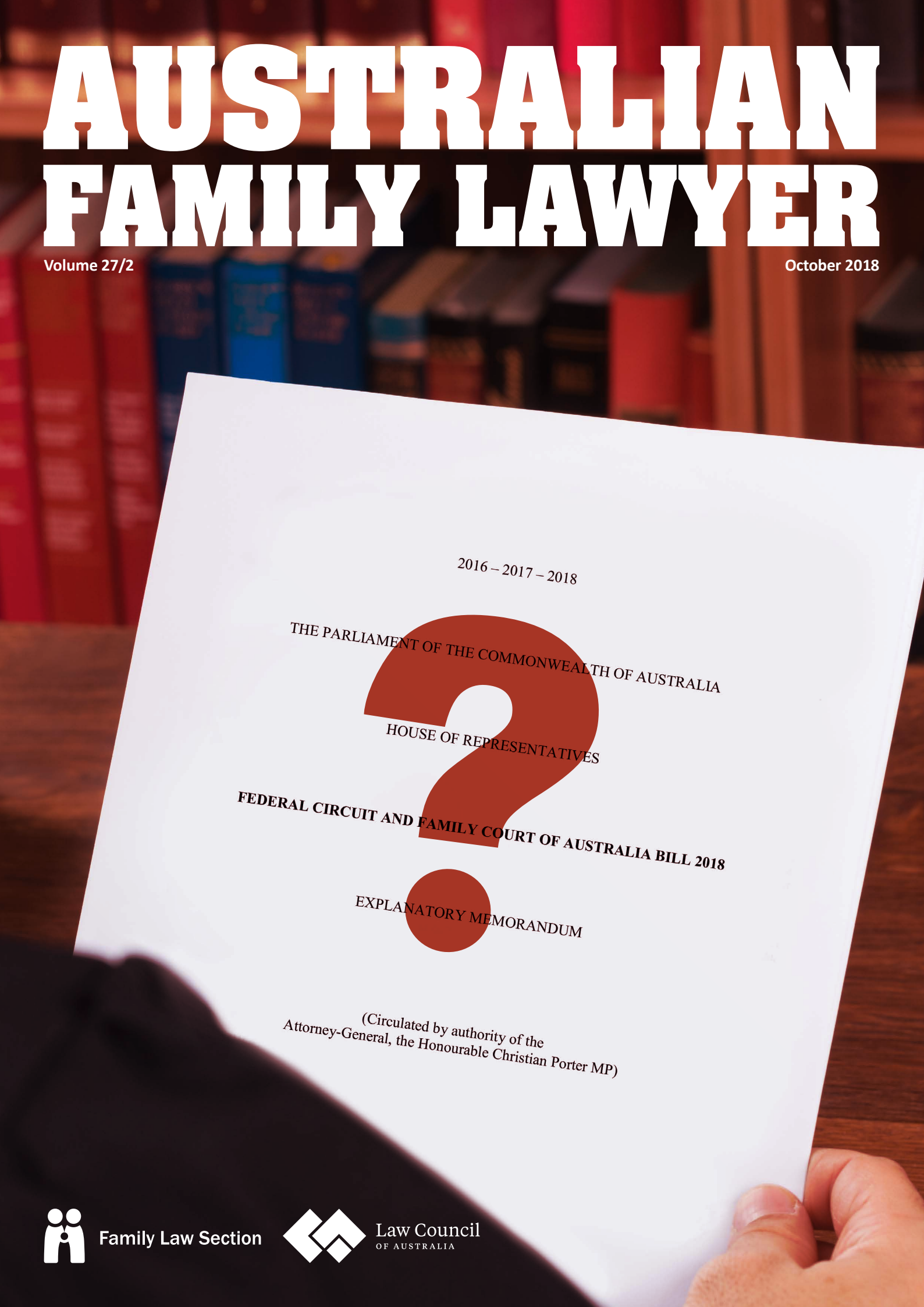
AUSTRALIAN FAMILY LAWYER

Volume 27/2

October 2018



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NOTICE TO CONTRIBUTORS

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.

Contributions should be submitted to Paul Doolan, Editor, Australian Family Lawyer c/- Barkus Doolan Family Lawyers, Level 9, 370 Pitt St, Sydney NSW 2000, DX 11561 Sydney Downtown, or email **paul_doolan@famlaw.com.au**.

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FROM THE KEYBOARD **OF THE EDITOR**

Paul Doolan

Welcome to the National Conference edition of Australian Family Lawyer.

The proposed federal courts amalgamation and the ALRC family law enquiry are enormous issues for family lawyers and the broader Australian community. The article from Chief Judge Stephen Thackray in this edition highlights the importance of a specialist family law court and an independent judiciary, matters that the parliament and the ALRC will no doubt keep uppermost in their thoughts as the debate over reform continues.

We are also delighted to bring you an article from Professor Richard Chisholm, who has a 'modest proposal' for the reform of the laws on contravention of parenting orders.

There is much to read in the journal and even more to enjoy and learn as the National Conference concludes.

I have enjoyed catching up with many friends and colleagues from around the country and overseas in Brisbane this week.

Kind regards
Paul Doolan

> *Thanks once again to all of our contributors, and if you have an article or an idea for content for the Journal, please let me know.*

FROM THE **CHAIR**

Wendy Kayler-Thomson

This is an edited transcript of the State of the Nation speech I delivered at the National Family Law Conference on 3 October 2018.

So, how quickly times change? Two years ago, at the last National Family Law Conference in Melbourne, we celebrated the 40th anniversary of the commencement of the Family Law Act, and the Family Court of Australia. We heard from the inaugural Chief Justice of the Family Court, the Honourable Elizabeth Evatt about the creation and formative years of the Court, and her dedication to creating a court that respected and responded to the needs of separating couples and their children in a way that the commercial courts had been unable to. We reflected on the initiatives and innovations of the Court over succeeding years that led to Australia being recognised as having a world leading family court.

> And yet now, just two years later, we gather on the precipice of the effective abolition of a specialist family court in Australia. How did it come to this?

Never before can I recall a proposed family law reform creating such a unified and strident reaction of opposition from the family law profession and the legal profession more broadly, and from our colleagues in associated professions within the family law sector, such as psychologists and family violence experts. The opposition to the government's proposed federal courts restructure comes from all corners of our profession – those in private practice, those in community legal centres and women's legal services and, dare I say it, from some judicial officers.

Why is there such a deep level of opposition to the government's plans amongst the family law profession? In my view, the answer goes to the core of why each and every one of us does this work. It is our commitment to improving the lives and outcomes for our clients and their children. Its because we know that for those of our clients that end up in a court, a specialised court, with judges and associated professionals who are experts in family law, and with procedures and case management specifically attuned to the unique nature of family law disputes, gives our clients and their children the optimal outcome. We can say that confidently because for the last 18 years, since the creation of the Federal Magistrates Court, we have had a court of comparison.

When a former coalition government floated the proposal of the creation of a lower level court to deal with some family law cases, the family law profession – and the Family Court – opposed it. With the benefit of hindsight, the creation of a separate court, with separate processes but with similar jurisdiction, was in the words of our current Attorney-General, a mistake. It was a mistake that we warned against making at the time, and it is little comfort to us and to our clients, that the mistake is now acknowledged.

In the beginning, the unique nature of the Federal Magistrates Court, was a success. It did provide, for a short time, a simpler and cheaper form of justice for our clients who had relatively simple family law problems. Despite there being no legislative requirement to do so, governments appointed well credentialed and experienced family lawyers to the bench, several of whom are still there today. But as successive governments increased the jurisdiction of that Court to the extent that today there is little difference between its family law jurisdiction and that of the Family Court, the practices and procedures of the Federal Magistrates Court have not stood the test of time. The lack of a

legislative provision requiring only people with the skill and experience in family law to be appointed as judges of the Federal Circuit Court to hear family law cases has started to bite. Judges who have had no previous experience in family law are now regularly hearing family law cases.

> Why is specialisation so important? I would argue for two reasons – one directly related to task of judging and adjudicating individual cases and the impact it has on the outcome and process experienced by our clients. The second relates to the processes and procedures of the Court as a whole, and its ability to ensure that it responds to the changing needs of separating families and the community's expectations of a court.

There is a whiff in some of the discourse from the government and others about the proposed restructure, including in commentary about the PwC report, that litigation in the family courts can be or should be more like litigation in commercial courts. This is particularly highlighted in discussion about so called 'efficiencies', about adherence to rules and other non-compliant behaviour. That assessment demonstrates a fundamental misunderstanding of the unique nature of family law disputes and the behaviour of family law litigants.

Thankfully, for most of us, particularly the solicitors in the room, most of the work we do does not involve a court. In cases that we are able to resolve without bothering a court, we are generally dealing with separated families, who, whilst experiencing the trauma of a family breakdown, have the capacity, with our assistance, to resolve their dispute. But for those clients that need the intervention of a court, or who find themselves responding to a court application by their former partner, there are many characteristics to their behaviour in a court setting that require a nuanced, specialised and experienced response. There has been much said, including in the ALRC 's Discussion Paper, about the complex problems involved in many family law cases before the courts. This includes family violence, sexual abuse of children, drug and alcohol addiction and mental health problems. They are complexities which are relatively easy to label and for the community to understand may involve disputes which require a skilled and experienced judge to determine. But there is a deeper layer of complexity that is well known to us. People who experience family breakdown, and particularly those who end up in Court, often demonstrate a range of personal behaviours that is unlike the behaviour of people or corporations involved in commercial disputes.

Many are grieving the loss of a relationship or experiencing the cycle of psychological responses to the breakdown of that relationship – hurt, anger, frustration, acceptance. It is an understatement to say that our clients are not at their best. Even the most accomplished and intelligent of our clients, behave in a compromised manner that often defies commercial logic or is not in the best interests of their children. Many of them are overwhelmed by the process of separation and the litigation – many are trying to maintain their employment, care for children, grieve the loss of a relationship and some are clinging to a hope that the relationship can be rescued. Some are recovering from an abusive relationship in circumstances where the tool of abuse has become the litigation itself. One of the most fascinating pieces of research in the family law field in Australia in recent years has been Professor Bruce Smyth's research on the role of hatred in parental conflict. Some of our clients truly hate each other with a passion that they once reserved for the love that they felt for each other.

> There is the nub of why many of us do this work. Assisting people like this to reach a resolution of their dispute or to achieve an outcome in court is what keeps us engaged. Family lawyers are not just skilled lawyers, we are skilled at managing the vagaries of the personal behaviours that our clients present. It is those 'people management skills' that means we are able to settle more cases than we run. If it were not for those skills of family lawyers, the family law court system would have ground to halt a long time ago.

Judges who are experienced family lawyers understand all this. Their understanding of the management of

family law cases and family law litigants isn't just about what they have learnt in the relatively sanitised environment of a court room. Their years of experience in doing what we do informs their work as a judge. Quite simply, it makes them better judges.

History also tells us that a specialised court, with judges who have a background and experience in practice as family lawyers, is a court that is best placed to develop practices and procedures that responds more generally to the community's expectations of how family law disputes should be managed. The Family Court has pioneered case management and processes that have adapted to the changing needs of our clients – the Less Adversarial Trial is a good example.

There is much that could be said about the details of the proposed restructure, but I wish to highlight just a few.

The first is that this proposal is not a merger of the two courts. It is not a simpler system for our clients. In fact I would argue that the proposal makes the court system more complex by adding a new court – the family law appeal division of the Federal Court. And if the parenting management hearings bill passes parliament, or the modified version of that concept suggested by the ALRC in the report released yesterday was implemented, there would be 4 tiers of courts for separating couples to navigate. On top of this for some clients, will be the state family violence courts.

> The proposal does not tackle the one significant issue that has faced the two courts over recent years which is the division of their work. The Bills represent a lost opportunity to redefine the family law jurisdiction of the two levels of courts.

