Husband filed an Application – Enforcement and so did the Wife on 20 July 2022. Under the final orders they each sought to enforce, there was provision for the parties to list the matter before Her Honour under a “liberty to apply” order.

The Enforcement

The question before Her Honour was whether or not, the “default” by the Husband, in his failure to pay on time, created substantive rights in property D for the Wife.

These questions arose in a context of various precedents dealing with machinery provisions relevantly in *Molier & Van Wyk*:

When the court has made an order (... under s 79) settling or altering interests in property, it is established that the order may not be varied as to its substance ... The court can, under general liberty to apply (or otherwise), make orders to give effect ... by altering its provisions in some manner which does not affect the parties’ substantive rights.⁴ ... This Court ... has power to enforce the order and to modify the machinery provisions of the order to effect enforcement

3 *Stinson & Goldsmith (No.2)* [2021] FamCA540.

4 [1980] FamCA 85 at 25.

provided that this does not affect the substantive property rights of the parties ...⁵

And in *Ravasini*:

In determining whether or not an order may be varied as a machinery order the enquiry must be firstly as to what part of the order is the substantive order and what part or parts of it merely follow that order as a necessary consequence ...⁶

In varying the order to extend the Husband’s time for compliance, Her Honour rejected the Wife’s argument that substantive rights had been created in her favour on the Husband’s default.

Her Honour first rejected this proposition on the basis that she deemed the timing of a payment by the Husband to be a machinery provision which could be changed because the payment itself, and its timing, were put in place “to implement the clear intention of the final order”⁷ which Her Honour illustrated with reference to paragraphs in her own final judgment which made clear that the Wife was not to retain any of the Husband’s business properties and the parties should not remain neighbours if possible (this being the effect of the default orders).⁸

The “unforeseen eventualities that occurred”⁹ (i.e. the late listing of the stay) contributed to the failure to implement the order but the husband “took all reasonable steps to implement the final order”¹⁰.

For much the same reasons, Her Honour proceeded to deal with the Enforcement before her by extending the Husband’s time for compliance pursuant to Rule 11.07 (e).¹¹

The Appeal & the Lesson¹²

The main question raised on Appeal was whether Carew J’s varying the time for compliance took away the Wife’s substantive rights to Property “D”.

On Appeal McClelland DCJ & Strum J and Riethmuller J gave separate judgments; their

Honours differed on the approach taken by Carew J in relation to amending the final orders but agreed on the dismissal of the Appeal.¹³ The Full Court did not use the opportunity to lay down a guide as to how to approach enforcement or the varying of machinery provisions, with the majority expressing a difference in opinion with the Full Court in *Bray & Bray*.¹⁴ However, the First Instance and Appeal judgments give a number of considerations to be had by family lawyers whenever enforcing substantive rights for their clients:

1. Identify all that one is required to do under an order that one seeks to be enforced and do it prior to seeking to enforce it – ensure that a party has taken “all reasonable steps to implement the final order”.

The approach taken by the Husband in *Stinson & Goldsmith* raises questions about whether or not he lost substantive rights by failing to carry through with the final order; Riethmuller J’s judgment requires some deep consideration because in these circumstances, the Husband actually refused to carry through with the final order whilst there was an outstanding Appeal.¹⁵ Although the Husband was being commercially sensible in seeking to stay the orders until the Appeal was determined, the clear intention of the Orders required the Husband to pay a sum by a set date and this occurred in circumstances where the Wife was ready to settle pending her Appeal. It is certainly understandable why the Husband stopped trying to abide by the final orders once the Appeal was raised but it would appear questionable whether he did take *all reasonable steps* to implement the final order having refused a settlement of the order and having failed to enforce that order before a stay was granted.

2. At least McClelland DCJ & Strum J appear to have endorsed the reference made by Carew J to her original Judgment to extract an intention from the orders. Citing *Besanko J in Polyaire*,¹⁶ it at least seems that their Honours are promoting an approach to enforcement that gives

5 [1980] FamCA 85 at [21].

6 [1982] FamCA 62 at [906] & [907].

7 *Stinson & Goldsmith* [2022] FedCFamC1F 524 at [35].

8 *Ibid* at [36].

9 *Ibid* at [38].

10 *Ibid*.

11 FCFCOA Rules 2021 (Division 1) (Cth).

12 *Goldsmith & Stinson (No 2)* [2023] FedCFamC1A 25 (15 March 2023).

13 it should be noted their Honours were united on the effect of the Wife entering a stay order with the Husband by consent – this ultimately doing away with the Appeal.

14 (1988) FLC 91-968; [1988] FamCA 22.

15 *Stinson & Goldsmith* [2022] FedCFamC1F 524 (22 July 2022) at [7].

16 *Polyaire Pty Ltd v K-Aire Pty Ltd & Ors (No 4)* [2007] SASC 36

consideration to the reasons behind the orders when there is a dispute as to whether or not an order is substantive or machinery in nature.

3. The effect of a default and whether that default alters the entitlement of a party from one substantive right into another must be considered deeply before an order can be made changing the time effecting an order – at least in *Stinson & Goldsmith*, there was an arguable case that the Wife’s entitlement under the final orders changed from a cash payment to the transfer of property at the expiration of a set-period which, at the time of enforcement of those orders, may or may not have had a value different to the cash sum she was meant to be paid. Although their Honours appeared to distinguish the present case from *Bray*¹⁷ in part on the basis that a failure to pay by a specific date in *Bray* led to the nature of the other party’s entitlement being transformed into a percentage of the proceeds of sale and not the payment of a cash sum (thus making the timing requirements of the orders substantive), there is some argument to be made that in *Stinson and Goldsmith*, the Wife’s final entitlement was similarly changed upon default and so the alteration of the order to change the amount of time given to the Husband to comply with the order did have the effect of also changing the nature of the Wife’s entitlement - leaving aside all the “unforeseen eventualities”.
4. The court seems to also have been informed, at least in part, by the conduct of the parties in relation to the orders - the Wife’s slow service of a Notice of Appeal, the mention of the Wife being an “officer of the court” in that context, and the Wife’s refusal to approach the chambers of the relevant Judicial Officer to hear a stay urgently (a day before the Husband would be in default of the final orders) are matters that are at least mentioned and there is an underlying sense that the Wife’s conduct was partly to blame for the Husband’s lateness and default. What one can extrapolate is that a party seeking to benefit from a final order or enforce a substantive right or seek an alteration of the timing provisions of final orders must not be seen as having caused a delay or default. It would be a nonsense for a party to benefit from a substantive order that was created as a result of that same party’s delay or obstinance – this perhaps would also enlighten a court in determining whether an order,

in specific context, is a mechanical order or a substantive order.

5. Importantly, at first Instance, Carew J relied upon Rule 11.07 (e) of the Rules to alter the timing provisions of the final order. This did not merit mention on Appeal but it would appear that the power of 11.07(e) expands not only to creating ancillary orders to assist with enforcement but also creating orders capable of altering or extending the time for compliance with an order.

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¹⁷ [\[1988\] FLC 91-968](#); [\[1988\] FamCA 22](#)

CASE NOTE: *AITKEN & AITKEN* [2023] FEDCFAMC 1A 69



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About the author

Therese Borger

Therese Borger accepts briefs as Counsel (and as a Nationally Accredited Mediator) in matters involving all aspects of family law and related jurisdictions. She holds undergraduate degrees in both Arts and Law, and a Masters of Applied Law (Family Law). This year (2023) she has been included by Doyle's Guide in its annual list of leading family law junior counsel for Victoria.

Upon joining the Victorian Bar, Therese read with Dan Sweeney, with Minal Vohra SC as her senior mentor. She regularly appears in the Federal Circuit and Family Court of Australia in parenting and property disputes, preferring to keep a balanced and challenging practice in both. Aside from her busy practice in Court, Therese is well regarded as an astute negotiator and creative problem solver, skills put to good use as both Counsel in mediations and in her role as Mediator.

The Full Court's consideration of the role of a Court in drafting binding orders, and an appeal against a 'buy out' order in the face of an application to sell the relevant entity.

Facts

The parties were married for 28 years from 1990 to 2018. At the time of trial, they had three adult children. During their marriage, and through their equal efforts, the parties amassed wealth in the sum of approximately \$80 million.

The parties agreed it was just and equitable that their respective interests in property be adjusted such as to affect an overall equal division of their assets. They disagreed on the value ascribed to certain property, how the Court should take into consideration taxation issues, and most relevantly, the value and identification of the parties' interests in the company 'D Pty Ltd'.

D Pty Ltd was valued by JJ Group on 4 March 2022 at \$45,514,742. It was acknowledged the valuation did not include some cash at bank, and issues of indebtedness including potential taxation liabilities for Fringe Benefits Tax and Capital Gains Tax in the event of the business being sold.

At trial, the husband contended that D Pty Ltd be sold and the proceeds divided equally between the parties. Alternately, the wife contended that the husband purchase her interest in the company for \$26,751,023. Wilson J found in favour of the wife and ordered the husband 'buy out' the wife. The husband appealed that decision.

The Court's role in drafting binding orders

As a preliminary matter, the Full Court took the opportunity open to it on the facts to consider the role of the Court in drafting binding orders. This was in circumstances where at trial, Wilson J, on three separate occasions, directed the parties to provide a minute of order reflecting his reasons. Unsurprisingly, the parties were unable to agree on a minute of order and on no occasion as so directed was a joint minute of order delivered to the primary judge's chambers. Upon the third occasion, Wilson J stated in his reasons "it's not my job to draft the orders; it's the representatives' jobs."

Eventually on 16 November 2022, Wilson J made final orders in the terms submitted by the wife. Notably, order 23 required the husband personally to pay the wife the sum of \$26,751,023 for the acquisition of her interest in D Pty Ltd. It was common ground that Wilson J did not include a default sale order in the event the husband could not comply with order 23.

In the appeal, the Full Court opined that

[r]epeatedly delegating responsibility to the parties to conceive the nature and form of the orders required to quell the controversy between them arguably amounted to an abdication of judicial duty...

