

Family Law Act

Property Amendments 2025

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1. Since its commencement, the Family Law Act 1975 (“the Act”) has been frequently amended as the community and Governments try to come to grips with social problems emanating from interpersonal relationships. As this presentation will demonstrate, there is no certainty in the practice of family law. In order to avoid complaints and negligence claims, regard must be had to the everchanging legislation and the consequent decisions emanating from the Courts.
2. The latest suite of changes affected both property, spousal maintenance and parenting matters. This presentation will focus on the property aspects of the amendments, but it is necessary to appreciate that there may be areas of overlap. For example, family violence is now a significant feature in all family law litigation and any allegations that family violence has occurred need to be kept front of mind when taking instructions, preparing a case for settlement or court.
3. Apart from the changes to s 79 and associated sections, provisions in the Family Law Amendment Act 2024 have application to property proceedings between married people as well as de facto couples. There are corresponding amendments to Part VIIIAB in relation to people in a de facto relationship. Unless specifically identified in this presentation, it can be assumed that the changes to the provisions for married persons have corresponding amendments for de facto partners.
4. These amendments were passed in 2024, but commenced on 10 June 2025. Therefore, unless a matter commenced its final hearing before 10 June 2025 and remains part heard, the amended legislation applies to all matters which are pending in which the final hearing has not commenced, or which were initiated after the start date.

The Amendments

5. These are the amendments which are relevant for consideration in this presentation;
 - a. Family Violence provisions
 - b. Principles for conducting property or other non-child-related proceedings
 - c. Duty of Disclosure
 - d. Property settlement proceedings
 - e. Specific provisions in relation to companion animals
6. While having the appearance of being straight forward, the amendments are far reaching and have some unique features, which require a rethinking of the approach to property and spousal maintenance proceedings.

Family Violence

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7. There is no doubt that family violence is a serious problem in the community. Governments have tried to deal with the problem with various degrees of success. The problems have not been eliminated, that is an impossible task. Nevertheless, the incidence of family violence in any Family Law proceeding is now front and centre in the Courts' consideration, so it needs to be tackled from the commencement of the lawyer-client relationship.
8. The public depiction of family violence is framed in the context of horrific murders and serious assaults. This is what most people who come to seek legal advice understand family violence to be. There is a tendency to assume that unless there has been a physical attack resulting in injuries, there is no family violence.
9. It is incumbent on any lawyer to explain to a client, whether an alleged perpetrator or victim, what family violence is according to the statutory definition. This should happen on the first occasion of taking instructions. Clients are surprised to discover that family violence is defined in sec 4AB of the Act as follows;

(1) For the purposes of this Act, ***family violence*** means 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.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

- (a) an assault; or
- (b) a sexual assault or other sexually abusive behaviour; or
- (c) stalking; or
- (d) repeated derogatory taunts; or
- (e) intentionally damaging or destroying property; or
- (f) intentionally causing death or injury to an animal; or
- (g) economic or financial abuse; or
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
- (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(2A) For the purposes of paragraph (2)(g), examples of behaviour that might constitute economic or financial abuse of a family member include (but are not limited to) the following:

- (a) unreasonably denying the family member the financial autonomy that the family member would otherwise have had, such as by:
 - (i) forcibly controlling the family member's money or assets, including superannuation; or
 - (ii) sabotaging the family member's employment or income or potential employment or income; or
 - (iii) forcing the family member to take on a financial or legal liability, or status; or
 - (iv) forcibly or without the family member's knowledge, accumulating debt in the family member's name;
- (b) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child (including at a time when the family member is entirely or predominantly dependent on the person for financial support);
- (c) coercing a family member (including by use of threats, physical abuse or emotional or psychological abuse):
 - (i) to give or seek money, assets or other items as dowry; or
 - (ii) to do or agree to things in connection with a practice of dowry;