The Family Law Section does not accept the efficiency claims made in the PwC report. Some of the raw data in the reports we can verify against that contained in the published annual report of both courts. But in the absence of any consultation by PwC with the profession, we are asked to take the balance of the raw data 'on trust'. Even if the raw data is correct, it is the interpretation of that data that is fundamentally flawed. Today is not a day for statistics, but most of us are incredulous at the claim that that the Federal Circuit Court can take on the more complex work of the Family Court and dispose of those cases more quickly or efficiently. The suggestion that the Federal Circuit Court can take on more work without any more resources being allocated to it for judges, family report writers, registrars and other court staff is astounding.

With this proposed restructure, it feels a little like the government exists in a parallel universe. There is a plethora of reports, inquiries and recommendations that have highlighted the complex nature of family law disputes. There are many reports, including those emanating from the parliament and yesterday's ALRC report, that call for increased skill and specialisation amongst the professionals working in the family law system, including judges. The community's understanding of separation breakdown, and in particular the heightened awareness of the prevalence of family violence, has caused the community to expect more of our governments and institutions. That is the universe that we live and work in. On the other hand, in the government's universe separated families are 'outputs' and statistics, and the complexities of our family law clients and their families can be dealt with by a court with general jurisdiction and just $4 million in extra funding.

I am sure you, like me, are looking forward to the Attorney's presentation this afternoon.

The Family Law Section does not accept the efficiency claims made in the PwC report.

FROM THE **COURTS**


Chief Judge Thackray

Family Court of Western Australia

Retirement of Chief Judge

The Honourable Justice Stephen Thackray has announced his retirement from the Family Court of Western Australia and the Family Court of Australia effective 6 January 2019.

Chief Judge Thackray joined the FCWA as its Principal Registrar and senior Magistrate in 1997. He was appointed a judge in 2004, a member of the Appeal Division of the Family Court of Australia in 2006 and Chief Judge of FCWA in 2007. He was until recently the senior judge of the Appeal Division but resigned as an appeal judge effective 28 September 2018.

There will be a ceremonial sitting to farewell the Chief Judge on **Thursday 13 December 2018** at **4 pm** to which all members of the profession are welcome.

Appointment of new Family Law Magistrate

Mr Paul Glass has been appointed as a Family Law Magistrate effective from 1 October 2018. Prior to his appointment, Magistrate Glass was a member of the Victorian Bar and a part-time member of the Administrative Appeals Tribunal.

Retirement of registrar

Registrar Thomas Kuurstra is stepping down from his role as a full-time Registrar, but will continue to undertake work as a Registrar with FCWA on a sessional basis.

Acting judicial appointments

Justice Simon Moncrieff will act as the Chief Judge while Justice Thackray is overseas on leave from 8 October 2018 to 5 November 2018 inclusive.

The appointments of Acting Judge Alan Moroni and Acting Magistrates Leonie Forrest, Robin Cohen and Andrew Mackey end on 1 October 2018. The Chief Judge has acknowledged the outstanding work of all these judicial officers during their time in their acting roles.

Acting Judge Moroni will return to his substantive position as a Family Law Magistrate and Acting Magistrate Forrest will continue her duties as Deputy Principal Registrar. Acting Magistrates Cohen and Mackey return to their senior roles at Legal Aid WA.

Magistrate Annette Andrews continues as Acting Principal Registrar pending the completion of a restructure of the FCWA's management arrangements.

Accommodation crisis

The Court is still awaiting advice concerning its request for funding to build four new courts in the Commonwealth Courts Building in Perth, now that the Court has outgrown its current premises. Magistrates of the Court continue to have to sit in unsatisfactory premises elsewhere in the Perth CBD. This is inconvenient for the Court, practitioners and clients alike.

THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY: **VALUES LOST OR CONVENIENTLY FORGOTTEN?**

Chief Judge Thackray

Written by Justice Stephen Thackray, Chief Judge, Family Court of Western Australia, presented at The David Malcolm Memorial Lecture 27 September 2018

I begin by acknowledging the traditional owners of the land on which we meet, the Wadjuk people of the greater Noongar clan and by paying my respects to their elders past, present and emerging. I also acknowledge and pay respect to all the other Aboriginal people of our country.

I am honoured to have been invited to deliver the fourth David Malcolm Memorial Lecture, shortly before the anniversary of David's passing four years ago. I especially acknowledge the presence tonight of Mrs Kaaren Malcolm, Chief Justice Peter Quinlan and many other distinguished guests, colleagues and members of the faculty of Notre Dame University.

This university is the place where David spent many happy and rewarding and, I am sure, more tranquil times after his retirement as the 12th and longest serving Chief Justice of Western Australia. It is fitting therefore that people gather here each year to remember one of the greatest citizens and certainly one of the greatest jurists this State has ever produced.

The judges who have previously given this lecture were, in order of appearance, Neville Owen, Robert French and Michael Barker of the Supreme Court, High Court and Federal Court respectively. Apart from their high offices and their brilliance, those three judges all had something in common with David Malcolm: integrity and independence – the essential attributes of any judge, most especially a head of jurisdiction.

The three previous lecturers also had another thing in common – they all had the privilege of knowing David much better than I did. As a very young lawyer, I worked for a firm of solicitors at 524 Hay Street, the modest building which then housed the tiny Western Australian Bar. David joined the Independent Bar in 1980, and I moved out of 524 Hay Street in the following year, by which time David had already taken silk and become President of the Bar! The closest I ever came to him in those days was when I trekked upstairs to Bar Chambers, clutching the $1.50 fee required to have an affidavit witnessed.

Winding the clock forward a quarter of a century, the Family Court of Western Australia was honoured when David, by then Chief Justice, sat on the bench at the ceremony at which I was welcomed as a judge.

Chief Judge Thackray graduated in Law from UWA with Honours in 1977.

He spent 20 years as a solicitor, barrister and mediator and was President of the Family Law Practitioners' Association.

His Honour was appointed Principal Registrar/Senior Magistrate of the Family Court of Western Australia in 1997. After serving as an Acting Judge he was appointed in 2004 as a Judge of the Family Court of Western Australia. In 2006 he was appointed to the Appeal Division of the Family Court of Australia. In 2007 he became the Chief Judge of the Family Court of Western Australia.

Justice Thackray has acted as the Chief Justice of the Family Court of Australia. He became the Head of the Appeal Division of that court in March 2017 and remained in the position until March 2018 at which time he resigned from the Appeal Division effective 28 September 2018.

He bounded into our chambers that morning with that towering presence, that sense of energy and that never-ending smile which were his trademarks. I was grateful for his presence, but I will always be indebted for the letter he sent to my Chief Judge afterwards, which for me characterised the generosity of his spirit. This being my last public speech before my farewell ceremony, I hope you will forgive me for thinking it appropriate that it is given in honour of a great man who took the time to be there at the start of my judicial career.

As I come to the end of my time as a Chief Judge, we have a new Chief Justice of Western Australia who is starting his journey in David's footsteps. At the same time, the Family Court of Australia, of which, until tomorrow, I am the senior Appeal Judge, prepares to farewell a Chief Justice for the second time in 12 months. This concurrence of events leads me to reflect on the nature of judicial leadership, and on David's example and legacy in that role, since judicial leadership is inextricably intertwined with my main theme, judicial independence.

An obvious, and regrettably current, circumstance in which the role of a Chief Justice as leader assumes prime importance arises when a court or some of its judges are under attack, whether from politicians, interest groups, or in the media. The leadership needed from a head of jurisdiction is now even more critical than it was in the past, when it was an accepted role of Attorneys-General to **defend** judges from attack, including attack by fellow politicians. As many here know, the judges of the Family Court of Australia, both in its appeal and trial divisions, have this year experienced public criticism that is ill-informed, inaccurate and unfair.

David Malcolm recognised the role Chief Justices should play in such circumstances. In an article in the Southern Cross Law Review, he pointed out:

> It is necessary to remind the public and the other arms of government that the judiciary is an equal and independent arm of the government. The Chief Justice must be ready to speak for the judiciary of the nation, or of a State or Territory, on issues such as those that affect judicial independence and attacks on the judiciary.

Recognising the reciprocal nature of the obligation, he went on immediately to add:

> The Chief Justice has a responsibility to ensure that relations with the legislative and executive arms of the government are appropriate, mutually respectful and cordial.

In my experience, Chief Justices agonise over the choices they must make as spokesperson. After all, as Chief Justice French emphasised, they are *"but one amongst equals"* and should therefore speak – **or remain silent** – not for themselves but for the body of judges. It is essential therefore that a Chief Justice develops a mechanism by which he or she can share information about matters of policy with all the judges and gather their views on matters of importance to the court. The mechanism should ensure there is room for a range of views, and a culture where judges are able to express opposing views in a proper forum. In this way, Executive Government can be confident that any representations made are indeed the views of the judges.

Representations to government are usually best made privately, but there are times when a Chief Justice needs to speak publicly, especially when views critical of the judges have been aired publicly by representatives of the government. The propriety of doing so is recognised by guidelines adopted in 2014 by the Council of Chief Justices of Australia and New Zealand. Those guidelines contemplate comment where, for example, proposed laws relate *"to the abolition of existing courts and the creation of new courts"* and in respect of laws which affect "*the jurisdiction and powers of the courts"*. Unsurprisingly, the guidelines contemplate such comments being made by the head of jurisdiction, no doubt after consultation with the judges.

Of course one contribution a Chief Justice can always make to any debate is to ensure that the public has an accurate appreciation of the work of his or her judges. Chief Justices will have an understanding of the day-to-day work of the judges because they share in that work and have long experience of it from the other side of the bar table. As Chief Justice Malcolm said:

> So far as I am aware, all Chief Justices in Australia regularly sit in Court. It is inconceivable that a Chief Justice would act entirely as an administrator and never sit as a judge. A Chief Justice is chosen and appointed to be a judge and is expected to demonstrate leadership in that capacity.

There can be no doubt David Malcolm lived up to this expectation. Apart from running an efficient court, being the face of the judiciary to the West Australian community, and making many speeches in Australia and overseas, he also sat regularly both at first instance and on appeal. His reputation spread well beyond the borders of our own State, and it was therefore no surprise when he was asked to preside over a specially constituted bench of the New South Wales Court of Appeal to hear a case involving a member of that court.

It was said at his farewell that David *"led from the front, never shirking the difficult cases"*. The importance of a Chief Justice leading his or her judges by example in deciding cases cannot be overstated. While each individual judge enjoys complete independence, a group of judges in my experience is no different to any other group in a workplace. *The tone is always set from the top* is an adage well worth remembering, and fundamental to all forms of leadership.

David Malcolm had amongst his many talents those of an outstanding sportsman. He would therefore forgive me for quoting from Australian cricket captain Ian Chappell who played his last test match in the same summer that David joined the Independent Bar. Chappell said this in a speech to the Wanderers Cricket Club, which was simply entitled *Captaincy*:

> Respect is vital to a captain. He must earn it in three categories: as a player, as a human being and finally as a leader.

Chappell went on to stress the importance of the skipper of the team being good enough to hold his place as a player, and criticised what he perceived to be the English method of selection which he felt did not always achieve this result, leading to the team playing *"virtually one man short."* I am sure the judges of the Supreme Court of Western Australia never felt they were playing one man short under the captaincy of David Malcolm.

I will return shortly to the topic of team selection, as it is vital to a consideration of the title I have chosen for this talk – *The Rule of Law and the Independence of the Judiciary: Values Lost or Conveniently Forgotten?* The rule of law and the independence of the judiciary were recurring themes in David's writing and work. In fact, I contend that the most enduring of his legacies is the contribution he made internationally to these twin pillars of our democracy.