Disagreeing with Wilson J's assessment of the scope of his 'job', the Full Court referred to *Wilson and Ors v Minister for Aboriginal and Torres Strait Islander Affairs and Anor* (1996) 189 CLR 1 at 11, in which the High Court described the function of Commonwealth judicial power in the following terms:

the function of the federal judicial branch is the quelling of justiciable controversies... This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion (*Fencott v Muller* (1983) 152 CLR 570 at 608). The result is promulgated in public and implemented by binding orders.

The Full Court clarifying further, that ss79 and 81 of the *Family Law Act 1975* ("the Act") require a judicial officer to determine the cause of action and make orders that are appropriate, just and equitable, and as far as practicable able to finally end financial relationships.

The ground of appeal – to 'buy out' or sell

At the appeal, the appellant proceeded on a singular ground, that the primary judge erred in making order 23 in that:

- a. "[h]is Honour failed to articulate the reasons by he rejected the Husband's proposal for a sale of [D Pty Ltd] insofar as the Trial Judge failed to address the capacity of the Husband to make the additional payment to the Wife necessitated by that rejection"; and
- b. "[h]is Honour did not have any evidence before him that the Husband had the capacity to pay the wife the sum required."

The ground incorporated two complaints: the legal error of inadequate reasons and the discretionary error of failing to take a material consideration into account.

In summary, the husband argued that:

- The evidence before the Court as to the value of assets held by the husband (in his personal capacity alone) amounted to \$1,128,188, a sum far less than required to make the payment.
- There was no cogent evidence before the Court that the husband could borrow or secure funding to make the payment ordered.
- Having regard to the failure of the primary judge to engage with the issue of the husband's capacity to fund the payment ordered, the primary judge provided insufficient reasons for why he rejected the husband's proposed sale of D Pty Ltd.

In summary, the wife argued that:

- The issue of the husband's capacity to meet the payment was not an issue of controversy in the proceedings.
- The husband failed to draw the primary judges' attention to his inability to pay the lump sum required at trial.
- The husband's capacity to pay the sum was not a 'fundamental and obvious' issue requiring the primary judge's consideration (by reference to *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 at [120]).

- In any event, it can be reasonably inferred by the primary judges' reasons that he concluded the husband had capacity to pay the lump sum ordered.

The Full Court acknowledged that the husband did not give evidence in chief as to his capacity to make any lump sum order made. It was noted however, that the valuation of D Pty Ltd was received after the filing timetable allowing the parties to file their evidence in chief. Accordingly, counsel for the husband at trial made it clear in both opening and closing the husband's case that the husband contended he did not have capacity to 'buy out' the wife's interest in D Pty Ltd. For this reason, the Full Court accepted that the issue was clearly before the Court.

Referring to *Macedonian Orthodox Community Church*, the Full Court wholly rejected the wife's argument that the husband's capacity to pay the sum ordered was not a 'fundamental and obvious' issue. Having satisfied himself of the 'justice and equity' of the order, the primary judge by the language of both s79(1) and s79(2) was required to make orders that were 'appropriate' (referring to *Zao & Lee* [2019] FamCAFC 196 at [48]).

Relevantly, the primary judge identified two key facts. First, that the husband had limited assets in his personal name. Second, that the value of the parties' property ranged between \$79,925,966 and \$82,522,809, with the larger sum being subject to taxation liabilities which required assessment by an expert. Further, the Full Court acknowledged that the assets held by D Pty Ltd were such that liquidating to fund any payment may trigger other uncalculated costs such as Capital Gains Tax. The failure to make any default clause requiring the sale of D Pty Ltd further added to the impractical nature of the order. The Full Court concluded the husband's capacity to pay was not only 'fundamental and obvious' but an issue that should have, but did not, receive adequate consideration in the proceedings.

Finally, with respect to the wife's argument that the primary judge's consideration of the husband's capacity to pay could be inferred from his reasons, the Full Court disagreed. It reiterated the principles relating to inferences which may be drawn in

civil cases and here, concluded that without any facts established by admissible evidence as to the husband's capacity to meet the payment, no inference as to capacity could be drawn from the primary judge's reasons.

Having regard to the above, the Full Court concluded that

the primary judge had an obligation to clearly explain why, despite the submission by the husband that he lacked the capacity to pay the required sum to the wife, the primary judge made order 23 which required the husband to do just that.

Concluding that he had not, the Full Court upheld the husband's appeal in toto.

Remittal vs re-exercise

The Full Court briefly considered the wife's application for it to re-exercise discretion upon error being found. In summary, the Full Court agreed with senior counsel for the husband that because order 23 was

the final piece required to give effect to the transactions specified in the orders it was not possible for the Full Court to re-exercise discretion in respect to only order 23 without receiving evidence and submissions regarding the operation of the orders as a whole.

The matter was accordingly remitted.

CASE NOTE: *SAMARAS & ALLEN (NO 3)* [2023] FEDCFAMC 1 F 787



About the author

James Eley

James Eley is a Barrister and Nationally Accredited Mediator at the Victorian Bar.

Since his admission to practice in 2012, James has practised exclusively in the area of Family Law, initially at O’Sullivan Davies (Perth) and later Gadens (Melbourne). James was called to the Bar in 2019.

James accepts briefs in the areas of Family Law and related jurisdictions in all Courts within Australia.

A case highlighting the importance of strict compliance with undertakings given to the Court.

Summary

This case concerned a parenting dispute which had a long history before the Court. The dispute as between the parties is not pertinent to a consideration of this decision, rather events arising from the breach of an undertaking given by mother’s solicitors in respect of documents produced pursuant to a subpoena.

The mother was represented by what was described in the judgment as a “big firm”. Solicitor A (the solicitor the subject of the decision whom breached the undertaking) was a very experienced legal practitioner holding the position of Special Counsel in the firm. Solicitor A was admitted in 2012 and is an Accredited Family Law Specialist.

The outcome of this recent decision of Brasch J was that the matter was referred to the NSW Legal Services Commissioner for consideration. This may include considering whether Solicitor A’s conduct amounted to unsatisfactory professional conduct.

This case provides a timely reminder to legal practitioners as to their ethical obligations and the importance of complying with undertakings given to the Court.

The Case

During the course of the proceedings, a subpoena was filed by the mother’s solicitors on 17 July 2023 on behalf of the mother directed to the Australian Federal Police (AFP). On 25 July 2023, an undertaking was given the firm of solicitors representing the mother on the firm letterhead which provided (reproduced at [19] of the

judgment):

1. I will not provide, disseminate or otherwise distribute electronic copies of the subpoenaed documents produced in proceedings number SYC5524/2017 by the Australian Federal Police (either electronically, in printed format, or otherwise) to my client or any other person, save for my agent or such other person directed by me to complete the inspection on my behalf;
2. Upon inspecting the subpoena documents, I will ensure that they are destroyed and permanently deleted from any storage or retrieval system (whether held by email, cloud storage or otherwise) at the conclusion of the final hearing in this matter; and
3. In the event I fail to comply (or reasonably suspect that I have failed to comply) with this undertaking (even as a result of circumstances entirely beyond my control), I will immediately notify the Registrar of the Court in writing.

I acknowledge that this undertaking has the same effect as an order of the Court. I acknowledge that if I breach this undertaking I may be guilty of contempt of court and punished by a fine or imprisonment.

Date: 25 July 2023

It is noteworthy that Solicitor A did not personally give the undertaking. The undertaking was given by a different solicitor of the firm.

A Notice of Request to Inspect was later filed by the mother’s solicitors on 1 August 2023 to inspect the documents that were produced by the AFP. Leave was granted to the parties to view the documents only.

On 23 August 2023, the mother’s solicitors received 4 documents relevant to the subpoena directly from the Australian Government Solicitors (AGS), the solicitors for the AFP. That correspondence was not copied to the father’s solicitors or the Independent’s Children’s Lawyer (ICL). These two irregularities should have been considered by the mother’s solicitor (being that the documents should not have been sent directly to the mother’s solicitors and the correspondence should have

been sent to all parties in the proceedings).

What should have occurred is that the documents sent to the mother’s solicitor should have been returned to the AGS, all copies deleted, and the AGS should have been advised to send to documents to the subpoena section of the Court. Instead, on 24 August 2023 the mother’s solicitor (Solicitor A) sent the documents to the mother. This was a clear breach of paragraph 1 of the undertaking.

Further compounding the breach of the undertaking, Solicitor A delayed in advising the Court as to the breach as it was not until 30 August 2023 (approximately a week after the breach on 24 August 2023) that the Court was advised by email of the breach. This was a breach of paragraph 3 of the undertaking which required the Court to be immediately notified of any breach of the undertaking. The email sent by Solicitor A to the Court on 30 August 2023 was not sent to the father’s solicitors or the ICL, which failed to comply with the Court’s “Communicating with Chambers Guidelines”.

Apologies were proffered to the Court by the mother’s solicitors including Solicitor A and evidence led that the firm had taken appropriate steps to ensure that no future breaches would occur. It was conceded by the mother’s solicitors that the actions of Solicitor A were serious.

In deciding to refer the matter to the NSW Legal Services Commissioner, Brasch J stated at [38]-[39] that:

38. As I said at the start, I accept that everybody makes mistakes. However as enumerated above, this was not just one error, but a series of serious errors of judgement.

39. Judicial officers must be able to trust the words and actions of all officers of the court. Judicial officers must be able to rely upon undertakings being complied with. Equally, officers of the court must also be able to trust the words and actions of other officers of the court and their compliance with undertakings proffered.

As stated by Brasch J at [44]:

... “Ethical obligations are ethical obligations. Undertakings are solemn promises to courts.”

This case highlights the importance of strictly complying with undertakings which are routinely given by solicitors in respect of the release of documents, especially those provided electronically in a post-COVID environment.

If you were the Federal Attorney-General for a day, how would *you* fix the Australian Family Law System?

Answer that question to apply for the *Family Law Section Pro Bono and Not for Profit Scholarship* for family law practitioners.

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This scholarship is to acknowledge the important work done by those who work in the access to justice and pro bono sectors.

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Closing Date
1 July 2024

AN ACCIDENTAL ENCOUNTER WITH LEGAL HISTORY



**GREG
HOWE**

About the author

Greg Howe

Greg has been a member of the Family Law Section Executive since November 2008. He is a director of the firm Howe Jenkin, a specialist family law firm in the Adelaide CBD, and is a senior Adelaide family law practitioner with over 38 years of experience.