- (d) hiding or falsely denying things done or agreed to by the family member, including hiding or falsely denying the receipt of money, assets or other items, in connection with a practice of dowry.
 - (3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
 - (4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
 - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.
10. What is evident from the comprehensive nature of sec. 4AB is that there is no limit to the type of conduct which can fall within the definition in sub-section (1). The examples given in sub section (2) to (4) are not limiting in their application. Regard must be had to the multiple use of the expression "*but are not limited to*" in several of the sub-sections.
11. It doesn't take a large measure of legal imagination to see that the interpretation of sec. 4AB can lead to extensive litigation on its own. Clients who are victims of family violence will seek vindication, while alleged perpetrators will deny everything. This situation will lead to hearings in which substantial fact finding will be required, before any question of property distribution or spousal maintenance can be determined. This issue will be discussed further below, when looking at what use the courts should make of the evidence of family violence.

Principles for conducting property or other non-child-related proceedings

12. In 2006 Division 12A of Part VII of the Act was introduced and commenced operation. That division dealt with how child-related proceedings were to be dealt with by the court. The division contained 5 principles² which had to be applied by the court when hearing child-related proceeding and, significantly, significant rules of evidence described in the former s. 69ZT(1) did not apply unless the court was satisfied that exceptional circumstances existed to justify the application of some or all of the rules contained in the excluded part of the Evidence Act 1995.
13. Division 12A applied by default unless otherwise ordered. Therefore, practitioners knew that the prescribed rules of evidence did not apply to child-related proceedings and cases were prepared on that basis. If the parties consented, Division 12A also applied to other proceedings under the Act, for example, spousal maintenance, property settlement, injunctions and proceedings arising from the interpretation of Financial Agreements.
14. Division 12A has been repealed and in its place Division 4 of Part XI has been enacted and inserted into the Act. Division 4 bears a striking similarity to the repealed division,

² Reproduced below at [16]

except its application can now extend to property and other non-child-related proceedings. The application of the division is prescribed in sec 102ND. In essence, Division 4 applies to proceedings which are wholly under Part VII (child related proceedings) in the same way as the repealed Division 12A applied to those proceedings before the amendments. Likewise, the parties can still consent to Division 4 applying to property or other non-child related proceedings.

15. A level of uncertainty has now been introduced by sec. 102ND of the amended legislation. That section provides;

- (1) This Division applies to proceedings that are wholly under Part VII.
- (2) This Division also applies to proceedings between parties that are partly under Part VII:
 - (a) to the extent the proceedings are under Part VII; and
 - (b) to the extent the proceedings are not under Part VII if:
 - (i) the parties consent to this Division applying to the proceedings to the extent the proceedings are not under Part VII; or
 - (ii) the court orders that this Division applies to the proceedings to the extent the proceedings are not under Part VII (whether or not the parties consent).
- (3) This Division also applies to proceedings between parties that are not to any extent under Part VII if:
 - (a) the parties consent to this Division applying to the proceedings; or
 - (b) the court orders that this Division applies to the proceedings (whether or not the parties consent).
- (4) In deciding whether to make an order under subparagraph (2)(b)(ii), the court must have regard to the principles in section 102NE.
- (5) In deciding whether to make an order under paragraph (3)(b), the court must have regard to the principles in section 102NE (other than subsection (3), paragraph (5)(a) and subsection (6) of that section).
- (6) Proceedings to which this Division applies under subsection (1) or (2) are ***child-related proceedings***.
- (7) Proceedings to which this Division applies under subsection (3) are ***property or other non-child-related proceedings***.
- (8) Consent given for the purposes of subparagraph (2)(b)(i) or paragraph (3)(a) must be:
 - (a) free from coercion; and
 - (b) given in the form prescribed by the applicable Rules of Court.
- (9) A party to proceedings may, with the leave of the court, revoke a consent given for the purposes of subparagraph (2)(b)(i) or paragraph (3)(a).