Amongst his many roles, David was Chair of the Judicial Section of LAWASIA and organised the Conferences of Chief Justices of Asia and the Pacific, of which he also served as Chair. The assemblies of those groups were arranged to coincide, so when they met in Japan in 2003, David gave not one, but two speeches, each dealing with aspects of judicial independence.

He commenced his address to the 10th Conference of Chief Justices in Tokyo with these words:

> It is almost universally acknowledged that one of the hallmarks of a democracy is the independence of the Judiciary. A Judiciary which exists merely to do a Government's bidding or to implement Government policy provides no guarantee of liberty.

Once upon a time, most politicians accepted that truth. One in this mould was Winston Churchill – a great hero of mine. Churchill spent a lifetime opposing tyranny in all its forms, some of which we now see re-emerging in precisely the same insidious ways that occurred in his lifetime. Whilst never a lawyer or judge, Winston Churchill had a clear understanding of the role the judiciary performs in preserving our freedom from tyranny. He maintained that:

> The independence of the courts is, to all of us, the guarantee of freedom and the equal rule of law. It must, therefore, be the first concern of the citizens

> of a free country to preserve and maintain the independence of the courts of justice, however inconvenient that independence may be, on occasion, to the government of the day.

As our Chief Justice, David Malcolm was similarly unwavering in his commitment to judicial independence. He spoke in defence not only of his court but of all courts and all judges. In my humble opinion he was the very model of a good Chief Justice who tries to work in harmony with the Executive Government, but never becomes its servant or mouthpiece.

David knew that judicial independence is indispensable to public confidence in the administration of justice. He knew also that it is not an end, but a means to an end. One of his contemporaries, Chief Justice Sir Gerard Brennan, had been at pains to point this out when addressing the Australian Judicial Conference in 1996:

> Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed.

David Malcolm did more than just talk about judicial independence. He was instrumental in the formal adoption by the Conference of Chief Justices of the Asia Pacific of what is known as the *"Beijing Statement of Principles of the Independence of the Judiciary".* Under his leadership, ours was the first region in the world where such a set of principles was adopted. His role in this regard was acknowledged by Chief Justice Wayne Martin in his valedictory oration at the sitting of the Supreme Court convened after David's death.

I will return to the articles of the Beijing Statement in a moment. But first, I want to develop the topic of team selection, since it is central to any consideration of judicial independence.

Winston Churchill certainly understood its importance and he understood, in particular, how important it is to avoid the appearance of the process of selection of judges being associated with political considerations.

After his visit to Italy in August 1944 following the fall of Mussolini, Churchill sent a message to the Italian people in which he emphasised, not for the first time, that *"the price of freedom is eternal vigilance"*. In answering the question of *"what is freedom"*, Churchill said that there are one or two simple tests by which the freedom of a country can be measured in the modern world. One of the tests he posed for any country was whether *"their courts of justice [are] free of all association with political parties".*

The same point was made by the Right Honourable Beverley McLachlin, the former Chief Justice of Canada, who coincidentally was appointed Chief Justice of British Columbia in 1988, the same year David Malcolm became the Chief Justice of Western Australia. Mrs Malcolm tells me that their paths crossed over the years, and their thinking about judicial independence certainly coincided. In a speech called "The Decline of Democracy and the Rule of Law", Chief Justice McLachlin gave some tips about what judges and heads of jurisdiction can do to preserve and promote judicial independence. She started off by saying that, as judges:

> We can educate the public and the politicians about what judicial independence means and why it is vital to our democracy and our social well-being.

Getting down to the specifics of team selection, her Honour went on to say:

> We should support an appointment process that appoints judges on merit, and not political affiliation.

And she immediately added:

> We must never allow ourselves to be co-opted by governments.

Delivering much the same message, Brennan CJ said to the 1997 Australian Legal Convention:

> Treating Courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable. Mutual understanding of and respect for the functions of each branch of government is essential to rebuild and preserve an appropriate relationship between the judicial and the political branches.

Through the agency of David Malcolm and others, these sentiments now find formal expression in the Beijing Principles which I mentioned earlier. Articles 11 and 12 provide as follows:

> **11.** To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.
>
> **12.** The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.

David provided valuable commentary on the Beijing Principles in the 2003 Western Australian Law Review, where he wrote, echoing sentiments he had expressed in Tokyo a little earlier:

> It is necessary that the influence of the executive should be kept to a minimum in order to reduce potential for improper considerations. In the interests of public confidence in the impartiality of appointees, the selection process should be open and formal.

This brings me to the critical question – *"how is Australia measuring up in 2018 to the Beijing Principles?"* Is the appointment process *"open and formal"*? Are appointments being made solely on the basis of competence and merit as we should not only hope but expect and demand? Or are some being made on the basis of political affiliation or personal connection or what the Executive expects those appointed will do to further some policy agenda?

After the unfortunate events that unfolded elsewhere in Australia a couple of years back, we might have had cause for optimism that governments would appreciate the potential for backlash if a perception arose that any person had been chosen for office for reasons other than suitability. It is therefore troubling that statements are now being made openly in the media questioning whether some appointments **have** been made on grounds other than merit.

For those who work in the area, it is particularly concerning that these complaints appear primarily focused on appointments to courts and tribunals that deal with family law disputes. Unfortunately, they bring to mind the story told of Lord Halsbury, the former Lord Chancellor of Great Britain, who was asked whether *"ceteris paribus"* (i.e. all other things being equal), the best man would be appointed to a vacant judicial position. His Lordship apparently responded "ceteris paribus be damned, I'm going to appoint my nephew".

I have in mind here especially the comments made by Professor Patrick Parkinson on ABC Radio National on 2 June 2018 when asked about the constitution of the new court the federal government has announced will be created to deal with family law matters. He said:

> What happens between now ... and January 1st when this new court is meant to occur is very, very important, and we have to have a dialogue about the right model for this new court and ensure that we have expert specialist people, who are not just friends of the Prime Minister or the Attorney-General, not just Liberal Party members, but people who know what they are doing who will be appointed to the new bench.

What was it that moved Professor Parkinson to make that statement? To give some context, it must be understood that Professor Parkinson, who is now Dean of Law at the University of Queensland, is perceived to be one of the more conservative commentators on family law. He has often been consulted by government, and was described in the *Sydney Morning Herald* of 26 March 2018 as *"arguably Australia's most distinguished scholar in family law"*. Why is it that a person with his background feels the need to insist publicly upon appointments being made on grounds of suitability rather than the other considerations he mentioned?

Professor Parkinson is not alone in drawing attention to concerns relating to the basis upon which at least some appointments have been made. After outlining her own concerns, Professor Margaret Thornton of the Australian National University wrote on 19 April 2017:

> As courts are the bulwark of a democratic society, we should not unquestioningly accept the absence of transparency. We must put pressure on the [Attorney General] and the ... Government to reinstate formal criteria in deciding appointments to all federal courts.

Another academic and newspaper columnist writing in the Melbourne Age on 8 June 2018 said this about what she described as *"some highly unsuitable appointments"*.

> They were made as grace and favour appointments. Now those grace and favour appointments will be presiding over the most serious family law cases in the country. Cases where there are incidents of sexual abuse, of child abuse, and of family violence.

In the same article, Professor Parkinson was again quoted as being "*desperately troubled"* by some of the appointments that have been made. The quote continued:

> I say this with all seriousness, the government and the opposition ... need to come together to devise an independent, merit-based and non-political appointment process for all judges in federal courts or tribunals.

The first point to make and which must be made very strongly is that the concerns that have been expressed are not directed at all, or even most, judges hearing family law cases. Of course, the same would not be able to be said in future if we moved away from a merit based system of appointment. It is not enough, though, for litigants to be confident that they have a good chance of coming before a competent judge – that confidence should be absolute.

The second point is that none of the concerns expressed are related to judges or magistrates of our State Family Court. In fact, it is fair to say that our Court is looked upon around the nation as the model of a good family law system, not only because of its unique structure but also because there can be no perception that appointments have been made other than on merit.

Returning then to the calls for changes to the appointment process, it should be appreciated that family law cases are dealt with not only by two separate courts in the Eastern States and by our unified State court here, but also by the Administrative Appeals Tribunal, which deals inter alia with the contentious issue of child support. Family lawyers and academics therefore also take an interest in the way in which appointments are made to that Tribunal, and I doubt it was by accident that Professor Parkinson included tribunals in his call for reform.

Examination of the public record will demonstrate why so many judges, lawyers and academics agree with Professor Parkinson that the time is ripe for a careful, bipartisan examination of the appointment process. I make no apology for saying so in a public forum, and I cite no less authority for doing so than the man whom we honour tonight. While David recognised that *"consistently with the need for judicial independence there is a general restraint on judges expressing views on matters of current political controversy"*, he was also very clear in stating:

> It is my firm belief that a judge should be fully entitled to speak out on a matter related to the administration of justice, even a matter of public controversy, so long as he or she does not give people cause for suspecting bias or partiality in the cases to be heard in the Court. A judge must also refrain from comment on matters of political controversy. There are however, matters that involve the administration of justice on which members of the judiciary may have not only a right but a duty to speak out.

I am further fortified in drawing attention to this topic by quoting Chief Justice McLachlin:

> Judicial independence, as its history attests, has not been won by fiat or by accident. It has been won by the vigilance and courage of lawyers and judges over the centuries. And it is by that same vigilance and courage that it is sustained...

And no less a person than Sir Gerard Brennan spoke out publicly on the same topic in 2008 when he drew attention to *"an increase in the number of anecdotal reports of unmeritorious appointments"*, leading to him to argue that *"the time has passed when it is possible to have any confidence in the system to discover and evaluate the abilities and the character of prospective appointees to Commonwealth courts".*

There is much more that could now be said about the background to the current calls for all appointments to Commonwealth courts and tribunals to be made on the basis only of merit, but this is neither the time nor the place. Examination of freely available material, including past editions of *The Australian* and interstate daily newspapers going back to at least 2008, would suffice to give at least some indication of the extent of the problem. What troubles me is that some people associated with the process seem not to understand there is a problem at all.

It is not often that we get an insider's view of how the process sometimes works. One exception appeared in *The Canberra Times* in an interview with a former Senator who had been appointed to a very senior, and highly remunerated, role in a tribunal. Having noted that the Senator had lost pre selection after many years in politics, the article went on to say that *"some of [the Senator's] colleagues in the [Government] felt badly about his involuntary departure"*.

I pick up the story with the former Senator's own words:

> "My colleagues had been knocking on my door throughout 2014 with offers of various sorts, they felt some sort of sense of responsibility to see I was looked after so I did have a number of offers made...
>
> "Initially I said no – I'd been working for governments one way or the other for close on 30 years and wanted to get off that treadmill for a while and see how I would go working in the private sector.

The Canberra Times article continued:

> Was he offered an overseas post? "Yes ... that's all I can say, sorry."
>
> So the offer of the tribunal did not come out of the blue but had the added attraction of being part of the legal system.
>
> He was due to go on holiday in Europe with his wife, as the appointment was about to be announced.
>
> "I realised I would have to spend some of that holiday brushing up on the law so I took a couple of text books with me and ploughed through them on the trains."

Having thus explained how he had prepared himself for this senior role, after his long absence from the law, the former Senator said this:

> "I wouldn't have predicted [this appointment] at all ... I wouldn't have said I was an outstanding lawyer because I never wanted to make it my career.
>
> "I had always seen it as a vehicle towards getting into politics, never as an end in itself. So coming back all these years later and suddenly finding myself back in the law, is a funny type of feeling."

Perhaps it is best that I allow that story to speak for itself and merely ask how many similar stories remain untold. Unless the concerns expressed by Professor Parkinson and others are entirely misplaced, the answer is that there are enough to give cause for disquiet. This is not to suggest that past political office, or political associations or friendships with politicians, should be a disqualification to holding judicial office. However, the public needs confidence that those appointed to judicial office owe fidelity to the law, not to those who appointed them.