He has acted primarily in financial matters and has particular experience in those matters involving companies, businesses, and trusts and more complex financial issues including property disputes in de facto relationships.

Greg is also a fellow of the International Academy of Family Lawyers (IAFL) and is one of only three practitioners in South Australia who are members of IAFL. In April 2008, Greg chaired the Organising Committee for the successful 13th National Family Law Conference held in Adelaide.

In 2013, I was the Family Law Section's Representative on the Law Council of Australia's Access to the Justice Committee.

I found myself at the Law Council's offices in Canberra on 23 October 2013, for a meeting of the Access to the Justice Committee to be held in the LCA boardroom. Having arrived from Adelaide an hour or so before the start of the meeting, I noticed on the bookshelf an old leatherbound book which, on closer inspection, was the visitor's book for Law Council, which commenced in November 1964. Upon opening the book, a number of treasures revealed themselves.

The first entry, on 28 November 1964, was by John R. Kerr, then the inaugural President of the Law Council. This is the same person who subsequently became one of the more well-known Governors-General of Australia! Two entries further down, on 21 December 1964, appears the Attorney-General of Australia, who signed as "Billy Snedden".

One of the remarkable entries appears on 31 July 1967. The entry is simply described, "Denning M.R.". It was, of course, the great Lord Denning, Master of the Rolls, and one of the greatest judicial figures of modern times. Immediately under Lord Denning's signature appears that of his wife, Joan Denning.

There then appear two significant entries. The first is on "3.VIII.71" and is inscribed simply "Diplock, House of Lords, London" and the next entry, on 19 July 1973, appears as "Widgery, Lord Chief Justice of England".

In inscribing their Lordships' surnames only, I was reminded of that wonderful episode of Fawlty Towers

when the confidence trickster who preys on poor Basil signs the hotel guest book as “Melbury”. When Basil snappily instructs him to use both names, he reveals to Basil that, as Lord Melbury, he usually just signs as “Melbury”, following which Basil grovels and fawns all over the imposter.

Another learned visitor inscribed his name in the book on 18 July 1975. Lord Geoffrey Cross of Chelsea was a Lord Justice of Appeal from 1969 until his retirement in 1975, the year of his visit to Australia.

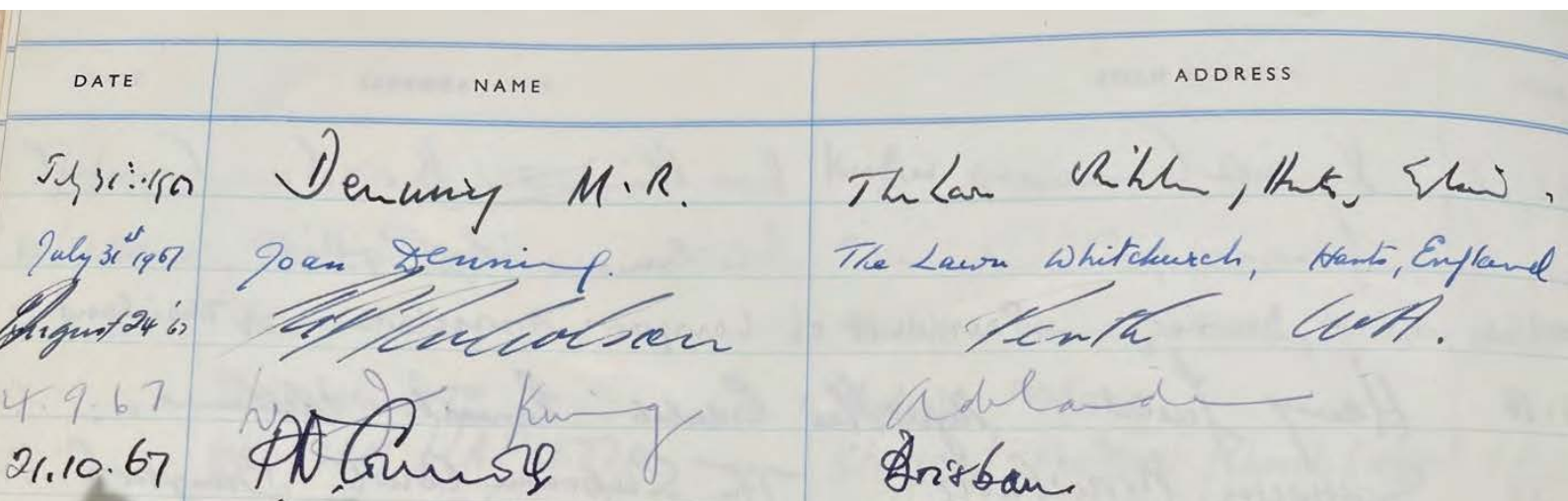
A few pages later appears the signature of another of the great law lords, Lord Scarman, who inscribed his name in the book on 10 September 1980.

As readers might imagine, I was highly excited to note these entries, and I determined that this was the only time in my life where I would have the opportunity of entering my name in the same book as these titans of the law. With great pride, I then signed my name, noting my address as the SA representative of the Family Law Section.

When other members of the Access to the Justice Committee arrived, I breathlessly announced my discovery to them, and all of them signed the visitor’s book as quickly as they could.

As it turned out, later that day, the Access to the Justice Committee meeting received a visit from the then Attorney-General, the Honourable Mark Dreyfus QC (as he then was). Before he addressed our meeting, I informed the Attorney of my discovery that day. The Attorney could not produce his fountain pen quick enough and was as excited as any of us to inscribe his name in the visitor’s book!

Below is a photo of these notable entries.



A SECTOR REUNITED FOR THE NATIONAL ACCESS TO JUSTICE AND PRO BONO CONFERENCE



**NATALIE
COOPER**

About the author

Natalie Cooper

Natalie is a Policy Lawyer at the Law Council of Australia. As a member of the Courts, Justice and Integrity Team, Natalie engages with a range of civil justice issues, including family law, access to justice, judicial matters and privacy law. She provides secretariat support to the Law Council's Access to Justice Committee, Young Lawyers Committee and Rural, Regional and Remote Committee.

Before commencing at the Law Council in early 2022, Natalie worked at the Commonwealth Attorney-General's Department. She participated in the 2020 Graduate Program, before joining the Family Law Branch as a Legal Officer.

Natalie was admitted to practice in 2020 and holds a Bachelor of Laws (Honours) and Bachelor of Arts from Monash University and a Graduate Diploma of Legal Practice from the College of Law. She is currently undertaking a Master of Public and Social Policy at Macquarie University.

From 21 to 23 June 2023, over 300 people came together for the first time since 2019 to support access to justice for society's most vulnerable at the 8th National Access to Justice and Pro Bono Conference, co-hosted by the Australian Pro Bono Centre, the Law Council of Australia and the Queensland Law Society.

The theme of the Conference was 'Reunited', as the event provided a welcome opportunity for members of Australia's dynamic legal assistance and pro bono sector to reconvene, reflect on the disruption caused by the COVID-19 pandemic, discuss emerging challenges and opportunities, and explore practical strategies to enhance access to justice nationwide.

The Conference, held at the Brisbane Convention and Exhibition Centre, attracted delegates from across Australia, including legal practitioners from the private and legal assistance sectors, judges, academics, public servants and students. More than 60 presenters, with significant expertise and experience across the sector, including in leadership roles, also attended.

In addition, the Conference was an opportune time for the sector to consider the operation and adequacy of the National Legal Assistance Partnership (NLAP) 2020-25—an agreement between the Commonwealth and all states and territories for Commonwealth funded legal assistance—that is currently subject to an independent mid-cycle review by Dr Warren Mundy.



Kicking off with a Welcome Reception on the evening of 21 June, an immediate sense of community and collegiality was apparent as attendees interacted—some meeting for the first time, and others reconnecting. A generous welcome by President of the Queensland Law Society, Chloé Kopilović, set a positive and collegiate tone for the Conference, while a presentation from Trent Wallace (First Nations Advisor, Pro Bono and Social Impact at Ashurst) reminded each attendee of the significant impact of their work on First Nations peoples—an enduring impact that should never be underestimated.

Day One

The first full day of the Conference began with opening remarks from the President of the Law Council of Australia, Luke Murphy. This was followed by a keynote address by the Honourable Chief Justice Susan Kiefel AC, who provided a detailed overview of the history of legal assistance in Australia and reminded delegates of the challenging, yet vital, role they play in this system to ensure access to justice is provided for those who need it most.

The first plenary session, ‘A sector reunited: Where to from here?’, provided a unique opportunity for a panel of representatives from Aboriginal and Torres Strait Islander Legal Services, Community Legal Centres, Legal Aid Commissions and Family Violence Prevention Legal Services to discuss the opportunities and challenges currently faced by the legal assistance and pro bono sector.

The second plenary session, ‘Truth telling, the law and its impact on First Nations people’, provided a sobering focus on the history of legislative development and government policies that have adversely impacted First Nations people, and continue to do so.

The third plenary session, ‘Automated decision-making in the aftermath of Robodebt’, explored the future of automated decision-making in the aftermath of the Robodebt scheme and, in light of evidence presented to the recent Royal Commission into the Robodebt Scheme, investigated how chronic underfunding of Australia’s legal assistance sector has limited its ability to challenge such schemes.

In addition to the plenary sessions, delegates were able to attend specialist sessions with a more interactive and practical focus that were specifically aligned with their area of interest and practice. Four simultaneous session tracks were available: Family law and access to justice, Legal assistance sector, Innovation and reform, and Pro Bono services. Topics for these sessions on Day One included Independent Children’s Lawyers, managing self-represented litigants, the role of human rights legislation in promoting access to justice, responding to the law and order agenda, and access to justice for older Australians.

The dedicated ‘family law and access to justice’ track was made possible by the generous sponsorship of the Family Law Section. These sessions, which consisted of panels of esteemed speakers from the private and legal assistance sectors, were well-attended with high audience participation and engagement, highlighting the clear intersection between the family law system and access to justice issues in Australia, especially in the context of significant reforms to the *Family Law Act 1975 (Cth)*. The Law Council of Australia sincerely thanks the Family Law Section for its significant contribution to the Conference.