16. Section 102ND (2)(b)(ii) and (3)(b) permit the court to order that Division 4 applies whether the parties consent or not. In making that decision, the court must have regard to some or all of the principles contained in section 102NE. The principles which apply to all proceedings when Division 4 applies are;

- a. The first principle is that 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
- b. The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.
- c. The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (b) the parties to the proceedings against family violence.

- d. The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.
 - e. The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.
17. When deciding whether to make an order that Division 4 applies to non-parenting proceedings the court must have regard to the following sub-set of principles;
- a. The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.
 - b. The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (b) the parties to the proceedings against family violence.
 - c. The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.
18. It appears that when an order is made that Div 4 applies, all of the principles apply to the conduct of the proceedings, whether child related or property and other proceedings. This interpretation is inconsistent with the note to sec 102NE which says that;

All the principles are relevant to child-related proceedings. The principles in subsection (3), paragraph (5)(a) and subsection (6) do not apply in relation to property or other non-child-related proceedings.

19. The existence of the power to order that Div 4 applies on the court's own initiative (sec 102NG) introduces a level of uncertainty to the conduct of non-parenting litigation. Prima facie, until the court makes an order, a non-parenting case is prepared and run in the usual way. However, the parties can find that at any stage of the proceedings, the court can make an order applying Division 4 applicable, and rendering previous preparation inadequate.
20. The effect of making Division 4 applicable is to introduce various powers to permit the court to control the proceedings and limit evidence – procedures that are both useful and commonly used to ensure the efficient disposition of case. The court can;
- a. decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
 - b. decide the order in which the issues are to be decided; and
 - c. give directions or make orders about the timing of steps that are to be taken in the proceedings; and
 - d. in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
 - e. make appropriate use of technology; and
 - f. if the court considers it appropriate—encourage the parties to use family dispute resolution or, in child-related proceedings, family counselling; and
 - g. deal with as many aspects of the matter as it can on a single occasion; and
 - h. deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

21. However, one major consequence of applying Div 4 is, by operation of sec 102NJ, to remove significant rules of evidence contained in the following parts of the Evidence Act 1995;
 - (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;
Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.
 - (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);
 - (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).
- (2) The court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying because of subsection (1).
22. Some or all of the excluded rules can be reapplied if the circumstances are found by the court to be exceptional – a very high bar!
23. It is conceivable that a Judge, confronted with a barrage of objections to evidence may feel persuaded that the non-application of the rules of evidence is an appropriate approach, having regard to the overarching purpose to resolve disputes “as quickly, inexpensively and efficiently as possible”³.
24. Unless the possibility of the application of Division 4 is considered and determined early in the proceeding, it may usually happen at the start of the trial, with the preparation of the case on a traditional evidentiary basis having been wasted. While the decision to apply Division 4 has to be made judicially, affording the parties procedural fairness and taking into account the applicable principles listed in section 102NE, there can be no certainty how a court may determine the issue, particularly as the order can be made on the court's own motion (see sec 102NG) The court has the power to make the order even if both parties oppose such an order being made.
25. It is very important to be aware of the reach of Division 4 and to plan the preparation of a matter well in advance of any trial. Also consider the fact that if there are third parties joined to the property application, if Division 4 is ordered to apply, its provisions apply to every party. Some commercial lawyers who appear in family law proceedings to protect the interests of third parties may not feel comfortable dealing with matters in the absence of the strict application of the rules of evidence.
26. If acting for the victim of family violence, there are distinct advantages in seeking the application of Division 4 to aid the proof of the matters which the court needs to consider when dealing with an application for property settlement or spousal maintenance. An illustration of the problem and its solution can be found in the Full Court's decision in *Dajani & Dajani* [2025] FedCFamC1A 28. The relevant facts were that the husband was convicted by a jury in the District Court of NSW of multiple offences of sexual assault against his daughter both as a child and also when she became an adult. He was sentenced to a lengthy term of imprisonment.