We pride ourselves on having inherited the best of the English legal traditions and I suggest the time may have come to look to that country for modern guidance about how to ensure the public retains confidence that those appointed to sit in judgment on them are the very best we have to offer and that their appointment can stand up to scrutiny against the Beijing Principles.

In speaking of fluctuations in the English approach to judicial appointments, Sir Harry Gibbs, another of our former Chief Justices, explained back in 1987 that:

Political influence continued to play too great a part in the making of judicial appointments in England until the time of the Second World War. However, from 1946 onwards both Conservative and Labour governments in England have endeavoured to select only the best person available for any judicial position and to exclude entirely any consideration of personal or political influence. The policy ... is a bipartisan policy, formulated by Lord Chancellors who put the public good before party interests; it is supported only by tradition, and has no constitutional or legal foundation.

This bipartisan policy now **has** legal foundation in the UK, courtesy of the Constitutional Reform Act 2005 and the independent Judicial Appointments Commission. The intent, quite simply, is to provide an open and formal procedure for appointments. There have been calls for something similar here at least as far back as 1977 when Sir Garfield Barwick argued that appointments should not be left to the Executive alone. From his great vantage point, as both a former Attorney-General and a Chief Justice, Barwick explained again in 1995 that:

> Left to politicians, the appointments are not always made exclusively upon the professional standing, character and competence of the appointee. At times, political party affiliation ... form some of the criteria for choice. Sometimes party-political considerations are the dominant reason for it...

Barwick's views were strongly supported in 2008 by Sir Gerard Brennan, who spoke of the particular importance of a "structured" process of appointment to what is now known as the Federal Circuit Court. Sir Gerard wrote that:

> Appointments to that Court are likely to attract less attention than appointments to the higher Commonwealth courts even though appointees will be exercising the judicial power of the Commonwealth in diverse areas including family law, bankruptcy, migration and industrial matters—issues which affect the vital interests of individuals.

Barwick was succeeded by Sir Harry Gibbs, who wrote in the 1987 Australian Law Journal about Australian departures from the high standards being set in the UK. He said:

> The work of the judiciary is too important to entrust it to those of doubtful competence, and a bad judge may do irreparable damage, since there are some judicial errors which even the most elaborate system of appeals cannot remedy. The further conclusive reason why appointments should not be made on political grounds is ... that they are capable of shaking public confidence in the judiciary.

There was a time, not that long ago, when an Australian federal government developed what appeared to be a successful mechanism, falling short of a formal Judicial Appointments Commission, to recommend appointments to the family courts. The approach was consistent with the bipartisan recommendation of the Senate Standing Committee on Legal and Constitutional Affairs in 1994. It is unclear why that mechanism has been scrapped. Perhaps whilst we consider something more formal, it might be worth giving it another try?

In the meantime, as Sir Harry Gibbs has pointed out, *"we must depend on the statesmanship of those in all political parties".* Inevitably, given the comments of Professor Parkinson and others, upcoming appointments to courts administering family law, in whatever shape those courts may take, will be scrutinised with more than usual interest for evidence of statesmanship.

I propose to conclude by making brief reference to the current debate about the future form of the family law system. On 30 May 2018, the Commonwealth Attorney-General announced his intention to create a combined court in the Eastern States which would improve the efficiency of the *"existing split family law system, [by] reducing the backlog of matters before the family law courts, and driving faster, cheaper and more consistent dispute resolution".*

Those of us who have been around for a while could not help but recall on hearing these remarks that the Attorney-General who created the current *"split family law system"* had, almost 19 years earlier, used eerily similar words when proclaiming that his new system would provide a *"quicker, cheaper option"* for family law dispute resolution. We could also not help recalling that the Honourable Alastair Nicholson, then Chief Justice of the Family Court of Australia, warned in 1999 that:

> [the] fragmentation of [the Family Court's] closely integrated system … will result in a less satisfactory and more expensive service. The potential for public confusion, forum shopping and waste of resources on shuffling matters between courts is high. The funds proposed to be spent on the [new court] could be used far more effectively by providing Magistrates within the framework of the Family Court of Australia.

The appointment of magistrates within the framework of *"one specialist family law court"* is what the Semple Review recommended in 2008 after wide consultation and examination of the coherent system in Western Australia. Plans to give effect to the Semple Report were successfully opposed by those who had introduced *"the split family law system"*. The split system has therefore stumbled along until 2018 when we are now informed, on the basis it seems of a report from a firm of accountants, that the flaws in the system are not entirely the fault of the government that created it, but rather the inefficiency of the court whose Chief Justice accurately predicted the outcomes we now see.

As our Chief Justice, David Malcolm understood that consultation about change is always desirable. Indeed, it is essential if we are to avoid decisions about change being based on incomplete, inaccurate, or misunderstood information. For example, that firm of accountants could have consulted with experienced trial and appellate judges in both courts in the Eastern States about what their raw data actually meant. And they could have consulted with those of us in the West, who already have a fully unified system, to help explain how the stark differences in the data relating to judicial officers working at different levels bears no relationship to efficiency.

It would be fair to say there is unanimity in supporting some changes to the system in the East. It is the form the changes take that is important since, in the seeming anxiety to rush change, we would not want Parliament to throw out the baby with the bathwater. After all, with all its faults, our system is regarded internationally as one of the finest, if not the finest, in the world.

Those who understand the system; know its history; and participate in the day-to-day work need to be consulted, not just about the detail of the Bills before Parliament, but about the broader policy, including the unprecedented plan to make no new appointments to the superior division of the proposed new court. This plan to slowly abolish the Family Court of Australia has profound implications for family law and deserves careful scrutiny, and proper consultation. Given David Malcolm's focus on eradicating all forms of gender bias in the law, I suggest he would have insisted that such consultation as has occurred to date ought to have included women – not just because we are dealing with families but because this is 2018.

It was, after all, the National Council of Women of Australia and its 620 affiliated organisations who, in two years of consultations leading up to the 1975 Family Law Act, strongly advocated for *"specialised Family Courts"* comprising **specialist** judges of superior status, working in one unified court alongside judicial officers at a lower level ***"specially appointed** and trained"* for the work. This concept could have been achieved in the Eastern States, as it has been in Western Australia, had the Semple Report been implemented. The concept of a two-tiered specialised court has been abandoned in the plan now presented to the Federal Parliament. Ironically, the Semple Report is being heavily relied upon as evidence supporting that plan!

Now that the policy has been decided, and the Bills have been introduced, there is a consultation process underway. Notwithstanding the government has been unable to secure a majority in the Senate on the progress of its Bills, the Commonwealth Attorney announced last week that:

> In the meantime, I will be discussing with the courts the need to advance the development of new processes, procedures and operational guidelines for the new court. There is no reason this important work which will be fundamental to establishing the new court cannot commence pending the final passage of the legislation.

This announcement is cause for concern if the consultation is intended to be meaningful. The Family Court of WA and the Western Australian legal profession are taking a keen interest in the progress of the Bills. They affect us because we have been informed that the associated policy not to appoint any more judges of superior status will be applied to our Court, thus diminishing the status of family law. They affect us because the Bills contain provisions relating to appeals which diminish the status of our specialist Family Law Magistrates. And they potentially affect us as there are now indications that the proposed merger will lead to changes in longstanding arrangements between our Court and the Family Court of Australia that have greatly benefitted Western Australian families.

Quite apart from the fundamental question of the structure of the new court and whether the Semple model would provide a better framework, one important issue for the consultation process is whether **all** judges who hear family law cases should satisfy the test of suitability now laid down for Family Court judges in section 22 of the *Family Law Act*. In the context of the argument I have made tonight for appointment on merit, this would have the distinct advantage that Australia's family lawyers not only support that requirement of suitability, but that they also have a very good collective understanding of who meets it.

Hopefully there is going to be sufficient time for wide community consultation on these issues just as there was prior to the 1975 *Family Law Act*. In the meantime, we should be wary of law reform being driven by statistics produced by firms of accountants in the guise of measuring or quantifying the productivity of the courts. As Chief Justice Murray Gleeson said:

> Nobody has yet devised a satisfactory indicator of judicial productivity, probably because the concept of productivity of judges is no more amenable to measurement than the productivity of parliamentarians. It is possible to measure some aspects of the performance of a judge or a court; and this may have utility. Justice, however, is more a matter of quality than quantity, and the desired judicial product is not a decision, but a just decision according to law.

David Malcolm understood that the true measure of a judicial system is not only its quality, but the faith the community has in the integrity and independence of its judges. I have been privileged to have held office under his influence, and that of his worthy successor. As I prepare to leave office, I have confidence that our new Chief Justice of Western Australia will preserve and build on the legacy of the man whose memory we honour this evening. A rich legacy that arises from David's powers of intellect, integrity and, above all else, independence.

COMPLIANCE WITH PARENTING ORDERS: **A MODEST PROPOSAL TO RE-DRAFT DIVISION 13A OF PART VII**

Prof. Richard Chisholm*

In 1993 Richard, then an academic specialising in family and children's law was one of the people who were startled to find that he had been appointed a Judge of the Family Court of Australia.

Since retirement from the bench in 2004, he moved to Canberra, where he is an Adjunct Professor at the ANU College of Law. He has continued to research and publish on family law topics and work with bodies associated with law reform and children's rights.

Introduction

This paper forms part of a larger project, namely to improve the way family law deals with parenting difficulties that arise after parenting orders have been made ('post-order parenting'). This first approach to the topic proposes a revision of the portion of the *Family Law Act* dealing with contravention of parenting orders, namely Division 13A of Part VII.

The current legislation is complex, lengthy and difficult to follow, making it hard to discern the principles and assess the policies. To clear the clutter, this paper proposes a re-draft of Division 13A. It is a 'modest' proposal because it does not seek to make any significant changes of substance. Instead, the intention is to re-state the existing law in a way that is clear and easy to understand. Once this has been done, it should be possible to tackle the important task, namely improving the law.

The title of this paper uses the obvious term 'compliance', the assumption being that the task is to ensure that people comply with parenting orders. Ensuring compliance seems a completely plausible, indeed self-evident, objective of the law. In a later paper, however, I will suggest that this is too crude a statement of the objective, and a better objective would be to promote cooperative post-order parenting. I will also argue that achieving this object, or even the increasing compliance with orders, could be advanced by drawing on a body of research conveniently called 'behavioural insights'. This research suggests ways of 'nudging' people into desired behavior, taking into account what we now know about the complex ways in which people actually make decisions. This first paper, however, merely seeks to identify the key elements of the present law and re-state them in a way that is easier to understand.

Part One provides a brief history of Division 13A. Part Two states what seem to be the main themes or policy decisions that underlie it. Part Three identifies reason why there should be a re-draft, and Part Four sets out the proposed re-draft. Part Five contains an explanatory commentary on the draft.

> *The intention is to re-state the existing law in a way that is clear and easy to understand.*

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PART ONE: A Brief History of Division 13A

Before 1976

Before the *Family Law Act 1975*, neither the earlier state and territory laws nor the *Matrimonial Causes Act 1959* had specific provisions about breach of what are now called parenting orders. The only way of dealing with breach of orders for custody, access and guardianship, and personal orders such as injunctions, must have been under the general law of contempt of court. The *Matrimonial Causes Act 1959*, Part XII, entitled 'Enforcement of Decrees', provided only for the enforcement of orders for payment of money, such as orders for maintenance or orders for the payment of costs.[1] Enforcement of court orders does not seem to have attracted much contemporary interest and there seems little or no evidence available about what happened when people failed to comply with court orders about custody, guardianship or access.

1976 – 1989: the early approach under the Family Law Act 1975

The original *Family Law Act 1975* included a power to punish for contempt 'for wilful disobedience of any decree made by the court in the exercise of jurisdiction under this Act'.[2] Section 114 gave the court power to grant injunctions, and to punish breach of such injunctions.