The delegates regrouped at the Queensland Art Gallery for the Conference Dinner, where a presentation by the President of the Bar Association of Queensland, Damien O’Brien KC, further instilled a sense of community and purpose among attendees. A keynote address, by Professor Peter Greste, highlighted the importance of the freedom of the press, while providing a cautionary tale of governments attacking journalism in the name of national security.

Day Two

The final day of the Conference commenced with a presentation from Professor Ed Santow, titled 'Community justice in the age of facial recognition: Are we heading towards mass-surveillance?'. This was an eye-opening presentation which illustrated the critical need for Australia's regulatory landscape and privacy laws to keep pace with developments in artificial intelligence and facial recognition technology.

Professor Santow's presentation was followed by an address by the Commonwealth Attorney-General, the Honourable Mark Dreyfus KC MP. The Attorney-General praised the efforts and agility of the legal assistance and pro bono sector in working towards the goal of a fair, affordable and accessible justice system for all. He reiterated the Federal Government's commitment to improving the systems that legal assistance and pro bono providers use to support clients daily. The Attorney-General also emphasised the need to prioritise efforts to remove barriers to justice and ensure that all individuals, regardless of their socio-economic status, have equal access to legal remedies and protections.

Delegates had another opportunity to attend various specialty track sessions on Day Two. Session topics included alternative dispute resolution and family law, the role of the legal assistance sector within a new federal administrative appeals framework, access to justice in regional Australia, and the ethics of pro bono.

The fourth plenary session of the Conference, 'Family violence law reform', explored the role that the legal assistance sector plays in supporting victim-survivors of domestic and family violence and ensuring just outcomes.

The Conference concluded with the plenary session, 'Climate change and the future of legal need', which investigated the role of the law and the legal assistance sector in responding to the complex challenges arising from the impacts of climate change.

What next?

The Conference served to highlight the considerable value of the legal assistance and pro bono sector, and the ongoing difference it makes to Australian communities. However, the largest take-away from the Conference was that the sector is in crisis. An urgent increase in funding is required to increase the availability of legal assistance,



particularly in rural, regional and remote areas, and to attract and retain suitably qualified legal practitioners to these roles.

Following the Conference, its co-hosts released a Statement, calling for:

- a significant increase in funding for all legal assistance providers that increases access to justice for people experiencing disadvantage;
- a priority focus on the issue of rural and remote legal assistance service delivery, with a view to increased investment across the legal assistance sector that focuses on recruiting and retaining practitioners;
- the Federal Government to work with the legal assistance sector to help identify systemic issues and implement change, where access to justice issues exist; and
- recognition of the contribution pro bono support makes within the legal assistance sector, and resourcing of mechanisms to help legal assistance organisations leverage pro bono support for the benefit of the community.

While details for the next Conference are yet to be confirmed, it will be held in 2025 and is sure to be another excellent opportunity for the legal assistance and pro bono sector to reconnect, learn, share strategies and look to the future.

A FAMILY LAWYER'S GUIDE TO COERCIVE CONTROL



**JUDGE KYLIE
BECKHOUSE**

About the author

Judge Kylie Beckhouse¹

Judge Beckhouse was appointed to the Court in 2020 after a long career in the family law jurisdiction, her last role as Director of Family Law services at Legal Aid NSW. She was an accredited specialist in family law and an Independent Children's Lawyer.

Judge Beckhouse was a driving force behind both the establishment and enhancement of family violence legal services including the National Family Advocacy and Support Service. A Churchill Fellow, in 2016 she published her research into the administration of child legal representation schemes internationally. In recognition of her services to women and the law she was recognised as the 2017 NSW Women's Lawyer of the Year.

At the FCFCOA she is a member of the Children's and Family Violence Committees and is referred cases from two specialist lists, Evatt (for high-risk parenting matters) and National Contraventions. She has also served on the Family Law Council and NSW Children's Court Advisory Committee.

¹ The author is a Judge in Division 2 of the Federal Circuit and Family Court of Australia (FCFCOA) in Sydney. Any views expressed in this article are the author's and do not represent the views of the FCFCOA or of other Judges. Views expressed in this article do not indicate how the author would decide a case after having the benefit of evidence and argument.

There is nothing novel about cases involving family violence in Family Law Courts,¹ indeed it represents the overwhelming majority of the work we undertake. But in recent times, inquiries and coronial reports² have highlighted that cases featuring coercive control are more likely to result in extreme and tragic outcomes for families.³

The recommendations they make emphasise the need for heightened awareness of the often subtle and concealed patterns of coercive and controlling behaviour, and the dangers of failing to recognise it.

The family law system's ability to appropriately respond to family violence has momentarily improved over the last decade. Well overdue funding injections have allowed enhancements to the Family Law Courts such as the Lighthouse Project and specialist Evatt List, purpose built risk screening and assessment tools, a quality assurance framework for Family Report writing, and the influx of decision makers, particularly registrars, who assist with the earlier triage and resolution of cases.

- ¹ This term is used generically to describe the Courts comprising Division 1 and Division 2 of the FCFCOA registries.
- ² See for example: [Inquest into the death of Hannah Clarke, Aaliyah Baxter, Laianah Baxter, Trey Baxter and Rowan Baxter \[2022\]](#) Coroners Court of Queensland, and [Inquest into the deaths of John, Jack and Jennifer Edwards \[2021\]](#) NSW State Coroner's Court.
- ³ Analysis undertaken by the NSW Domestic Violence Death Review Team identified that, among 112 incidents of intimate partner homicide that occurred between June 2000 and July 2019, coercive controlling behaviour was a feature of the relationship between couples involved in all but one case. See also: Dr Hayley Boxall, Laura Doherty, Dr Siobhan Lawler, Christie Franks, & Dr Samantha Bricknell (2022) [The "Pathways to intimate partner homicide" project: Key stages and events in male-perpetrated intimate partner homicide in Australia](#) (Research report, 04/2022) ANROWS.

In recent years, services essential to supporting families experiencing family violence and good decision making practices have been integrated into and embedded within the Family Law Courts. Courts (and families using them) can now obtain information early in proceedings about risk via officers from police and child protection agencies co-located in Family Law Courts. Family Advocacy and Support Services, now attached to every court registry across Australia, provide expert legal and social support for families experiencing family violence, including safety planning. The s 102NA cross-examination scheme ensures that no victims of family violence are cross-examined by their perpetrator.⁴

Family law professionals have received high quality training, such as the internationally recognised *Safe & Together* family violence training attended by all family law judges, child experts and registrars. For family law practitioners, this has allowed access to better resources in our toolkits including risk screening and assessment tools, safety plans and knowledge.

What is coercive control?

Family violence takes many insidious forms. This was expressly recognised over 11 years ago when the definition of family violence under the *Family Law Act 1975* (Cth) (“the Act”) was extensively amended to reflect a range of behaviours and situations that may constitute family violence.⁵ The term “family violence” is defined in s 4AB(1) of the Act as “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful.”

Notably, the definition introduced the important elements of behaviour that “coerces or controls” or causes fear. The terms “coerce” and “control” whilst front and centre of the legislative definition of family violence, are not defined in the Act.

4 Whether a party is a victim or a perpetrator is naturally a matter alleged and subject to court findings. But for ease, the terms “victim” and “perpetrator” will be used here. Similarly, while men can and are victims of family violence, the overwhelming majority are women, and to reflect the gendered nature of family violence, victims will be referred to in the feminine. Furthermore, despite the binary nature of the language used in this paper, it is important to recognise that family violence also affects members of the LGBTIQ+ community, despite limited research in this area: Monica Campo and Sarah Tayton, *Intimate partner violence in lesbian, gay, bisexual, trans, intersex and queer communities: Prevalence*, Practitioner Resource, December 2015, Australian Institute of Family Studies; Our Watch, *Primary prevention of family violence against people from LGBTI communities* (Research Paper, October 2017) Victorian State Government.

5 *Family Law Act 1975* (Cth) s 4AB (“The Act”).

The concept of coercive control was explored by Professor Evan Stark, a sociologist and forensic social worker, who defined it as a pattern of domination typically characterised by:

frequent, but low-level physical abuse and sexual coercion in combination with tactics to intimidate, degrade, isolate and control victims.⁶

Recently in the decision of *Carter & Wilson*,⁷ the Full Court was asked to decide whether the primary judge was in error when finding that the mother’s conduct in limiting the amount of time the child spent with the father and her insistence upon such time being supervised, amounted to controlling conduct for the purpose of the definition of family violence as set out in s 4AB of the Act. They did find error but, in doing so, considered the meaning of the words “coercive” and “control”.

Deputy Chief Justice McClelland and Justice Campton jointly considered a range of authorities, including *Illgen & Yike*, where Justice Gill analysed the terms “coerce” and “control”:⁸

123. *Coerce* is defined in the 7th Edition of the Macquarie Dictionary relevantly as:

1. To restrain or constrain by force, law or authority; force or compel, as to do something.
2. To compel by forcible action.

124. *Control* is defined in the 7th Edition of the Macquarie Dictionary relevantly as:

1. To exercise restraint or direction over; dominate; command.

125. The phrase “coerces or controls” is expressed disjunctively. However it may be seen that the two concepts are closely related. Together they form an expanded concept of the exercise of power, to restrain another or to cause another to act, by force, domination or command. ...

The Full Court in *Carter & Wilson* also considered approaches of comparable jurisdictions who had applied

6 Evan Stark, ‘The dangers of dangerousness assessment’ (2013) 6(2) *Family and Intimate Partner Violence Quarterly* 13.
7 *Carter & Wilson* [2023] FedCFamC1A 9, (“Carter & Wilson”).
8 *Illgen & Yike* [2018] FamCA 17, [123]-[125].

the ordinary and natural meaning of the words, including the decision in *Ramzi & Moussa*.⁹ In that case, “coerce and control” was also applied in the context of conduct that was not inherently violent or threatening:¹⁰

Generally, coercive control is understood as a course of conduct aimed at dominating and controlling another person, including a family member.

Deputy Chief Justice McClelland and Justice Campton ultimately decided it was unnecessary to give a “comprehensive definition of what constitutes behaviour by a person that is other than violent or threatening, but that “coerces or controls.” They concluded at [15] that:

What is clear is that the determination of what constitutes behaviour ‘that coerces or controls’ must be considered in the context in which the conduct occurred (*Helbig & Rowe and Ors* [2016] FamCAFC 117 at [91]).