27. The conviction was able to be proved by tendering a certificate of conviction. However, that document ordinarily records the offences of which the defendant was convicted and any punishment imposed. The wife sought to tender the sentencing remarks of the District Court Judge. These would illuminate the factual circumstances relating to each count. It was argued on behalf of the husband that the operation of sec. 91 of the Evidence Act 1995, precluded those remarks being admitted into evidence. Sec. 91 provides;
- (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.
28. The trial Judge admitted the remarks over the husband's objection. The Full Court dismissed the appeal because nowhere in the trial judgement did the Judge take into account any aspect of the sentencing remarks. Rather, the finding that the wife's contributions were made more arduous by the husband's assaults of the daughter and the wife's direct evidence of her observation of the daughter's behaviour at the time when the certificates of convictions demonstrated that the sexual assaults were taking place.
29. The trial Judge said;⁴
- "The Court observes the artificiality and incongruity of having before it clear evidence about the husband's convictions and sentencing, but not the details of the conduct that resulted in those convictions and sentencing. There is a sense in which the Court could almost be misled by the incomplete evidence of merely the convictions and sentencing."
30. Unfortunately, his Honour was bound by the law as it stood at trial and had to proceed without taking into account the sentencing remarks, which were admitted into evidence for another purpose. The legal gymnastics required to make the requisite finding of the effect of the assaults on the daughter would have been considerably aided by reference to the sentencing remarks. The daughter was not called to give evidence in the property proceedings, and that decision on the part of the wife is totally understandable.
31. Had Division 4 of Part XI applied (as it now can) his Honour would have been assisted by s. 102NN (3) which provides;
- (3) The court may, in child related proceedings or property or other non-child related proceedings:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
- (i) the court; or
(ii) another court; or
(iii) a tribunal;
- and draw any conclusions of fact from that transcript that it thinks proper; and
- (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).
32. If a child related case and a property or other proceeding are being heard together, it is hard to see how the rules of evidence can apply to one part of the case but not the

⁴ Reproduced at [12] of the Full Court's judgement

other, particularly where findings in relation to family violence need to be made in relation to both types of proceeding. If family violence is established without recourse to the rules of evidence for the parenting proceedings, but it can't be proven for the property proceedings if the rules of evidence apply, a perverse result would follow.

33. Given the problems of proof associated with demonstrating the consequences of family violence, and having regard to the fact that the giving of evidence by children (even as adults) is undesirable, any available methods of proof need to be utilised in order to preserve and advance the interests of justice.

Duty of Disclosure

34. The duty of disclosure is a fundamental obligation cast upon the parties in financial proceedings, but which is sometimes honoured in the breach, has now been elevated into the Act. Previously, the source of the obligation was to be found in the Rules.
35. The duty of disclosure appears in the Parts of the Act dealing with financial proceedings. Thus sec. 71B deals with financial proceedings arising from a marriage, and s 91RI is the corresponding section in relation to de facto relationships. In each case the duty is imposed at every stage of the proceedings, except appeals. This includes circumstances which the legislation describes as “preparing for a proceeding relating to financial or property matters”.
36. The parties have a duty to the court and to each other party. The duty also applies to third parties joined to the proceedings, to the extent that the financial information or documents are relevant to the proceedings before the court.
37. The duty extends to the time when a party is preparing for proceedings. The Act is unclear what is meant by the notion of preparation for proceeding. Does the duty apply if a party seeks advice about whether there is an arguable case, or whether an application should be made? Or if advice is sought before committing to a separation? The Explanatory Memorandum describes what is intended to be captured by the concept of preparation by providing the following non-exclusive examples⁵ (in respect to married persons);
- a. taking steps to define or resolve their dispute under the Pre-Action Procedures for financial matters (currently in Part 1 of Schedule 1 of the Family Law Rules)
 - b. engaging in alternative dispute resolution (for example, by using letters of settlement offers, Family Dispute Resolution or arbitration) to attempt to resolve their financial or property matter before proceedings commence, and
 - c. drafting, or instructing a legal practitioner to draft, court documents to start/institute/initiate a proceeding about a financial or property matter.
38. The duty of disclosure extends to information as well as documents. Therefore, for example, if one party knows that there is a buyer for a property who is willing to pay a particular price, the duty extends to providing that information even though no document containing that fact exists.