Section 70, headed 'Interfering with child subject to custody order', dealt specifically with contravention of children's orders. Subsection (6) provided that if a court was satisfied that a person had knowingly and without reasonable cause contravened or failed to comply with a provision of s70, the court could:

- impose a fine of up to $1,000;
- require that person to enter into a recognisance or order that person to be imprisoned until that person enters into such a recognisance or until the expiration of 3 months;
- require delivery of a passport and other documents; or
- 'make such other orders as the court considers necessary to enforce compliance with this section'.

The Full Court had held thats 70 was the preferable way of enforcing access orders,[3] and in practice many of the applications made to enforce access orders were made under s 70(6), under which imprisonment was not possible (unless the person then refused to enter into a recognisance), rather than under s 108 (contempt).[4]

It can be seen that during this early period the law applied traditional approaches to enforcement of court orders. As the ALRC's *Contempt* report neatly put it, 'The main aims of the imposition of sanctions for non-compliance with orders made in family law are, as in other types of proceedings, coercion and deterrence.'[5]

The 1987 ALRC Contempt Report

In the 1980's the Australian Law Reform Commission had resources beyond the wildest dreams of those working in law reform bodies today, and it made excellent use of those resources. Its monumental report *Contempt* in 1987 was based on extensive research and consultation, and it remains a valuable resource today.[6] The Commission's most important recommendations in relation to Family Court orders may be summarised as follows:

> Contempt sanctions should be minimised, and therefore 'the range of alternative enforcement procedures available within the Family Court should be as wide as possible and the Court should have sufficient resources to render them effective'.
>
> Because orders in family law matters often impose recurring obligations, a suspended sanction may be imposed in respect of past disobedience of an order with the aim of securing compliance with future obligations under the order.
>
> In family matters, it is particularly important that the full range of sentencing options – including weekend detention and community service orders – should be available.
>
> Variation of an order should not, however, be seen as an appropriate sanction, even if this may appear to achieve a coercive or deterrent aim.
>
> There should be a single unified procedure (non-compliance proceedings) for the enforcement of orders made in family law, replacing the existing 'hierarchy' of contempt and quasi-contempt provisions.[7]

In relation to access orders, after a detailed and illuminating analysis of the issues they pose, the Commission recommended, in substance:[8]

> The law should spell out the relatively narrow range of circumstances in which, despite a finding of breach coupled with the necessary mental element, the court should be required not to impose any sanction.
>
> The law should also list certain considerations as relevant to the exercise of the court's discretion in imposing sanctions for breach of an access order. These should comprise the benefits derived for a child from maintaining contact with both parents, the child's reactions to access and the effect on the child of any sanction imposed on the custodial parent. The existence of prior maintenance default should not be included in the list.
>
> Where non-compliance proceedings are instituted for the first time in respect of an access order, sanctions should not be imposed until the parties have first been directed to attend confidential counselling and adequate time has elapsed to permit counselling to have full effect, unless counselling has already occurred since the order was made or the court is satisfied that, in the special circumstances of the case, it should be dispensed with.
>
> Where the custodial parent has abducted and concealed the child, resulting in continued and total denial of access, the Family Court should have power to issue a warrant to a police officer for the arrest of the custodial parent.
>
> Finally, although the variation of a subsisting order should not be decreed as a formal sanction for noncompliance, the Family Court, when hearing proceedings to vary an access order, should consider making a temporary order for increased access as compensation for access that has been wilfully and unjustifiably denied.

The Family Law Council report Access – Some Options for Reform (1987)

Shortly after the ALRC's *Contempt* report, the Family Law Council published its report *Access – Some Options for Reform* (1987). The discussion of non-compliance with parenting orders is relatively limited and is in many ways a commentary on the ALRC's recommendations in the *Contempt* report, then hot off the press. It is not necessary to review the details.

The legislation of 1989

The recommendations of the ALRC's *Contempt* report, and to a lesser extent those of the FLC, were the basis for the *Family Law Amendment Act 1989* No. 182, which came into force on 25 January 1990. The major thrust of the 1989 amendments was to provide a range of appropriate sanctions, in particular directed at increasing the sentencing options available to judges in cases of unreasonable breach of orders, clarifying the circumstances in which denial of access would be considered reasonable, and providing counselling in the resolution of disputes arising from enforcement applications.[9]

The Act inserted a new Part into the *Family Law Act 1975*, namely Part XIIIA, entitled 'Sanctions for Failure to Comply with Orders and Contempt of Court'. The purpose was to implement the ALRC recommendations and unify the provisions of the Act which provide sanctions for failure to comply with a court order, and to relocate and modify the existing contempt provision in s108. The new Part XIIIA applied to all orders made under the Act, including orders made under Part VII relating to children.

The basic approach of those new contravention provisions remains today. The 1989 Act provided for sanctions for contravening an order under the Act,[10] and set out what constituted a 'reasonable excuse' for certain contraventions.[11] The range of possible penalties was increased by making it possible for the court to impose such penalties as a term of community service or weekend detention, by arrangements with participating states and territories. Imprisonment was carefully limited, and certain fines were specified. The court was ordinarily not to make an order unless counselling had been provided. The court could make a 'compensatory access order', namely 'an order giving a person such access to a child (in addition to access provided for by

an access order) as the court considers appropriate, having regard to any deprivation of access resulting from the contravention concerned.'[12] A warrant could be issued for the arrest of persons who contravened custody or access orders;[13] the alleged offender would be dealt with under s 112AD. In these matters the Act often adopted the draft legislation that formed part of the ALRC report. Surprisingly, as noted earlier the Act did not (and the law still does not) implement the sensible and cost-neutral recommendation that the law should list the considerations relevant to the exercise of the court's discretion in imposing sanctions for breach of an access order (paragraph 2 in the above summary).

Although the new provisions gave the courts a wider range of orders that could be tailored to the particular situation, most of them were of the same general character as the blunter instruments that had been available under the traditional law of contempt, providing deterrence and punishment. The limited published case law for the period 1976-1989 deals with some technical issues and illustrates the operation of the law in those decisions, but does not add much of substance.[14]

The Joint Select Committee Report of 1992

On 26 November 1992, the Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (Chaired by Senator McTiernan) tabled its report entitled *The Family Law Act 1975*: *Aspects of its operation and interpretation.*[15] In relation to contravention of parenting orders, it quoted extensively from many submissions that criticised the Family Court for failing to enforce its orders, particularly access orders, as well as some that referred to difficulties faced by custodial parents. However it made no recommendations that require attention here, although it did deal with some technical matters involving the police, and recommended that the Family Law Council conduct a review of penalties applied by the Family Court in cases of non-compliance with orders and injunctions.

The Australian Law Reform Commission Report, For the Sake of the Kids (1995)

The most significant recommendation of the Report was that there should be two alternative procedures for enforcement (the applicant could elect one or the other). In the 'simpler' procedure, the applicant would bear only a civil standard of proof, and the orders would be limited to orders for compensatory contact, to secure compliance, to require the respondent to undertake to comply in the future, and to order costs. The 'stricter' procedure would be confined to cases where the applicant sought a fine, imprisonment, orders under s 112AP (the contempt power), punishment for a breach of a previous recognisance, community service orders or periodic detention or other similar orders, as well as any of the orders available in the less strict procedure. The applicant would bear the onus of proving all elements of the breach beyond reasonable doubt. In each procedure, the onus would be on the respondent to prove reasonable excuse on the balance of probabilities, and the court could order counselling and make costs orders. This recommendation has not been precisely implemented, but subsequent legislation did distinguish between the handling of more severe and less severe breaches, somewhat along the lines of the Commission's recommendation of the 'stricter' and 'simpler' procedures.

The Family Law Council's Interim report on penalties and enforcement, March 1998, and Final Report of June 1998, Child Contact Orders: Enforcement and Penalties

In March 1998 the Family Law Council published an interim report on penalties and enforcement,[16] and in June 1998 its final report *Child Contact Orders: Enforcement and Penalties* (June 1998).[17] Most of the recommendations do not require comment here.

Recommendation 12, headed 'special legislation', is of particular importance because it seems to have been taken as a proposal to create the three-tier structure subsequently adopted in the legislation.

Recommendation 12 said, in substance, that special provisions should apply in relation to breaches of contact orders, separate from those relating to other court orders. It continued:

> A solely punitive approach for breaches of contact orders has shortcomings and the legislation should recognise the need for preventative, remedial and punitive approaches to be available to the parties and the court in relation to breaches of contact orders.
>
> In extending the powers of the court to take preventative, remedial and punitive action appropriate to individual cases, Council recommends that the issues discussed in paragraphs 8.09, 8.10, 8.12, 8.14, 8.16 and 8.21-8.25 be taken into account.

2000: Introduction of the three-stage 'parenting compliance regime': The Family Law Amendment Act 2000

The *Family Law Amendment Act 2000* created a 'three- tier' regime, characterised as follows by the EM:

Stage 1 – preventative measures, to improve communication between separated parents and educating parents about their respective responsibilities in relation to their children;

Stage 2 – remedial measures, to enable the parents to resolve issues of conflict about parenting; and

Stage 3 – sanctions, to ensure that, as a last resort, a court takes other action in relation to a parent who deliberately disregards a court order.

The EM states that the approach was recommended by the Family Law Council, but this is not so, as can be seen from the wording of Recommendation 12 above. The Council proposed adding preventive and remedial responses but it did not recommend a three-tier structure. The creation of the three tiers has led to unhelpful legislative complexity. As Professor Helen Rhoades explained in an important article:[18]

> … instead of seeing these approaches as being applicable in different situations, depending on the nature of the problem underlying the contact dispute, the resulting legislation constructed them as successive stages of a single 'disciplining' regime.
>
> […] Its staged framework, in which parenting programmes are 'offered' for a first offence and punitive measures reserved for subsequent contraventions, means that the kind of response a parent receives depends on the chronology of their litigation, rather than the nature of the problem

Other changes made by the 2000 Act included the following:

- Standard clauses in parenting orders setting out the obligations imposed on the parties and the consequences of failing to observe them; and a requirement that parties be given information about the availability of programs which will 'assist them in understanding their changed parental responsibilities';
- power for the court to require parties to attend post-separation parenting programs where there had been a less serious contravention;
- power to adjourn proceedings to enable a party to apply for a parenting order that alters the existing order;
- various technical matters, including clarification of the standard of proof.

2006: Revision to the three-stage regime: Family Law Amendment (Shared Parental Responsibility) Act 2006

Non-compliance with orders was only one of the many areas covered by the extensive amendments of 2006. The seminal 'Every Picture Tells a Story' report had recommended a 'cumulative list of consequences' for breaches; 'reasonable but minimum' financial penalties for breaches; consideration being given to a parenting order in favour of the other parent when a parent committed a third breach as part of a 'pattern of deliberate defiance of court orders', and 'retaining the ultimate sanction of imprisonment'.[19]

The Government had agreed, and added that it would introduce new measures, namely a requirement that the courts consider 'make-up' contact if contact has been missed through a breach of an order, a power to award compensation for reasonable expenses caused by a breach of an order, and in cases involving a series of breaches or a

serious disregard of court orders, a presumption that legal costs would be awarded against the party in breach, unless it is not in the best interests of the child; and a discretion to impose a bond for all breaches of orders.

These decisions are reflected in the legislation of 2006, and the relevant provisions remain the current law. That revision retained the general approach of the Division 13A, but substantially re-organised it, and made various changes of detail.[20]

PART TWO: Essential Aspects of the Current Division 13A

The following discussion attempts to identify the essential aspects of the current law under Division 13A. The relevant matters will be described in somewhat general terms. More detail will be discussed as necessary in relation to particular sections of the re-draft set out in Part Four, below. Provisions of the current Act illustrating the various matters are set out in footnotes.