Similarly, Justice Bennett was also loathe to adopt a general definition. Helpfully, however, her Honour also distinguished between the Australian cases and approaches of international jurisdictions observing at [80] that:

... Intention on the part of the perpetrator is not a necessary component of family violence under s 4AB of the Act and for good reason. As argued by Riethmuller J and Senior Judicial Registrar O’Neil writing ex curially:¹¹

‘The use of “intent” to provide limits to the definition is unlikely to be helpful: most perpetrators of family violence claim (with all the sincerity that they can muster) that, subjectively, they did not intend to perpetrate ‘family violence’, even in the most palpable of cases.’

As a family law practitioner you will come across parties who allege a coercive and controlling relationship frequently. More often than not however, you will be required to identify such behaviour yourself, because it perhaps has not been identified by a party. It is your

professional responsibility to do so. As the Honourable Justice Chisholm once observed:

...whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding.¹²

The ability to recognise coercive control is a skill that requires a nuanced understanding of family violence because it needs to be viewed as part of a pattern of conduct. Your client may be unable to articulate the exact behaviour they are experiencing, or might deny that they have experienced family violence because they understand it to manifest physically. But they will certainly be able to express their sense of risk.

Coercive control needs to be viewed as part of a pattern of conduct. It is therefore critical that you are aware of behaviours by litigants that might ultimately be found to be coercive and controlling.

How do you recognise behaviour that might be coercive control?

In cases involving allegations of coercive control, it can be difficult for people to even identify it. They might simply describe it as “walking on egg-shells”. Often this arises because the behaviour complained of is subtle and manipulative and there may be no evidence of physical violence.

The starting point for effective representation is to take comprehensive instructions. It has been observed that many lawyers do not ask the right questions of their clients about family violence and this can lead to coercive control being missed. As Professor Evan Stark observes:

Asking clients, ‘Is there someone in your life making you afraid?’ or ‘Controlling what you do or say?’ promises an even more profound awakening than asking women about violence.¹³

Risk screening tools support you to gather the information you might need to determine whether a pattern of

⁹ *Ramzi & Moussa* [2022] FedCFamC2F 1473.

¹⁰ *Ibid* [145].

¹¹ Grant Riethmuller and Lisa O’Neill, “Australia Taking Family Violence Seriously: Adjusting the Court Process to Improve Access to Justice” in Margaret Brinig (ed) *International Survey of Family Law* (Intersentia, 2021) 38.

¹² Professor Richard Chisholm, *Family Courts Violence Review*, (Attorney-General’s Department, 27 November 2009), 5.

¹³ Evan Stark, *Coercive Control: the entrapment of women in personal life* (Oxford University Press 2009), 372.

behaviour is emerging. There are a range of excellent risk screening tools available but the most jurisdictionally specific one is the *Family DOORS* screening tool.¹⁴ This screening tool is used for matters entering the Lighthouse Project. Unlike others, it helps identify the likelihood of harm or exposure to a range of risk factors (including child abuse and neglect, family violence, mental health issues and drug or alcohol misuse).

Any screening tool will provide you with some standard questions to ask or give you access to standardised questions that can be self-completed by your client.¹⁵

Screening questions serve as valuable aide memoires and are critical for identifying the issues particular to each client, for example controlling behaviour, harm to children, or stalking. The Law Society of NSW Best Practice Guide includes references to a variety of screening tools.¹⁶

Full instructions cannot be taken in one meeting. Having identified that there are indicators of harm for your client and/or their children, check whether your client is engaged with any counsellor or domestic violence service. Recounting can be traumatic and it best happens over several supported meetings. Domestic violence support workers are trained on the use of risk assessment tools (as opposed to the tools you might use to identify risk). Endeavour to have your client engage with a service who can support them. If not, ensure they are referred to one. They are critical partners for you and your client.

Risk screening tools allow you to identify indicators of risk. But the critical issue, and one that requires you to exercise your professional judgment, is assessing the impact of the behaviour. On impact, Judge Murdoch observed in *Dornan & Moloney* at [76]:¹⁷

It is generally understood that coercive controlling behaviour by its very nature can be more difficult for the victim-survivor to recognise and escape, as such conduct can have significant impacts on the victim-survivor's self-worth – thus creating a cycle of dependence and further family violence.

The Deluth 'Power and Control Wheel'¹⁸ is another tool used to better understand the pattern of behaviour complained of and its impact.

Is all coercive control high risk?

Risk screening tools allow you to identify indicators of risk, for example controlling behaviour, choking, harm to children or animals, or stalking.¹⁹ The more risks present, the more extreme the level of danger for your client.

Lethality risk indicators are factors that are known to be signs of the likelihood of serious injury and death. The more lethality risk indicators that are present combined with more extreme behaviours reflect the presence of higher risk.

The Ontario Domestic Violence Death Review Committee developed a set of 41 lethality risk indicators.²⁰ They can be grouped under six sub-headings as follows:

1. Perpetrator History
2. Family/Economic Status
3. Perpetrator Mental Health
4. Perpetrator Attitude/Harassment/Violence
5. Access
6. Victim's Disposition.

It is not an exhaustive list and different jurisdictions may include additional factors. But turning your mind to the types of lethality risk indicators allows for a more informed and strategic approach to the case. For example, the level of risk identified will *inform decisions you make, like:*

- a. the appropriateness of the case for dispute resolution processes
- b. the social supports that your client might need to have in place
- c. whether a protection order should be sought
- d. what orders your client might seek
- e. the urgency with which the matter should come before a court
- f. the need for your client to have a safety plan for court events, and

14 Family DOORS App, [Family Detection of Overall Risk Screen \(DOORS\)](#) (Web Page).

15 See for example: The Law Society of NSW, 'Working with clients affected by domestic and family violence – A guide for family law practitioners' (October 2021) 23, ("Law Society Guide").

16 Ibid 24.

17 *Dornan & Moloney* [2023] FedCFamC2F 691.

18 Domestic Abuse Intervention Programs, [Wheel Information Center](#) (Web Page).

19 Law Society Guide (n 16) 23.

20 Domestic Violence Death Review Committee 2018 Annual Report, [Appendix V: DVDRC risk factor descriptions](#) (Web Page).

- g. the need for you to consider measures for your own safety.

Preparing for an interim hearing

By the time of an interim hearing, you may not have obtained full instructions from your client, nor had the opportunity to gain a better picture of the relationship with the assistance of secondary sources. You may also be restrained by the Court’s own rules limiting the size of the affidavits and annexures to be filed (unless leave is granted).²¹ Acknowledging these obvious challenges, there are some things you can do to make it as easy as possible for the decision maker.

Affidavit drafting

In the family law jurisdiction your client’s affidavit is the most important tool they have to set the scene. Once you have identified that your client complains of experiencing coercive control, you need to carefully describe how this came about in their affidavit.

Sometimes interim affidavits contain what I would describe as a “shopping list” of examples of coercive control but depose no detail. For example:

- The father was very coercive and controlling towards me during the relationship and this included:
 - a. isolating me from friends, family and support networks
 - b. monitoring my phone and social media accounts
 - c. paying me an allowance and limiting what I spent money on
 - d. telling me what to wear, and
 - e. calling me derogatory names.

Your material needs to be drafted so that it articulates the behaviour alleged, and how the behaviour coerces and controls. The affidavit needs to contain evidence not assertions, opinions and conclusions. At an interim stage, the Court is unlikely to make a finding of fact, but apart from the obvious admissibility issues, clumsy drafting such as this does not allow any assessment of risk.

You (and your client) may be appearing electronically. The affidavit needs to explain that which cannot be seen. As a starting point, does your client have any vulnerabilities? For instance, relationships with a significant age difference or those commenced when women were children themselves. Consider whether there are other vulnerabilities you should articulate such as language, culture, mental health or cognitive functioning.

For example, if your client is a small Asian woman and the father weighs 130 kilograms and has face tattoos and body piercings, say it. That is not to suggest that a man weighing 130 kilograms with face tattoos and body piercings is necessarily prone to family violence. But to understand family violence requires an assessment of conduct and the impact of such conduct – and knowing those features of a case allows the decision maker to better understand why the mother might say she was fearful.

When drafting your client’s affidavit, a useful approach might be to consider and articulate the dynamic from three dimensions: primary perpetrator, potency and pattern. Incidentally, these three descriptors form part of an earlier screening tool known as the “PPP” screening tool developed by Jaffe et al.²² Screening tools have since become simpler and jurisdictionally specific, but this way of approaching affidavit drafting may be of assistance.

- *What is the physical presence of the perpetrator?*

Sometimes, this may be easy to explain. In cases involving allegations of coercive control, it can be more subtle but recognisable by your client all the same: He gave me “that smile”, he was intoxicated, he was tapping his leg. Clients can often tell you a secret signal or other subtle changes that acted to warn them and the children that consequences would flow from their non-compliance.

Your affidavit should put your client’s vulnerabilities in the context of the perpetrators. Consider in this context physical traits, age, culture, size and behaviours if they are relevant. Identifying the behaviour can make those in the courtroom more hyper-attentive to it as well.

- *Potency or Context*

Consider at this point the potency of the perpetrator. Has the perpetrator previously made threats? Do they have access to weapons? Is there a history of monitoring your client’s movements? Do they allege

21 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth) r 5.08*, (“FCFCOA Rules”); *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021 (Cth) r 2.02*.

22 *Peter G Jaffe, Janet R Johnston, Claire V Crooks and Nicholas Bala, ‘Custody disputes involving allegations of domestic violence: toward a differentiated approach to parenting plans’ (2008) 46(3) Family Court Review 500, 504.*

instability or unpredictable behaviour (i.e. arising from drug, substance abuse, anger management or mental health issues)?

- *Pattern*

Have there been previous interactions between the perpetrator and the criminal justice system and if so, what is the nature of them? Markers of this might be a contempt or disregard for authority, criminal convictions for past offences involving physical violence or stalking, previous Apprehended Domestic Violence Orders (ADVOs) from other relationships or obsessive behaviour.