⁵ Explanatory Memorandum Family Law Amendment Bill 2024 at [301]

39. It is important to remember that the amended Act now casts a duty upon legal practitioners to;
- (a) provide the party with information about:
 - (i) the duties of disclosure under this section and explain the circumstances in which they apply; and
 - (ii) potential consequences of the party not complying with the duties; and
 - (b) encourage the party to take all necessary steps to comply with the duties.
40. While the legislation talks about encouragement, it must be read together with other ethical obligations cast upon a practitioner, particularly the duty not to mislead the court. That duty would extend to not misleading the other party. The “encouragement” and the requisite advice should be carefully documented, and the advice should be provided at every stage when a client shows signs of being evasive about the provision of information and documents. If a lawyer knows that disclosure is being less than fulsome, he/she cannot hide behind the client’s refusal to disclose, and continue to act in the matter as if the undisclosed material did not exist. Any attempt to use a lawyer to knowingly mislead should result in the client being asked to find another lawyer.
41. The inclusion of the duty of disclosure in the legislation signals an attempt to emphasise the seriousness of non-disclosure. While there are no sanctions for failing to comply with the legislation, notes in the Act remind the reader of the consequences of noncompliance;
- Note: Courts have a range of powers that may be exercised to impose consequences when a person fails to comply with their duty of disclosure. For example, a court might do any of the following:
- (a) take the failure into account when making an order under section 79 (alteration of property interests);
 - (b) make any orders with respect to costs or security for costs against the person that the court considers just, having regard to the failure;
 - (c) make any orders with respect to disclosure that the court considers appropriate;
 - (d) if an order made by the court is contravened—impose sanctions under section 112AD;
 - (e) punish the person under section 112AP for contempt;
 - (f) stay or dismiss all or part of the proceedings.
42. Additionally, if the failure to disclose is discovered after judgment and is serious, an application to set the order aside or vary the order under sec 79A or 90SN will almost certainly follow.

Property Settlement Proceedings

43. The major amendments relate to property settlement proceedings. Sections 79 and 90SM have been substantially re-written, and while the layout appears familiar, there may be unintended consequences in the application of the legislation, as was demonstrated in the Full Court’s decision of *Shinohara & Shinohara* [2025] FedCFamC1A 126 (about which more below).
44. The former sec. 79 has been divided into two separate sections by adding a new sec. 79AA. The rewritten sec. 79 now only deals with the making of property orders, including how the court must approach an application and what considerations need to be brought to bear in order to attain an order which it considers appropriate (sec 79(1)).