The 'essential aspects' do not include the three-tiered structure that was introduced in 2000, because, as the above history demonstrates, that structure is not essential to the legislative purposes.

Legislative objectives

In relation to compliance, the legislation does not explicitly state the objectives of the relevant Parts of the Act, or of the relevant provisions. The legislative objectives must therefore be inferred from the provisions of the Act and the background documents.

Orders that the court can make

Punishment and deterrence[21]

Penalties, with the object of punishment and deterrence, have been in the Act from the start. The changes over time have been, essentially, to provide more varied penalties, and to require that the more severe penalties can be imposed only when the case has been established on the criminal standard of proof. In the present context it is appropriate to include bonds as penalties, since their purpose is to impose penalties if the bond is breached.

In McClintock & Levier,[22] a majority of the Full Court (Coleman and Cronin JJ, Finn J dissenting on the point) held that general deterrence could not be considered under Part 13A (although it could be considered under s112AP).

This means that in contravention proceedings (as distinct from contempt proceedings under s 112AP) the court may impose penalties for the purpose of ensuring the person's compliance with the parenting orders, but not for the purpose of retribution, or to deter others from breaching court orders.

Counselling and support[23]

The 1989 amendments gave the courts power to direct the parties to counselling or support services, as recommended by the ALRC in its *Contempt* report, and supported by the Family Law Council in 1987. Such provisions have been a part of the legislation ever since.

Revision of parenting orders[24]

The amendments of 2000 had introduced the idea of linking amendment of parenting orders to enforcement, by providing that the court could adjourn the contravention proceedings 'to allow either or both of the parties to the primary order to apply for a further parenting order under Division 6 of Part VII that discharges, varies or suspends the primary order or revives some or all of an earlier parenting order'.[25] The 2006 amendments went a step further, providing that in certain circumstances the court could modify the relevant parenting orders when dealing with contravention cases.[26]

Compensatory access[27]

Compensatory access, as it was originally named, was recommended by the ALRC in 1987 and introduced in the 1989 legislation; it remains part of the legislation. From the first, in relation to this compensatory access, the child's welfare (now 'best interests') was to be the paramount consideration.

Monetary compensation for reasonable expenses caused by breach of an order[28]

The 2006 amendments introduced a power to award compensation for reasonable expenses caused by a breach of an order, something that the ALRC had recommended in its 1987 *Contempt* report.[29]

Costs[30]

The 2006 amendments introduced a presumption that in relation to more serious breaches legal costs would be awarded against the party in breach.

Procedural matters

Enforcement of parenting orders starts with an application by a party to the orders asking the court to deal with the other party for contravention (breach) of the order.

The onus of proof lies with the applicant, who must prove that the respondent contravened the order.

A respondent who claims to have had a reasonable excuse for the contravention bears the onus of proving the reasonable excuse.[31]

The standard of proof is generally on the balance of probabilities,[32] but on the criminal standard in relation to certain more severe penalties.[33]

Legislative purposes inferred

Having regard to the measures available and the historical and legislative context, we can perhaps infer that the legislative purposes of the current law are as follows.

Purpose 1: To encourage compliance by penalising non-compliance with parenting orders and associated orders eg: for costs and monetary compensation: specific deterrence.[34]

Purpose 2: To help parties comply with parenting orders by providing counselling and support.

Purpose 3: To increase parties' compliance with parenting orders by allowing opportunities to correct defects in existing parenting orders and to adjust the orders to provide for changed circumstances.

Purpose 4: To benefit children by providing additional contact to make up for contact lost through breach of contact orders.

Purpose 5: To deter people from breaching orders, and from unreasonable conduct in litigation, by making costs orders.

It is submitted that the redraft contained in Part Five will be 'modest' if it maintains the essential features of the law as just described. The intention is to provide a re-draft that will maintain those features but will be considerably easier to understand than Division 13A in its present form.

PART THREE: Need for Revision of Division 13A

The drafting style of the present legislation was no doubt intended to minimise uncertainties and ambiguities, but it has done so in a way that makes the legislation difficult to understand and apply in practice. It may be helpful to illustrate the drafting problems that the re-draft seeks to avoid.

In some long sections, different subsections deal with different topics, but the reader cannot readily see at a glance what those topics are. For example it is not immediately obvious to the reader of s70NEB and s70NFB what are the main types of orders that can be made, essentially because there are no subheadings, and because much detail is mixed in with the list of orders.

Second, understanding one provision often requires the reader to refer back to another. Section 70NAF (standard of proof) is a good example. A related problem is the use of two terms whose meaning the reader might have to check: *'**primary'*** order and *'**current**'* contravention.

Third, there is considerable repetition which, although no doubt intended to make the intention clear, burdens the reader with a daunting amount of material. Section 70NAE (reasonable excuse) is an example.

Fourth, although it makes sense to have separate paragraphs for new points, sometimes this is taken to extravagant lengths, resulting in an unnecessarily large number of paragraphs and subparagraphs. Section 70NBB is an example. Sometimes, even in relation to fairly straightforward ideas, the reader is required to remember what is in one paragraph while reading another. Section 70NFA is an example.

Fifth, at least one provision, s70NAD, simply re-states the law and thus has no actual effect. One can understand the drafting strategy of reminding the reader of relevant points, but the disadvantage of this strategy is that it adds to the length. If it is really necessary to remind the reader of another provision, the use of a note is preferable.

Sixth, sometimes the sequence of topics is not what the reader would expect. For example, s70NFB is headed 'Powers of court', but the first subsection – which requires the reader to read ahead to para (2)

(g) – provides that the court must make one kind of order unless it is satisfied of certain things, and must consider certain things. It would be easier for the reader to understand this if the section had first set out, as the heading suggests it would, what orders the court can make. Instead, a reader wanting to know what orders the court can make for more serious contraventions is confronted immediately with a different subject matter, and quite a complex one. Subdivision C is headed 'Contravention alleged but not established' but turns out to be just one of several provisions about costs.

Seventh, sometimes the point can be more simply expressed. Thus s70NBA provides that the court can vary an order affecting children if either:

> (i) the court does not find that the person committed a contravention of the primary order; or
>
> (ii) the court finds that the person committed a contravention of the primary order.

The section would be easier to understand, and no less precise, if it had said that the court can vary an order 'whether or not the court finds that a person contravened the order' – or, indeed, if it had omitted these words altogether.

Eighth, the difficulties with the current law appear to stem partly from the way the subject matter is divided into two topics: less serious (Subdivision E) and more serious contraventions (Subdivision F). This division, which may be associated with the desire to create a three-tier structure (discussed above) has led to considerable repetition and some complexity. The idea of separate subdivisions appears to be based on an assumption that it will be apparent at the commencement of a case which category it is. But this is not correct. The court has a discretion to treat an otherwise serious case as non-serious,[35] and vice-versa.[36] But the court can exercise that discretion only after hearing all the evidence and argument, ie at the end of the hearing. So, while of course the outcome of a case will be affected by the seriousness of the breach, there seems no advantage in having the two categories.[37]

The court has a discretion to treat an otherwise serious case as non-serious, and vice-versa.

Ninth, some matters that are dealt with in other parts of the Act are also dealt with, unnecessarily and confusingly, in Division 13A. For example, there is provision for making costs orders, although this topic is dealt with in s117. Again, there is provision for the making of a parenting order to compensate a person for lost time with a child, but parenting orders are comprehensively dealt with elsewhere in Part VII, and the provision in Division 13A is difficult to reconcile with the provisions of that Part, such as s 60CA. Yet another example is the inclusion of a power to punish a person for breach of a bond, or for failure to enter into a bond – this topic should be in Part XIIIA, dealing with contraventions generally.

PART FOUR: Proposed Re-draft of Part VII Div 13A

SUBDIVISION A: GENERAL

1. Meaning of contravene an order

A person is taken to have contravened a parenting order if:

(a) the person is bound by the order and has intentionally failed to comply with it, or has made no reasonable attempt to comply with it; or

(b) the person has intentionally prevented compliance with the order by a person who was bound by it, or has aided or abetted a contravention of the order.

Note:

Parenting orders may be subject to a subsequent parenting plan (see section 64D). This means that an action that would otherwise contravene a parenting order may not be a contravention, because of a subsequent inconsistent parenting plan. Whether this is the case or not depends on the terms of the parenting order.

2. Standard of proof

In proceedings under this Division,

(a) the court may make an order under s 10 (community service; fine; imprisonment) against a person only if satisfied beyond reasonable doubt that the person contravened the parenting order.

(b) In relation to other matters, the standard of proof is proof on the balance of probabilities.

SUBDIVISION B: MEASURES AVAILABLE TO ADDRESS UNDERLYING PROBLEMS

3. Court may vary an existing parenting order, order additional time, or refer parties to a program

At any stage of proceedings under this Division, if it considers it desirable to do so, the court may do any of the following:

(a) vary a parenting order;

(b) suspend the operation of the whole or any part of a parenting order for a specified time;

(c) where a child has not spent time with a person as required by a parenting order, make an order that the child spend time with a person in lieu of the time that did not take place under the parenting order;

(d) recommend or make an order requiring that one or more parties attend a post-separation parenting program or other specified program to support compliance with, or resolve difficulties relating to, a parenting order.

4. Service provider to be notified

1. If the court makes an order under section 3(d), unless the court otherwise orders the principal executive officer of the court shall

   (a) ensure that the provider of the program concerned is notified of the making of the order; and

   (b) request the provider to inform the court, and the other party or parties to the proceeding, if the provider considers that a person ordered to attend the program is unsuitable to attend it, or has failed to attend the entire program.

2. The court may make such orders as it considers appropriate if a person ordered to attend the program has been assessed as unsuitable to attend it, or has failed to attend any part of the program.

SUBDIVISION C: REASONABLE EXCUSE

5. No order to be made under s 9 or s 10 if contravener proves reasonable excuse

1. No order is to be made under s 9 or 10 where a person who has contravened a parenting order has a reasonable excuse for the contravention.

2. The circumstances in which a person has a reasonable excuse for contravening a parenting order include, but are not limited to, the circumstances set out in sections 6 and 7.

Note 1: Even when a person has a reasonable excuse for contravening a parenting order, the court has power to make the orders provided for in section 3.

Note 2: The court's power to make costs orders under s 117 may be exercised in cases where a person has a reasonable excuse for contravening a parenting order (as well as in other cases).

6. Reasonable excuse where the person did not understand the obligations under the order and ought to be excused

1. A person has a reasonable excuse for contravening a parenting order if the court is satisfied that the person:

   (a) contravened the order because, or substantially because, at the time of the contravention he or she did not understand the obligations imposed by the order; and

   (b) ought to be excused in respect of the contravention.

2. If a court decides that the person had a reasonable excuse for this reason, the court shall explain, in language the person is likely to understand, the obligations imposed by the parenting order and the possible consequences if the person fails to comply with the order in future.

7. Reasonable excuse where contravention was reasonably believed necessary to protect health or safety

A person ('the respondent') has a reasonable excuse for contravening a parenting order if the court is satisfied that:

(a) at the time of the contravention the respondent believed on reasonable grounds that the person's actions were necessary to protect the health or safety of a person (including a child); and

(b) any period during which, because of the contravention, the child did not live with or spend time with a person in accordance with the parenting order was not longer than a period of time the court considers was reasonably necessary to protect the person's health or safety.

SUBDIVISION D: ORDERS WHERE PERSON HAS CONTRAVENED A PARENTING ORDER AND HAS NOT PROVED A REASONABLE EXCUSE

8. Principles relating to making orders under sections 9 and 10

In considering what orders if any to make under s 9 or s 10 the court should have regard to

(a) the importance of compliance with parenting orders;

(b) the seriousness of the contravention;

(c) whether the person who contravened the parenting order had previously been found by a court exercising power under this Act to have contravened a parenting order, or had behaved in a way that showed a serious disregard of obligations under the order;

(d) the likely effects of the order on any child or other person;

(e) the behaviour of any person with whom the child is live or spend time under the parenting order; and

(f) any other relevant matter.