Articulating the potency and pattern is important because it forms part of the elements of the definition of family violence: that as a result of its potency, the behaviour coerces or controls or causes the family member to be fearful. However, it is also useful to be guided by your own risk screening process because, for the decision maker, determining the issue of risk essentially involves a risk assessment process where the potential seriousness of the harm is assessed in the context of the probability of its occurrence.²³

Putting this into practice, say your client, who is housed in emergency refuge accommodation at an undisclosed location, instructs you that she saw the father watching her and the children a few streets from the refuge. When she saw him, he laughed and held his phone up in the air at her. She seemed terrified by the encounter.

Deposing the incident in the way it was relayed to you may not communicate to the decision maker a reasonable basis for her fear. No doubt, the father will instruct his lawyer that the meeting was a coincidence – he happened to be there on his way to work. Indeed, expressed in that way may open your client up to his assertion that she is “anxious” or “paranoid”. Because he is such a nice and reasonable fellow, he says he would agree to an injunction restraining him from coming within 100 metres of the children, but he does not want to because he does not know where they live and it might just be opening him up to an unfair accusation in the future or unfairly curtailing his freedom of movement. Does that at all sound familiar?

But consider the client’s response through the PPP screening of primary perpetrator, potency and pattern. He had previously installed a tracking device on her phone and monitored the movements of the children with a *Spacetalk* tracking watch. After separation, he was sending multiple messages to her on a daily basis, many threatening in nature, until she changed her phone. He had previously threatened that if she left, he would track her down and kill her. She was upset because she had left the home and gone into emergency housing to avoid his monitoring. He is supposed to have no knowledge of where she was living. She believes there is a pattern to his behaviour – his previous relationship had ended badly and his ex-partner had taken out an ADVO for her protection.

Coming back to the task of the Court at the interim stage, in assessing whether there is a risk that something may happen, “possibilities” are a legitimate basis for finding that there is such a risk, as long as there is a proper basis for those “possibilities”. Presenting the evidence in this way will assist the Court’s task when assessing risk, and, if your client is seeking an injunction, they bear the onus of satisfying the Court that the circumstances justify the making of that order.²⁴

Identifying the potency and pattern is important because it forms part of the elements of the definition of family violence: that as a result of its potency, the pattern of behaviour coerces or controls or causes the family member to be fearful.

When drafting your affidavit, be cautious of painting your client as the “perfect victim”. You can avoid this by ensuring that you obtain a good picture of the history of the conduct complained of, including how your client responded. Because coercive control often involves a strategic course of oppressive conduct, it is not uncommon to find that a perpetrator has made complaints about the victim’s conduct to other agencies and is (or will be) highly critical of the other party in affidavits (and can provide some evidence in support of this). You need to know:

- Whether your client has used violence against the perpetrator and, if so, what evidence is there of this?
- Has a complaint been made about your client’s parenting to another agency such as a child protection agency or a school?

23 [Deiter & Deiter](#) [2011] FamCAFC 82, [61] (“Deiter & Deiter”).

24 [Bant & Clayton](#) [2015] FamCAFC 222, [99].

- c. What about your client's mental health? Some common behavioural impacts for victims who have lived in a coercive and controlling partner are damaged confidence, depression or anxiety. It is not uncommon for victims of coercive control to have received mental health treatment.
- d. Whether your client has used and/or continues to use alcohol and drugs. In some cases, victims have turned to alcohol, cannabis or the use of prescription medication to "self-medicate" the impact of toxic relationships.

Knowing about these issues is critical to effective representation. Importantly, it allows the family law practitioner to understand the context behind the client's matter. And your client also has a legal obligation of disclosure.²⁵

Following on from this, determining the issue of risk essentially involves a risk assessment process where the potential seriousness of the harm is assessed in the context of the probability of its occurrence.²⁶

Children

In any matter involving allegations of family violence, you must not overlook addressing the impact of this alleged conduct on the children. It is the children who are front and centre of s 60CC(2)(b) of the Act, which requires the court to "protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

Section 4AB(3) provides that a child is exposed to family violence if he or she "sees or hears family violence or otherwise experiences the effects of family violence."

Section 4AB(4) provides a non-exhaustive list of situations that may constitute a child being exposed to family violence and includes seeing or hearing an assault of a member of that child's family.

Research about coercive and controlling violence points to the unfortunate reality that children in these families are often trapped in the perpetrator's controlling abuse and dysfunction. Indeed, they are often described as "co-victims" or as victims themselves. Emma Katz proffers that because the conduct is ongoing, children are often

caught in the "same twisted "world"" as their mother.²⁷ She describes an "array of harms", including:²⁸

social isolation and the restriction of movement, monitoring and surveillance, deprivation of basic resources such as food and heating, imprisonment in the home, brutal and unjust forms of punishment, and imposition of inappropriate rules and expectations of what could be said or done in the home. Children were vulnerable to every one of these tactics.

In cases involving incidents of high conflict and physical violence, consideration is often given to the proximity of the children to the incident. For example, someone might depose something along these lines: "Fortunately, the children were asleep and therefore not exposed to the family violence".

As observed by Katz, whether intentional or not, children living in the same household have been exposed to coercive control. They too may have suffered social isolation, heard their father denigrate their mother, or have had to constrain their behaviour when their father is around.

Take instructions from your client about this and include it in the affidavit. The first affidavit you draft for your client might not be comprehensive, however it needs to spell out the reasonable basis for your client's fears about any risk of harm to the children. Despite the Court's limited ability to make findings in respect of controversial facts in interim proceedings, the Court is not relieved of the responsibility to determine risk.²⁹ Your client is likely to recall more and contextualise their fears as the case evolves. But you must ensure that what they can remember and articulate is presented well.

An Independent Children's Lawyer (ICL) is in a good position to test this out with the children they represent. What is the lived experience of these children? For example, you might talk to a child about how often they see their mother's family and friends, explore their participation in community and other social activities, and what differences they are experiencing now that their parents are not living together. Questions along these lines might give you some instructive information about their experience of living in the household.

Sometimes ICLs express a reluctance to speak directly to children about their lived experience, especially in

25 FCFCOA Rules (n 22) r 6.05.

26 Deiter & Deiter (n 26) [61].

27 Emma Katz, *Coercive Control in Children's and Mother's Lives* (Oxford University Press 2022) 123, ("Katz").

28 Ibid 122.

29 *SS & AH* [2010] FamCAFC 13, [100].

matters where the safety of a child is an issue. In my view, this is actually the most unhelpful thing an ICL can do. The worst outcome (for the ICL) may be that the information results in a mandatory notification to a child protection agency and a new ICL is appointed. However, open, direct and frank conversations with the child ensure that they feel heard and that their concerns are responded to appropriately. If the meeting with a child raises a concern, perhaps requesting the preparation of a Child Impact Report is the necessary next step (if one hasn't already been ordered).

The danger of chronologising

Beware that the perpetrator's coercive and controlling behaviour can get lost in a chronology because it often arises from a pattern of control around everyday activities that does not necessarily translate when written in an affidavit or chronology.

A chronology does have a useful purpose in ensuring that key dates are pleaded and the facts in agreement and dispute are identified. However, coercive and controlling behaviour is not incident based and needs to be seen as part of a broader pattern of behaviour. For example, your client might allege that she was given a spending allowance each week and the perpetrator set up alerts with the bank to monitor her expenditure. Each time she spent money, the perpetrator would ask her to account for it. This behaviour would no doubt be anxiety-inducing but it would ultimately lose its impact in a chronological approach.

In the Family Law Courts, we come across cases where a perpetrator uses multiple systems and agencies to monitor and/or harass victims. This behaviour is commonly known as "systems abuse". In a matter where systems abuse is alleged, it may be helpful to record all communication a client has had with other agencies arising from, and incidental to, the separation. It can be a powerful way to understand any impact such interactions have had on the mental health of your client.

The use of sub-headings in an affidavit is also a useful way to identify and group together the patterns of behaviour alleged, as well as communicating its impact on your client.

Assisting the decision maker at the interim hearing

As the interim hearing approaches, spend some time considering how best to present your client's case. Early decision making is, of course, optimal, but is the matter ready to proceed? Cases involving allegations of coercive

and controlling conduct can be subtle and lack evidence. Is there evidence not yet available that will better support your client's case and assist the Court in making its decision? For example, a Child Impact Report offers screening, identification, and a preliminary assessment of risk issues and other factors relevant for the children and family. If you are appearing as the ICL, check the Parenting Questionnaires and Notices of Child Abuse, Family Violence or Risk filed. Have documents been produced under s 69ZW of the Act, or whether other subpoenas need to be filed? Be prepared to raise readiness of the matter for hearing if it is a concern.

The decision maker will generally have several matters before them, including your interim hearing. In matters where coercive and controlling conduct is alleged, affidavits prepared in a chronological manner or that jump from one topic area to another, accompanied by a large electronic tender bundle, can be difficult to follow. You should be in a position to identify the pattern of coercive control complained of, point the decision maker to the relevant paragraphs you rely upon, and the pages of the evidence in support.

Case Outline documents can be onerous to prepare but consider them your best opportunity to put forward your case succinctly. Is this a case about unacceptable risk? If so, articulate what the risk is and whether or not it can be mitigated. To a certain extent, spending time reciting considerations under s 60CC(3) of the Act is not time well spent and detracts from the real issue that the court needs to determine.

What orders are you seeking?

Katz warns of the need to identify whether the coercive control is ongoing, because, if it is, the requests to spend increasing amounts of time with children may be part of the perpetrator's "campaign".³⁰ She opines that granting contact in these circumstances could be both unsafe and detrimental to the child.³¹ In some situations, you might ask the court to consider whether a re-introduction of time between children and the perpetrator is actually in their best interests at an interim stage until findings can be made.

Supervised time will always be an option available to mitigate the risks identified. Before proposing orders for supervision, however, ensure that it is both affordable and available to your client. Alternatively, is supervision necessary? Can a third party supervising changeover ameliorate the risk? Think carefully about the risks that you are alleging and the timeframe for the case to be determined. In extreme cases, you need to be

30 Katz (n 29) 121.

31 Ibid.

able to address the Court on the purpose of long term supervision orders and consider whether there are emotional and psychological risks for the children in that process.

At any hearing, you should be in a position to provide the decision maker with an “in the alternative” order and be prepared to make submissions on that position as well. If you don’t do this, and the decision maker does not agree with you, the orders proposed by the other party become the template from which the decision maker will work from.