45. The new sec. 79AA deals with procedural powers and duties which were previously in the former sec. 79. The matters dealt with in sec. 79AA include;
- a. Enforcement of sec 79 orders after death of a party;
 - b. Adjournment of property settlement proceedings to allow the parties to consider the likely effects of a sec. 79 order on the marriage or the children of the marriage;
 - c. Adjournment in case of likely significant change in financial circumstances;
 - d. Continuation of the proceedings after the death of party and before the property settlement proceedings are complete;
 - e. Attendance of parties at a conciliation conference before orders are made;
 - f. Creditors and other interested parties entitled to become a party to proceedings;
 - g. Bankruptcy trustee or trustee of an insolvency agreement may become party to proceedings on application;
 - h. When an application is taken to be finally determined for purposes of bankruptcy or insolvency agreement provisions.
46. The amendments create a new class of property being companion animals. The new sub-section 79(6) prescribes that where the property being dealt with is a companion animal (essentially a pet as opposed to a working, farm or breeding animal) the court can only make three types of order;
- a. That only one party to the marriage, or only one person who has been joined as a party to the proceedings, is to have ownership of the companion animal; or
 - b. that the companion animal be transferred to another person who has consented to the transfer; or
 - c. that the companion animal be sold.
47. The court is specifically prohibited from making any other kind of order with respect to the ownership of the companion animal. In formulating which of the three options the court will adopt, there are separate factors in se. 79(7) which the court must consider. These are;
- (a) the circumstances in which the companion animal was acquired;
 - (b) who has ownership or possession of the companion animal;
 - (c) the extent to which each party cared for, and paid for the maintenance of, the companion animal;
 - (d) any family violence to which one party has subjected or exposed the other party;
 - (e) any history of actual or threatened cruelty or abuse by a party towards the companion animal;
 - (f) any attachment by a party, or a child of the marriage, to the companion animal;
 - (g) the demonstrated ability of each party to care for and maintain the companion animal in the future, without support or involvement from the other party;
 - (h) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.
48. It is therefore necessary to seek separate orders and provide supporting evidence in relation to family pets. If the family has a number of pets, the exercise is a fairly costly one from the point of view of the parties. It must also be remembered that only the three types of orders specified in sec. 79(6) can be made, even if it is by consent.

49. The other amendments to sec 79 provide for the process by which the court determines what order (if any) it will make, previously called the three, four or five step process, within the section. Section 75(2) which had to be read with some adaptations, because it was originally framed for spousal maintenance applications, has now been consigned to apply to spousal maintenance applications. The new sec 79(4) is entitled “*Considerations relating to contributions*”. That section will be familiar to all practitioners. Sec 79(5) is entitled “*Considerations relating to current and future circumstances*”. That sub section has familiar factors found in sec 75(2) but they have been modified to more accurately reflect the pertinent matters relating to a property application.

The Process

50. Section 79(3) now requires the court to;
- (a) identify:
 - (i) the existing legal and equitable rights and interests in any property of the parties to the marriage or either of them; and
 - (ii) the existing liabilities of the parties to the marriage or either of them; and
 - (b) to take into account (except for the purpose of making an order with respect to the ownership of property that is a companion animal):
 - (i) the considerations set out in subsection (4) (considerations relating to contributions); and
 - (ii) the considerations set out in subsection (5) (considerations relating to current and future circumstances).
51. There is nothing unusual about that statement. It is what the court has been doing since the start of the Act in various guises. The cases of *Hickey And Hickey And Attorney-General For The Commonwealth Of Australia (Intervener)* (2003) FLC ¶93-143 and more recently *Stanford V Stanford* (2012) FLC ¶93-518 [2012] HCA 52 made it clear that this was the preferred pathway to determining property proceedings.
52. In the explanatory memorandum, the Government made it clear that it wished to help litigants understand the way in which the court would deal with a property application. Unfortunately, that good intention has produced unintended consequences.
- a. Add Backs can no longer appear on the Balance Sheet as an asset retained by the parties in whose favour a preliminary distribution was made. The Full Court in *Shinohara & Shinohara* [2025] FedCFamC1A 126 held that the amended legislation requires the balance sheet to comprise only current legal and equitable interests in property. Property which has been disposed of, whether by expenditure, waste or ineptitude is no longer in existence and should not be included on the balance sheet. The Full Court found that such former property which would have been available had it not been disposed of, should be looked at in the context of the contribution assessment or the s 79(5) assessment of current and future circumstances. The Full Court said (at [125] to [127])
- “125. So that it is clear, s 79 now directs that the categories identified in *Omacini* pre-amendment that were notionally added back are to be considered in ensuring a just and equitable outcome, either by way of historical contributions, or by way of their relationship to and impact upon

the current and future circumstances at the s 79(5) stage. For the avoidance of doubt, it is open when consideration is given to s 79(2) of the Act, to consider the matters in s 79(3)(a) and s 79(3)(b), together with those in s 79(4) and s 79(5) and conclude it is not just and equitable to make any order (Cosola & Moretto [2023] FedCFamC1A 61; (2023) FLC 94-143).”