9. Orders for less serious contraventions: bond; compensation

In proceedings under this Division:

(a) if the court is satisfied that a person has contravened a parenting order; and

(b) if the person does not satisfy the court that he or she has a reasonable excuse; the court may, subject to this Division, make one or more of the following orders:

(c) an order **requiring a person to enter into a bond**, as provided in s 11.

(d) where the respondent's contravention resulted in a person not spending time with a child or living with a child as provided in the order, an order requiring the respondent to **compensate** the person for some or all of the expenses reasonably incurred as a result of the contravention.

10. Orders for more serious contraventions: community service; fine; imprisonment

1. In proceedings under this Division:

(a) if the court is satisfied beyond reasonable doubt that a person has contravened a parenting order; and

(b) the person does not satisfy the court on the balance of probabilities that he or she has a reasonable excuse, the court may, subject to this Division, make one or more of the following orders:

(c) any order referred to in s 9; or

(d) an order requiring a person to perform community service, as provided in s 12; or

(e) an order imposing a fine, of not more than 60 points; or

(f) an order imposing a term of imprisonment, as provided in s 13.

2. The court shall not make an order under this section if it considers that it would be more appropriate to deal with the matter by way of an order under section 3 or section 9.

11. Matters relating to bonds

When the court makes an order under section 9 requiring the person who committed the contravention to enter into a bond:

(a) the bond is to be for a specified period of up to 2 years, and may be with or without surety, and with or without security.

(b) the court may impose one or more conditions, including conditions that require the person to do one or more of the following:

(i) to attend appointments with a family consultant; or

(ii) to attend family counselling; or

(iii) to attend family dispute resolution; or

(iv) to be of good behaviour.

(c) the court shall explain to the person, in language the person is likely to understand:

(i) the purpose and effect of the requirements; and

(ii) the consequences that may follow if the person fails to enter into the bond or enters into the bond but then fails to act in accordance with it.

12. Matters relating to community service orders

1. The court may make a community service order under s 10 if:

(a) the proceedings are heard in a State or Territory where laws of that State or Territory provide for a community service order of any kind to be made against a person convicted of an offence; and

(b) an agreement under section 70NFI is in force in the State or Territory.

2. The community service order may not regulate the person's conduct beyond 500 hours or such lesser period as is prescribed in relation to the State or Territory.

3. The community service order ceases to have effect 2 years after it was made, or after such lesser period as is specified in the order.

4. To the extent provided by the regulations, the laws of the State or Territory with respect to a community service order made under those laws apply in relation to the order.

5. Before making the community service order, the court shall explain to the person, in language the person is likely to understand:

(a) the purpose and effect of the proposed order;

(b) (the consequences that may follow if the person fails to comply with the order or with any requirements made in relation to the order; and

(c) that the proposed order may be revoked or varied (if that is the case) at any time during the term imposed.

6. If the community service order was made by (the Family Court of Australia or the Federal Circuit Court of Australia), either of those courts may vary or discharge it. If the order was made by any other court, that court (and the Family Court of Australia) may vary or discharge it. The court may give directions as to the effect of the variation or discharge that the court considers appropriate.

7. An arrangement made under section 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIIIA is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

13. Matters relating to imprisonment

1. The court may under section 10 sentence the person to a term of imprisonment expressed to be:

(a) for a specified period of 12 months or less; or

(b) for a period ending when the person:

(i) complies with the order concerned; or

(ii) has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court; whichever happens first.

2. A court must not sentence a person to imprisonment under s 10 unless it is satisfied that, in all the circumstances of the case, it would not be appropriate to deal with the contravention by making other orders under this Subdivision.

3. If a court sentences a person to imprisonment under s 10, the court must state the reasons why it is satisfied it would not be appropriate to deal with the contravention by making other orders under this Subdivision. However a failure by a court to comply with this subsection does not invalidate a sentence.
4. A court that sentences a person to imprisonment under s 10 may:
   (a) suspend the sentence upon the terms and conditions determined by the court; and
   (b) terminate such a suspension.
5. A court, when sentencing a person to imprisonment under s 10, may, if it considers it appropriate, direct that the person be released upon entering into a bond described in subsection (6) after the person has served a specified part of the term of imprisonment.
6. A bond for the purposes of subsection (5) is a bond (with or without surety or security) that the person will be of good behaviour, for a specified period of up to 2 years, and/or comply with the terms of a specified order of the court.
7. A court that has sentenced a person to imprisonment under s 10 may at any time order the release of the person if it is satisfied that the person will, if released, comply with the court's orders.
8. To avoid doubt, the serving by a person of a period of imprisonment under s 10 for failure to make a payment under a child maintenance order does not affect the person's liability to make the payment.

14. Imprisonment not to be imposed for a child maintenance contravention unless contravention intentional or fraudulent

The court must not make an order imposing a sentence of imprisonment on a person under s 10 in respect of a contravention of a child maintenance order made under this Act unless the court is satisfied that the contravention was intentional or fraudulent.

15. Imprisonment not to be imposed for certain contraventions relating to child support

The court must not make an order imposing a sentence of imprisonment on a person under s 10 in respect of:

(a) a contravention of an administrative assessment of child support made under the *Child Support (Assessment) Act 1989*; or

(b) a breach of a child support agreement made under that Act; or

(c) a contravention of an order made by a court under Division 4 of Part 7 of that Act for a departure from such an assessment (including such an order that contains matters mentioned in section 141 of that Act).

SUBDIVISION E: OTHER MATTERS

16. Relationship between this Division and other laws

1. This section applies where an act or omission by a person who is the subject of proceedings under this Division is also the subject of a prosecution for an offence against any law.
2. If the person is prosecuted in respect of the act or omission, the court shall dismiss the proceedings under this Division, or adjourn them until the prosecution has been completed.
3. Nothing in this Division renders a person liable to be punished twice in respect of the same act or omission.

17. Arrangements with States and Territories for carrying out of sentences and orders

An arrangement made under s 112AN for or in relation to the carrying out of sentences imposed, or orders made, under Division 2 of Part XIIIA is taken to extend to the carrying out of sentences imposed, or orders made, under this Subdivision.

18. Division does not limit operation of section 112AP (contempt)

Nothing in this Division is intended to limit the operation of section 112AP (contempt).

19: Matters relating to costs applications

1. In any application for costs under s 117 arising from proceedings under this Division, the court may consider, among other relevant matters, any previous contravention proceedings between the parties and the outcome of those proceedings.
2. The court shall make an order for costs under s 117 against a person who is found to have contravened an order and has not satisfied the court of a reasonable excuse unless the respondent satisfies the court that such an order should not be made.

PART FIVE: Commentary on Proposed Re-draft of Div 13A

This commentary first discusses some general issues and then discusses each provision.

GENERAL

The main purpose of this proposed re-draft is to enable Division 13A to be more easily understood. However it makes some limited changes of substance, notably the following:

1. The power to order additional time in contravention proceedings whenever a child has not spent time with a person as a parenting order required.
2. The power to order parties to attend a post-separation or other program at any stage of Div 13A proceedings, and the power to recommend such attendance.
3. Setting out some principles for orders.
4. The complex provisions about costs have been replaced by a rebuttable presumption favouring a costs order under s117 against a contravener.

The change relating to costs requires explanation, which is set out below. The reasons for the other changes are noted briefly in relation to the relevant provisions. The draft could readily be amended to remove or modify these changes of substance if they are not accepted.

The draft arranges the provisions as follows:

- **A: General** (meaning of contravention, standard of proof).
- **B: Measures available to address underlying problems** (varying order, referring to counselling).
- **C: Reasonable Excuse.**
- **D: Orders where person has contravened and not proved a reasonable excuse.**
- **E: Other matters.**

COSTS ORDERS

What changes the draft makes

The present law creates separate powers to make costs orders in Division 13A, and imposes certain requirements. The draft removes most of these provisions. The power to make costs orders under s117 would apply to Division 13A proceedings as it does to other proceedings. However under the draft, s19 provides that the court may consider, among other relevant matters, any previous contravention proceedings between the parties and the outcome of those proceedings.[38] It also creates a presumption that a costs order should be made under s117 against a person who is found to have contravened an order and has not satisfied the court of a reasonable excuse unless the respondent satisfies the court that such an order should not be made.

The existing costs provisions

The existing provisions relating to costs are complex and their purpose not always apparent. The following paragraphs attempt to summarise the more important provisions and also to indicate what policies seem to underlie them.

Under the present law, the court may order an applicant to pay costs where no contravention has been established: s70NCB(1). And it **must** consider making such an order where the applicant had previously brought unsuccessful[39] proceedings: s70NCB(2). Similarly, if there is a reasonable excuse, and no make-up time with a child is ordered, the court may order the applicant to pay costs, and must do so if the applicant had previously brought unsuccessful proceedings: s70NDC. *[Policy: to deter people from using contravention proceedings unreasonably, or to harass].*

If there has been a less serious contravention, the court may order the contravener to pay costs: s70NEB(1)(f). [Policy: deter people from contravening]. But if the court makes no other orders in relation to the contravention, the court may order that the applicant pay costs: s70NEB(1)(g); and must do so if the applicant had brought unsuccessful proceedings before: s70NEB(1)(7). *[Policy: deter people from using contravention proceedings unreasonably, or to harass].*

If there has been a serious contravention, court must order the contravener to pay costs, 'unless the court is satisfied that it would not be in the best interests of the child concerned to make that order'. *[Policy: strongly deter people from seriously contravening].*

This analysis should assist readers to assess the suitability of the proposed re-draft. If it were decided to persist with the present legislative policy, the costs provisions would inevitably be a little more complex than in the proposed draft, but could still be expressed more clearly than in the existing legislation. It would be an improvement to keep s117 as the source of costs orders, but include guidelines in Division 13A, and amend s117 by adding something to the effect that in Division 13A proceedings, the costs provisions of Division 13A would apply.

Comments on Particular Provisions of the Draft

Note to s1: Meaning of contravene a parenting order

A slightly simplified version of s70NAC. Subsection (2) is substantially the same as s70NAC, as is the note. The words 'for the purposes of this Division' are not strictly necessary and have been omitted in the interests of brevity.

The subdivision is essentially about parenting orders, and this draft uses that term rather than 'an order under the Act affecting children'. Contravention of any other orders relating to children, such as injunctions, would on this draft be dealt with under the ordinary contravention provision, s112AD. This seems appropriate, there being no obvious advantage in having Division 13A apply to other orders that have some connection with children. Making the Division apply to parenting orders is simple and easy to understand, whereas the existing term, 'order under the Act affecting children', is not intuitive and requires the reader to look up other sections of the Act.

Note to s2: Standard of proof

Based on s70NAF. The substance is the same, ie the criminal standard of proof applies in relation to fines, community service orders and imprisonment, and the civil standard for other (less punitive or less severe) orders. Although the combination of the two standards can create difficulties,[40] there are valid reasons for the different standards (the criminal standard being applied to the more punitive orders), and this re-draft does not change the law. In relation to the criminal standard, the draft uses 'that the person contravened the parenting order' rather than the wording of the existing s70NAF(2) ('that the grounds for making the order exist').

Note to s3: Court may vary an existing parenting order, order additional time, or refer parties to a program

The title to subdivision B ('Measures available to address underlying problems') of the draft is new. The orders in paras (a) to (d), being non-punitive, are now available at any point in contravention proceedings.

Paragraph (a) is based on s70NBA(1). Subsection 70NBA(2) is difficult to understand and has been omitted from the proposed draft.