The existence of coercive control can make shared parental responsibility impossible, as it allows the coercive and controlling behaviour to continue. As Lux and Gill (writing for Canadian family law practitioners) conclude, “[s]hared parenting and shared decision-making are unlikely to serve the children’s best interests in the face of coercive control.”³²

Expert evidence

A Family Report will provide a comprehensive assessment of the circumstances of the family, including considerations regarding risk. It cannot, however, offer individual clinical assessment of any party or child, or a diagnosis of any mental health or related issue.

In matters involving coercive and controlling violence, consider whether a Family Report will provide the level of expertise your matter requires. In some matters, a Single Expert Report may be more suitable. The Single Expert should not be selected on the basis of availability but on the basis of expertise to comment on areas jointly agreed to be contained in a joint letter of instructions.

You should also be proactive when settling the orders appointing the Single Expert and the joint letter of instructions. Ensure that both documents cover the intended scope of the report. Some considerations for inclusion into either the agreed letter of instructions, or later, questions seeking clarification,³³ may include:

- Can the Expert comment on what impact the relationship between the parents has had on their

parenting capacity?

- If the Court makes a finding that the father has engaged in coercive and controlling violence, what recommendations do you make to best support the recovery of the mother and the children?

Preparing for final hearing

You should now be in a position to put together a comprehensive affidavit on behalf of your client. If you have had to generalise or use broad descriptions in earlier affidavits, now is the time to include as much detail as possible. Describing behaviours broadly can prevent findings being made. For example, recently a mother deposed that her partner told her what she should wear, prohibiting her leaving the house in sleeveless shirts and revealing clothing. To refute this assertion, her partner sought to rely upon hundreds of photos taken during the relationship. It is possible that the photos were taken on holidays and in another context, but the generalised nature of the mother’s evidence did not allow a finding to be made.

Consider the impact of trauma and how it may cause a victim to recall family violence in a confused, patchy or inaccurate manner. Invariably, a statement given to police when seeking a protection order differs from the account of the incident in the affidavit. You should try to explain this, for example:

When I spoke to the police I found it difficult to put into words the effect that Frank’s actions have had on me and how fearful I am of him. I find the process of retelling my experiences of Frank’s violent behaviour traumatic. At the Police Station for example, I was very distressed because telling my story brings up lots of painful memories.

If, in the various updates of affidavit material, your client has recalled new events or provided more detail about events previously deposed to, you should address them as well. Sometimes this arises from the use of interpreters. If this has happened, explain it. For example:

I have found recounting my story difficult due to the trauma I have experienced. I use interpreters to speak to my lawyer. Where my version of events differs in this affidavit compared to previous affidavits, I believe this is because each time I have done an affidavit I have had to use a different interpreter.

When the client’s version of events are quite different between two documents, prepare your client for rigorous

32 Glenda Lux and Sandy Gill ‘Identifying coercive control in Canadian family law: a required analysis in determining the best interests of the child’ (2021) 59(4) *Family Court Review* 810, 823, (“Lux and Gill”).

33 FCFCOA Rules (n 22) r 7.26.

cross-examination, but avoid coaching.³⁴ Perhaps your client has a domestic violence specialist or other mental health practitioner who can give evidence about the impact of the past family violence on their ability to recall details or the process of recollection that they observed during the sessions. If you are considering this, be mindful of r 7.08(1) of the Rules,³⁵ which restricts the adducing of evidence or tendering of a report from another expert witness on the same issue without the Court's permission.

Risk assessment by decision makers

The Act does not require independent verification of allegations of family violence (such as police or medical reports) for the Court to be satisfied that it has occurred.³⁶ The same risk assessment process applies in interim and final hearings, although the Court will certainly make findings of fact on the balance of probabilities at a final hearing.

The Court may reach a conclusion of “unacceptable risk” from the accumulation of factors, where each fact individually might not be proved to that standard. In *Isles & Nelissen*,³⁷ the Full Court unequivocally held that when undertaking a risk assessment process, the civil standard of proof is not a measure by which unacceptable risk of harm is to be assessed.³⁸ Rather, “[t]he assessment of risk is an evidenced-based conclusion and is not discretionary.”³⁹ It involves a forecast of risk, and any evidence which is relevant to and influential in that predictive inquiry is admissible and should be taken into account.⁴⁰

Having identified the existence of an unacceptable risk, it is then necessary for the Court to assess whether that risk “is able to be sufficiently managed or ameliorated”.⁴¹ Your written submissions should direct the court in this way.

Safety in court

There is now a substantial body of research highlighting

how, post-separation, Family Law Courts can be used as a vehicle to continue coercive control.⁴² Perpetrators may use both their parenting role and the court system as a way of exercising control over their former partner.⁴³ Research has also recognised that some parties may use a range of litigation tactics to continue to abuse or control the other party.⁴⁴ In addition to family law proceedings, these parties may use several systems to continue their abuse (for example, local courts, child protection authorities, Child Support Agency, Centrelink, and immigration agencies). This can result in great cost but also affect the psychological wellbeing of the other party. This can also lead to victims self-representing because they cannot afford ongoing legal representation.

As much as Family Law Courts have an obligation to respond appropriately, lawyers have an obligation to understand the dynamics of family violence, be alert to the possibility of systems abuse and call it out when necessary. There are a range of options to consider when you are concerned about the safety of the process. The National Domestic and Family Violence Bench Book provides excellent commentary on the methods used, and some protections available to ensure appropriate responses.⁴⁵ Practitioners are also referred to Miranda Kaye’s research for further guidance on the various mechanisms available to protect victims of family violence, and victims’ experiences regarding safety within the Family Law Courts.⁴⁶

Family Law Case Management and court management

Perhaps acknowledging the problem, when the Court released its Central Practice Direction (CPD) in 2021, the first core principle underpinning family law proceedings is as follows:⁴⁷

The prioritisation of the safety of children, vulnerable parties and litigants, as well as the early and ongoing identification and appropriate handling of issues of risk, including allegations of family violence, are essential elements of all case management.

34 As this would be contrary to r 24 of the Legal Profession Uniform Australian Solicitors’ Conduct Rules 2015.

35 FCFCOA Rules (n 22) r 7.08.

36 See *Amador & Amador* [2009] FamCAFC 196.

37 *Isles & Nelissen* [2022] FedCFamC1A 97, (“Isles & Nelissen”).

38 At the time of writing this paper, a special leave application has been filed in the High Court.

39 *Isles & Nelissen* (n 39) [85].

40 *Ibid* [105].

41 *Blinko & Blinko* [2015] FamCAFC 146, [83].

42 *Lux and Gill* (n 34) 823.

43 Toivonen, C and Backhouse, C (2018) *National Risk Assessment Principles for domestic and family violence* (ANROWS Insights, 07/2018) ANROWS.

44 The Australian Institute of Judicial Administration, 2022, *National Domestic and Family Violence Bench Book*, (Web Page).

45 *Ibid*.

46 Miranda Kaye ‘Accommodating violence in the family courts’ (2019) 33 *Australian Journal of Family Law* 100, (“Kaye”).

47 Federal Circuit and Family Court of Australia, ‘*Family Law Case Management Central Practice Direction*’ (2021) [3.2].

The CPD limits each party to two Applications in Proceedings without leave,⁴⁸ and requires parties to make a reasonable and genuine attempt to settle the issue first.

In addition to protections afforded by the CPD, s 69ZN of the Act contains important principles relating to the conduct of child-related proceedings, including the Court's role in actively directing, controlling and managing the conduct of the proceedings, and in safeguarding children and parties against family violence.

The five principles governing the conduct of proceedings relating to children are as follows:

1. The Court is to consider the needs of the child concerned, and the impact that the conduct of the proceedings may have on the child, in determining the conduct of the proceedings.
2. The Court is to actively direct, control and manage the conduct of the proceedings.
3. The proceedings are to be conducted in a way that will safeguard:
 - a. the child concerned against family violence, child abuse and child neglect, and
 - b. the parties to the proceedings against family violence.
4. The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
5. The proceedings are to be conducted without undue delay and with as little formality as possible.

In the Canadian context, it was observed that perpetrators of coercive control may:⁴⁹

sabotage interventions by failing to bring necessary materials, refusing to share information, failing to fund the intervention, delaying the intervention, failing to show up consistently or show up on time, controlling the agenda, inserting legal counsel in interventions, adopting a take-it-or-leave-it style of negotiation, refusing to honour agreements, constantly asking to change or adjust agreements, or feigning confusion as to their understanding of agreements.

These tactics are not at all uncommon in the Australian context either. A recent report by Australia's National Research Organisation for Women's Safety ("ANROWS") highlighted concerns by legal practitioners and judicial officers in Australia about the use of contravention proceedings as a continuation of coercion and control.⁵⁰

There are options available. Do not be afraid to ask a decision maker to consider making any appropriate orders or directions that give effect to these child-related proceedings principles. The new case management pathways are an effective way of ensuring proactive and efficient case management. Some matters will benefit from consistent case management by a judge and legal practitioners can request this. Matters might be listed for undefended hearing, and, in extreme cases, summarily dismissed or simply expedited. Another remedy might be a range of costs orders including indemnity of costs and security of costs.

At the conclusion of a case, and particularly if findings of coercive control and/or adverse credit have been made, restrictions and limitations can be sought on the institution of further proceedings.

a) *Protections for victims*

The Family Advocacy and Support Service ("FASS") is a free service in all Family Law Court registries, including circuit locations. FASS provides a duty lawyer service for any unrepresented party in matters involving family violence. Even if your client is represented, the support service can assist with safety planning, support in court, provide referrals to other specialist services and help with other agencies such as Centrelink, Housing and Police.

Your client can also request a safety plan at the court. It might include how they will enter and leave the court and access to a safe room. These plans must be prepared ahead of each court event. Safety plans are not available to the decision maker. Chambers staff will work with court

48 Ibid [5.22].
49 Lux and Gill (n 34) 824.

50 Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022) *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (Research report, 01/2022) ANROWS.

security to ensure the plan is put in place. However, there are times when the legal representative may need to raise the safe conduct of a hearing with the judicial officer in advance. If a party is self-represented, this task may fall to the ICL in their honest broker role.