126. *The holistic approach in assessing and determining contributions and adjustments thereto (Jabour & Jabour [2019] FamCAFC 78; (2019) FLC 93-898 (“Jabour”); Horrigan & Horrigan [2020] FamCAFC 25 (“Horrigan”)) remains applicable. Each of the considerations, by either s 79(4) or s 79(5), requires engagement with the circumstances of the disposal of property, the value it achieved, and its use and application being considered and weighed to achieve the mandate of justice and equity that permeates s 79 of the Act.*

127. *As notional property does not exist, it cannot be identified to form part of the balance sheet recording the current items of the parties’ property. Items 7 to 10 inclusive will be removed from the balance sheet and considered in the contribution findings or the adjustments thereto.*

- b. The court must now follow the mandated procedure. Thus, in cases where the court resolves that a payment of a fixed sum, which is unrelated to the percentage of an asset pool, should be made it is still necessary to make the findings contained in the sub-section.
- 53. Great care should be taken when advising on interim property settlements or litigation funding orders. While the addback procedure ensured that each party was paying their own legal costs of the proceedings (unless a costs order was made by the court) the current approach could result in the interim distributions or reductions of capital used for costs being lost in the *“holistic approach in assessing and determining contributions and adjustments thereto.”*
- 54. The problem is exacerbated if one of the parties is funded by a litigation funding company. The legal fees paid out become a liability of the funded party. The liability incurred by that party will appear on the balance sheet as it must. It will be necessary for the other party to argue that such liability be disregarded. The Act requires identification not adjustment of every item. The law on this issue will need to develop.
- 55. In assessing contributions the new section 79(4)(ca) makes reference to;
 - (ca) the effect of any family violence, to which one party to the marriage has subjected or exposed 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);

This is a codification and modification of the principle emerging from the case of *Kennon and Kennon* (1997) FLC ¶92-757. In that case the Full Court stated the principle that family violence which was demonstrated to have a significant adverse impact upon the victims contribution to the marriage should only apply to exceptional cases. The majority were concerned with the “floodgates argument”.

- 56. The common law has moved beyond that argument and the amendments to sec. 79 have codified the principle that the effect of any family violence has on the victim’s ability to make the contributions provided for in the section. The section is expressed in

neutral terms in order to allow the court to make an assessment. This means that cases need to be prepared to provide evidence of the effect of the violence as well as the occurrence and extent of the violence.

57. The prospective effect of the family violence on the victim's current and future circumstances are dealt with in sub-section 79(5)(b). That means that family violence has both a retrospective and prospective effect. It also means that in addition to the evidence necessary to support the proposition that contributions were made more difficult, evidence is necessary to establish any diminution of the victim's earning capacity, or the health of the victim and the prospects of recovery. This combination of retrospective and prospective factors is the codification of the Full Court's decision in *Boulton & Boulton* (2024) FLC ¶94-202.
58. Sub-section 79(5) (d) deals with the effect of any material wastage of property or financial resources, caused intentionally or recklessly by a party to the marriage. This is a codification of the of Baker J's decision in *Kowaliw and Kowaliw* (1981) FLC ¶91-092, which is regularly cited in relation the following circumstances (often described as waste);
 - (a) where one of the parties has embarked upon a course of conduct designed to reduce 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.
59. Baker J took the view that these matters should be taken into account under the former sec. 75(2)(o) (now sec. 79(5)(v)). How those matters are taken into account depends on the evidence and the effect of the conduct. However, it is clear from the discussion in *Shinohara* (op. cited) that they will not be added to the property pool and divided. If they are dealt with as considerations under sec. 79(5) it is unlikely that the innocent party will be reimbursed for the whole value of the wastage or ineptitude.
60. There is what appears to be a strange inclusion at sub-section 79(5)(e) of "*any liabilities incurred by either of the parties to the marriage or both of them, including the nature of the liabilities and the circumstances relating to them*". It will be remembered that liabilities must be considered at sub-section 79(3)(a)(ii) when identifying legal and equitable interests in property (effectively the property pool). How the two subsections will be interpreted and applied remains to be seen. It is conceivable that sub-section 79(5)(e) will authorise a disregard of certain liabilities in the pool of assets, for example obligations to litigation funders discussed above.
61. Sub-section 79(5)(f) deals with the extent to which a party to the marriage has care of a child of the marriage under the age of 18 years. That factor has always been present. What is new is the inclusion of the need of either party to provide appropriate housing for such child. At a time of a national housing crisis, it is obvious that this sub-section will receive a lot of attention.
62. Otherwise, the current and future circumstances which need to be considered remain the same as they were in the previous section 75(2) with only minor adjustments for renumbering and modernising the language.