Compliance and Readiness Hearings are an appropriate time to raise the safety of the hearing process, especially how parties will give their evidence, the order of the evidence and whether audio visual links (“AVL”) facilities are sought as a protective measure for a party who may find the process to be traumatic or stressful. An AVL hearing can take place in the court registry but may also be done via a remote link from an external location. A remote link avoids a party having to attend the court registry. Some argue that electronic participation may make a victim feel marginalised and instead suggest that the alleged perpetrator should attend court remotely.⁵¹ You should discuss these matters with your client and be ready to make the application.

The judicial officer will ultimately decide on the process by balancing the need for procedural fairness with the need to ensure the safety of the parties.

b) *Cross-examination*

There has been considerable research describing the traumatising impact on victims when cross-examined by their perpetrators. For this reason, the practice is banned under s 102NA of the Act when:

- a. Either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party.
- b. A family violence order (other than an interim order) applies to both parties.
- c. An injunction under ss 68B or 114 of the Act for the personal protection of either party is directed against the other party.

The Court also has discretion to make an order to ban personal cross-examination even if those circumstances do not apply.

At a Compliance and Readiness Hearing, the Court will consider whether an order under s 102NA will be made. Once a ban is imposed, the affected party may apply for legal representation under the Family Violence and Cross-Examination of Parties Scheme, administered through Legal Aid commissions.

If you are appearing as the ICL, you should be ready to address the court on whether a ban should be imposed. Where the ban applies, the ICL should direct an unrepresented party to make an application under the Scheme.

Legal advocates can often push boundaries during cross-examination. While the provisions relating to the conduct of child-related proceedings equally apply to final hearings, the *Evidence Act 1995* (Cth) (“the Evidence Act”) also allows objections to be made to the manner in which a witness is being questioned. Section 26 of the *Evidence Act* gives the Court power to make orders it considers just regarding the questioning of witnesses, and s 41 requires a Court to disallow questions that it considers improper on certain grounds.

c) *Vexatious proceedings*

The Court can dismiss all or part of proceedings at any stage if satisfied that they are frivolous, vexatious or an abuse of process.⁵² Vexatious proceedings includes proceedings that are: an abuse of process; are instituted or conducted to harass or annoy, cause detriment, or for another wrongful purpose; or are instituted or pursued without reasonable ground.⁵³ Section 102QB of the Act outlines the process for seeking such an order. The Court must be satisfied that a party has frequently instituted or conducted vexatious proceedings in one or multiple courts.

While these sections are relatively untested, in bringing such an application it would be necessary for the Court to understand the history of the matter, especially the coercive control alleged. These are the type of cases that will benefit from case management by a consistent judge.

Conclusions

Whilst across the Australian family law system we are now better responding to family violence, coercive control is continues to be unidentified or misunderstood. Family law practitioners, whoever they are acting for, need to better identify and respond in matters involving coercive control. The reflections and suggestions contained in this paper are made in the hope that they can be incorporated into your practice. Ultimately, doing so will result in a more nuanced approach to determining parenting arrangements that are not only safer for parents and children, but also are in the best interests of those children.

⁵¹ Kaye (n 48) [3.2].

⁵² The Act (n 6) s 45A(4)-(8).

⁵³ Ibid s 102Q.

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FAMILY LAW 20 INTENSIVE SERIES 24



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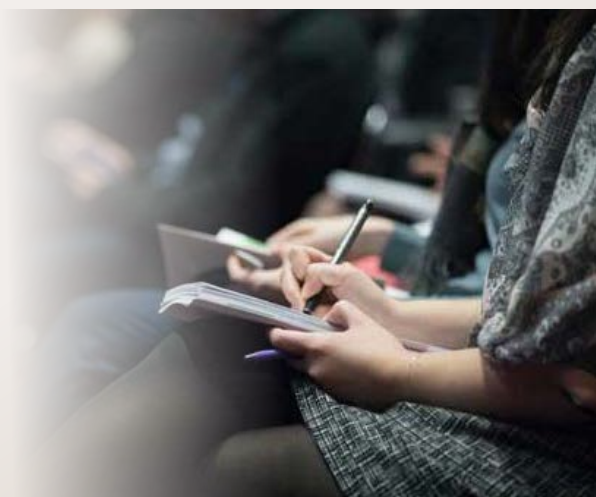
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PARLIAMENTARY FRIENDS EVENT – LUKE MURPHY LCA PRESIDENT



**LEONIE
CAMPBELL**

**Law Council
OF AUSTRALIA**

On 7 September 2023, the Law Council President, Mr Luke Murphy, attended Parliament House to speak at the Parliamentary Friends of Ending Violence Against Women and Children panel event to discuss family law reforms. Other speakers at the event included the Hon Mark Dreyfus KC MP (Commonwealth Attorney-General), Ms Louise Glanville (Chair of National Legal Aid) and Ms Elena Rosenman (Chair of Women’s Legal Services Australia).

This event was a welcome opportunity for the Law Council to speak to interested Parliamentarians and stakeholders regarding the proposed family law reforms, given its close involvement in consultations on the Bill in the course of 2023.

In his presentation, Mr Murphy welcomed the Family Law Amendment Bill 2023, particularly the proposed repeal of the presumption of equal shared parental responsibility, noting that parties are agreeing to potentially unsafe parenting arrangements in the

shadow of a misunderstood law. He noted that, should the Bill pass, it will be essential for the legal profession, and the broader community, to be educated on what these changes will mean in practice.

Mr Murphy also emphasised that Australia’s family law system cannot be fixed by legislative intervention alone. He spoke of the critical need for greater funding for Australia’s courts and legal assistance sector to promote access to justice and improve outcomes for parties and impacted children. Mr Murphy also raised concerns that it is increasingly financially unviable for members of the private profession to undertake legal aid work.

The Law Council monitored the progress of the Bill in the Senate and looks forward to engaging with the Government on further tranches of reforms to the family law system.



Left to right: Ms Louise Glanville, The Hon Mark Dreyfus KC MP, Ms Alicia Payne MP, Ms Elena Rosenman, Mr Luke Murphy

A.

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VALE: CAROLINE TEO

Caroline Teo passed away peacefully on 4 July 2023, she was only in her 40s. Caroline had been diagnosed with cancer some 18 months prior, and despite being unwell for an extended period she continued to work right to the very end.

Caroline was a very long serving member of the Family Law Practitioners' Association of Western Australia. She sat on the council and executive and she diligently served council and gave a lot of her time for several years, even attending every meeting in her last 12 months as Treasurer, despite often being in pain. Caroline was also a member of the Women Lawyers of Western Australia.

Caroline began her legal career in 2004 working in estate planning before making the move to family law. Caroline loved the law and made a great contribution to the profession in terms of both presentations on technical aspects of the law (particularly tax).

Caroline was passionate about her work, her clients and was very generous in spending time with her friends and colleagues.

Caroline's dear friend and former colleague Nicola Jansen of O'Sullivan Davies said as follows:

I began my career working with Caroline in around 2010. I often tell other lawyers that Caroline was responsible for making me the

lawyer I am today. She taught me the importance of disclosure and client management, and always had time for my questions. Caroline was not known for succinct answers, and I used to enjoy winding her up by asking her to explain complicated legal concepts in 25 words or less. Our skills and personalities were complementary.

In the years that followed, she turned from a boss into a colleague and friend. She continued to mentor and teach junior lawyers, always doing what she could to support and mould the next generation of our profession.

Caroline was very excited about the up-and-coming 20th National Family Law Conference (to be held in Perth 30 October – 1 November 2024). She sat on the local organising committee in Perth and worked on the plenary abstract for the conference.

In the months since her passing, many people in the law profession in Perth have mourned Caroline's death. Her funeral was attended by judges, court staff and many family lawyers. Caroline was a highly experienced, knowledgeable and practical lawyer and will be sorely missed professionally.

She is survived by her family including her nieces and nephews, of whom she was immensely proud.

Caroline Teo meant so much to the WA family law profession and her friends within the profession, of which there were many. She will be profoundly missed by all who knew her.

VALE: TIM BUGG AM

Based on the farewell by Dobson Mitchell Allport, where Tim had been their long time Managing Director.

Mr Tim Bugg AM passed away on Sunday, 23 July 2023.

He was President of the Law Council of Australia from 2006 to 2007 and a much loved and admired member of the family law fraternity, especially in his home state of Tasmania.

Tim was a giant of the legal profession. In a career spanning over 40 years, he dedicated his time to a range of roles supporting and promoting the legal profession at a local, national, and international level. He was an accomplished advocate and respected colleague and opponent. Tim was known within the profession for his extensive legal knowledge, quick wit, and pragmatism. He believed wholeheartedly in the skill and potential of Tasmanian lawyers, championed and embraced change in the profession, and worked passionately to foster the causes he believed in. Despite his busy schedule, Tim always took the time to mentor younger lawyers and is looked upon as a role model by many.

Tim was a cherished workmate, friend, father, and husband. His sense of mischief and zest for life was contagious.

Always the first to join the party and usually the last to leave, his oft repeated phrase “get a grip!” served as his reminder not to take things too seriously, and he lived by that mantra until the very end. Tim was truly one of a kind, and his passing leaves an enormous hole for those who knew and loved him.

VALE: ALICE MCSHERA

The Family Law Section joins with the Family Law Practitioners Association of Western Australia to advise members of the tragic passing of Perth family law barrister Alice McShera on Monday, 30 November 2023.

In the words of FLPA(WA):

For those of you who have already seen the media coverage, you will know that Alice's life was tragically cut short in an alleged act of senseless family violence. It is difficult in those circumstances to know how best to approach this notice. Understandably, we are outraged and angry that so many women continue to be the victims of these acts of violence. However, Alice is one of our own. She is not a media story. She is not just another statistic of family violence. She is a friend and a colleague. And so, whilst there will be time for outrage at how she died, for now we remember Alice for how she lived.

Alice was kind, outgoing, exuberant, intelligent, ambitious and quick-witted. She commenced her career in the law with four years at the Family Court of Western Australia as Associate to her

much-loved mentor and friend, Justice Jane Crisford (as she then was). Alice then moved into private practice before going to the Bar in 2020 collecting friends as she went. Throughout the entirety of her career, Alice was a lover of FLPA social events and could often be found, a glass of bubbles in hand, making people laugh.

Her presence in our lives will be greatly missed.

Alice was a member of Murray Chambers in Perth and was only 34 years old.