Interim Property Distribution and Paid Legal Fees

63. The add back of paid legal fees interim property distributions provided a convenient method for accounting for those disbursements of funds. Paid legal fees in particular need to be carefully considered because if they are not taken into account at their full value, one party will be contributing to the payment of the other's legal fees in the absence of an order for costs.
64. Just because property that no longer exists is not to be added to the balance sheet does not mean that it cannot be taken into account at its full value when considering the section 79(5) factors. It would be prudent to perform a calculation of what each party "owes" the other in paid legal fees, interim property settlements or wasted assets and present that as an adjusting amount at the stage of calculating the result. Any other approach, it is suggested, is productive of an injustice. This evidence should be provided separately from the balance sheet, with the adjustment clearly identified as a sec. 79(5) adjustment.

Conclusion

65. The changes made appear to be minor, but they will have a significant effect on the way in which property cases are decided or settled. The elimination of the requirement in *Kennon and Kennon* (op cited) that consideration of family violence be confined to exceptional situations brings the law into line with the unfortunate reality of the violence epidemic. Problems will arise in relation to the ability to compromise cases in which the allegation of family violence is made. Practitioners are under a duty to ensure that client victims are not pressured to abandon any legitimate claims and perpetrators are rarely, if ever, going to admit that they were a source of the problem.
66. Until there is guidance from the courts on this issue, victims of family violence are doomed to press their cases before the courts with the attendant costs, both financial and emotional. In the past where the court has considered and taken family violence into account, it produced an uplift for the victim of between 3% and 5%. In a case where the net assts total \$1 million, this represents about \$30,000 to \$50,000 extra. The question must always be asked whether it is worth putting the client through the trauma and expense of pressing a family violence adjustment.
67. The spousal maintenance provisions have had family violence included as a factor in the same way as the property provisions.
68. The potential for the courts to apply Div. 4 of Part XI of the Act and do away with the rules of evidence in property and maintenance cases will also bring about a change in the way proceedings are prepared and conducted. It requires a rethinking of what is expected of the courts and parties. Applying rules, which were developed to ensure that impermissible or prejudicial information was kept from juries, when civil proceedings were determined in that way, does not accord with the modern approach of courts presided over by professional judges who are able to assess the relevance and probative value of evidence and not be swayed by unreliable material. The power to control what evidence is given and the way in which it is given should, if properly exercised, alleviate the problems of litigants in person flooding the court with hundreds of pages of irrelevant material.
69. The Explanatory Memorandum explains the inclusion of the new sec 79(3) in this way;

44. This Item partially implements Recommendation 11 of the ALRC Inquiry, by specifying the approach the family law courts will take when considering whether to make an order to alter the interests of the parties to the marriage in any property. This Item provides clear guidance for all Family Law Act users, including those negotiating their own property settlements outside of court, on how to consider what order (if any) should be made to alter the property interests of a party to a marriage.
70. For so long as factors are “taken into account” without providing a measure by which the outcome can be explained, it is doubtful that the new provisions will achieve that stated aim, particularly for users negotiating their own property settlements outside of court.

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