Paragraph (b) seems useful, but could readily be omitted if preferred.

Paragraph (c) is based on s70NBD and also s70NEB(1)(b). This provision raises a difficult question of principle, namely whether such an order should be categorised as a parenting order with all the consequences that flow from that. Under the proposed draft, it would be a parenting order – see the definition of 'parenting order' in s 64B. If so, then the paramount consideration principle and all the other provisions in Part VII would apply. If it is not to be a parenting order, the legislation would need to say something about what principles are to apply.

This raises the question whether the purpose of the order is to benefit the child or to compensate the party for missing out on time with the child. The present provisions of Division 13A are inconsistent on this topic. Sections 70NDB(1) and 70NEB(1)(b) refer to a 'further parenting order that compensates the person…'. Although such an order is expressed to be a parenting order, the definition of that term in s64B does not expressly include compensating a person, and the idea of compensating the adult seems difficult to reconcile with the operation

of the paramount consideration principle which applies to parenting orders. If it is a parenting order, it would have to be an order made in the best interests of the child - s60CA – and thus it makes no sense to provide, as does subsection (5), that the order should not be made if it is not in the best interests of the child.

It is not possible to settle the wording of this section satisfactorily until a policy decision has been made about whether such orders are to be treated as parenting orders, or whether they are made for the purpose of compensating that adult who has missed out on time with the child. In the re-draft, the order is a *parenting* order and the wording of 'compensating' has been replaced by 'time in lieu of the time that did not take place under the parenting order'.[41]

Paragraph (d) reflects s70NEB(1)(a), but adds the power to recommend.

Note to s4: Service provider to be notified

Based on sections 70NEB(3) and 70NEG.

Note to s5: No order to be made under s9 or s10 if contravener proves reasonable excuse

The provisions relating to reasonable excuse are now together in Subdivision C.

Section 5 is based on s70NAE. There is no change of substance. New Note 1 seems useful, and new Note 2 stems from the decision not to have separate provisions for costs orders in Division 13A.

Note to s6: Reasonable excuse where the person did not understand the obligations under the order and ought to be excused

Based on s70NAE(2) and (3).

Note to s7: Reasonable excuse where contravention was reasonably believed necessary to protect health or safety

Based on s70NAE(5).

Note to s8: Principles relating to making orders under sections 10 and 12

This provision is new, but the principles are intended to reflect the policies implicit in the existing provisions. Section 8 (b) removes any need to complicate the Division by dividing it into two subdivisions dealing separately with 'less' serious' and 'more serious'.

Note to s9: Orders for less serious contraventions: compensation; bond

Section 9 is based on s70NEA and 70NEB. It sets out the orders not requiring proof on the criminal standard.

The power under s70NEB(1)(a) to refer parties to a program is not in s10 because it is now in s3.

The power to adjourn so the parties can obtain a parenting order (s70NEB (1)(c)) has been omitted. Because of the powers in s3, there seems no need for this provision.

The draft also omits the provision about failure to enter into a bond: s70NEB(1)(da). Such a failure is a breach of a court order and is therefore covered by s112AD and the other provisions of Part XIIIA.

Note to s10: Orders for more serious contraventions: community service; fine; imprisonment

Sets out orders for which the criminal standard of proof is required. Additional provisions relating to these orders are dealt with in succeeding provisions. No change of substance.

Note to s11: Matters relating to bonds

Based on s70 NEC. No change of substance.

Note to s12: Matters relating to community service orders

Based on s70NFB(2)(a). No change of substance.

Note to s13: matters relating to imprisonment

Based on s70NFB(2)(e), s70NFG.
No change of substance.

Note to s14: imprisonment not to be imposed for child maintenance contravention unless contravention intentional or fraudulent

Based on s70NFG(9) and s70NFB(4).
No change of substance.

Note to s15: imprisonment not to be imposed for certain contraventions relating to child support

Based on s70NFB(5). No change of substance.

Note to s16: Relationship between this Division and other laws

Based on s70NFH. No change of substance.

Note to s17: Arrangements with States and Territories for carrying out of sentences and orders

Based on s70NFI. No change of substance.

Note to s18: Division does not limit operation of section 112AP

Based on s 70NFJ (which should refer to s112AP rather than s105). No change of substance.

Note to s19: Matters to be considered in relation to costs applications

This is a new provision, replacing a number of provisions about costs, for the reasons discussed above.

Endnotes

1. Part XII, ss 102 – 109. Section 107 provided that rules could made for enforcement of decrees under the Act 'by means other than those specified in the preceding provisions of this Part', but the rules made (Matrimonial Causes Rules No 97 of 1960) did not provide for enforcement of what are now called parenting orders.
2. Section 108.
3. In the Marriage of Sahari (1976) 2 Fam LR 11,126; FLC 90-086.
4. The Hon Justice Adrian Smithers, 'Enforcement in relation to access and contempt issues' Fifth National Family Law Conference, 1992, 335 – 371.
5. Australian Law Reform Commission, Contempt (ALRC 35, 1987), Summary, para 89. Cases illustrating the purpose of deterrence include In the Marriage of Sahari (1976) 2 Fam LR 11,126; [1976] FLC 90-086; In the Marriage of M (1978) 4 Fam LR 555.
6. Australian Law Reform Commission, Contempt (ALRC 35, 1987).
7. Summary, paragraph 90.
8. Summary paragraph 92.
9. 1992 Report, para 7.7.
10. Defined in s 112AB. Under s 112AB(1) a person would be taken to have contravened an order under the Act only if he or she is bound by the order and has either intended not to comply with the order or, without having that intent, has failed to make any reasonable attempt to comply with the order.
11. Section 112AC.
12. Section 112AD (2) (g). The child's welfare was to be the paramount consideration when the court considered making such an order: s 112AL.
13. Section 70AA
14. Decisions include In the Marriage of T and H Stavros (1984) 9 Fam LR 1025; In the Marriage of G (1981) 7 Fam LR 267; In the Marriage of M (1978) 4 Fam LR 555; In the Marriage of Rossi – (1980) 6 Fam LR 148; In the Marriage of Attreed (1980) 6 Fam LR 453; In the Marriage of McJarrow (1980) 6 Fam LR 746; S & S [1986] FamCA 9; (1986) FLC 91-736; 10 Fam LR 1055 husband failed to return the child after an access period and disappeared with the child); Between: Minister of Community Welfare Appellant and BY Respondent/ Husband and LF (Formerly Y) Respondent/Wife Appeal [1988] FamCA 11 (22 September 1988) 12 FAM LR 477; (1988) FLC 91-973; In the Marriage Of: Camille Maria Foster Appellant/Wife and Maxwell Keith King Respondent/ Husband [1988] FamCA 20 (9 December 1988) The AUSTLII version of the case seems incomplete at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/1988/20.html?stem=0&synonyms=0&query=contempt.
15. Accessed at www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=reports/1992/1992_pp326report.htm.
16. Family Law Council, Interim Report: Penalties and Enforcement on the enforcement of Family Court orders and injunctions and penalties for non-compliance with orders and injunctions (April 1998).
17. Family Law Council, Child Contact Orders: Enforcement and Penalties (June 1998). Although the ultimate analysis and recommendations are set out in the Final Report, much of the background information in the Interim Report is not repeated in the Final Report, so for a complete picture both reports need to be consulted.
18. Helen Rhoades, 'Contact Enforcement and Parenting Programmes – Policy Aims in Confusion', 16 Child & Fam. L. Q. 1 (2004) 2, 15
19. House of Representatives Standing Committee on Family and Community Affairs Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation December 2003 at paras 4.116 – 4.118; 4.140 -4.144.
20. EM para 241.
21. Illustrative provisions: s 70NEB(1)(d), (da), (e); s NFB (2) (a) (b) (d) (e) (f).
22. *McClintock & Levier* (2009) 41 Fam LR 245; [2009 93 FLC 401; [2009] FamCAFC 62.
23. Illustrative provisions: s 70NEB(1)(a); s 70NEG.
24. Illustrative provisions: 70NBA; s 70NEB(1)(c)
25. Section 70NEB(1)(c).
26. Section 70NBA(1).
27. Illustrative provisions: s 70NDB; s 70NEB(1)(b).
28. Illustrative provisions: s 70NEB(1)(e); s 70NFB(1)(f).
29. Paragraph 554.
30. Illustrative provisions: s 70NCB; s 70 NCDC; s 70NEB (1)(f), (g), s 70NFB(1)(g).
31. Illustrative provisions: s. 70NEA(1)(c); s. 70NFA(1)(c).
32. Section 70NFA(1).
33. Illustrative provisions: s. 70NFA(3).
34. As mentioned elsewhere, the Full Court has held that general deterrence is a legitimate purpose of the contempt provision (s 112AP), but not of the provisions of Div 13A.
35. Section 70NFA(4).
36. Section 70NEA(4).
37. Interestingly, the Explanatory Memorandum to the Family Law Amendment (Shared Parental Responsibility) Bill (2005), at 262, makes an error in relation to the standard of proof. It says that s 70NAF 'provides that a stricter standard applies to orders being considered under the more serious contravention applications that may incur a criminal penalty under provisions in Subdivision F'. But this is not so. The criminal standard applies to the making of certain orders, some of which are in Subdivision E and some in Subdivision F. This error may indicate that the existence of the separate subdivisions has the potential to confuse.
38. Section 117 would need to be amended to make it subject to s 19.
39. In this sentence 'unsuccessful proceedings' is a shorthand reference to more elaborate provisions.
40. *Elspeth & Peter; Mark & Peter; and John & Peter* (2007) 37 Fam LR 696; [2007] FLC 90-341; [2007] FamCA 655.
41. If the other policy is to be embraced, then the order should not be characterised as a parenting order. The provision could say, for example, that the order could be made in order to compensate the adult but should not be made if it would be contrary to the best interests of the child.

THE 2018 CHILD SUPPORT CHANGES – WHAT FAMILY LAWYERS NEED TO KNOW

Written by the Child Support Program Branch
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Background

In August 2016, the Government responded to the report, *From conflict to cooperation: Inquiry into the Child Support Program*, and agreed in principle or in part with the majority of the report's recommendations.

The *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* gives effect to some of those recommendations by:

(a) The use of amended tax assessments in a broader range of circumstances;

(b) Improving the policy regarding the making of interim care determinations where care is not happening in accordance with a written care arrangement;

(c) Expanding the range of methods available to collect child support overpayments in line with those used to collect child support debts;

(d) A new set of rules for courts where an application is made to set aside a child support agreement that was made before 1 July 2008; and new suspension and termination provisions where a person receiving child support under a child support agreement ceases to have at least 35% care of a child.

When do these amendments come into effect?

Measures A and B commenced on 23 May 2018. Measures C and D commenced on 1 July 2018.

In addition to the changes arising from the Parliamentary Inquiry, this package of legislative amendments makes changes to the date of effect provisions for:

- care percentage determinations;
- taxable incomes for periods prior to 1 July 2008; and
- elections to end child support assessments.

Western Australian ex-nuptial children

These legislative amendments do not apply to child support cases involving ex-nuptial children living in Western Australia until the changes are adopted by the Western Australian State Parliament. The legislation prior to these amendments will continue to apply in WA ex-nuptial child support cases. However, the new disputed care legislation applies to WA ex-nuptial children for Family Tax Benefit assessments.

Changes to how amended tax assessments are used for child support purposes

Prior to 23 May 2018, any correction to a parent's income tax assessment in the form of an amended tax assessment was generally not able to be used in their child support assessment. One of the few exceptions was where the amendment was due to fraud or tax evasion.

In many cases, this led to child support assessments which did not accurately reflect the parent's income and therefore capacity to support their children. Unless the parent successfully sought a change to their child support assessment to reflect the corrected income, they paid too much or received too little.

The amendments to the legislation ensure a parent's amended tax assessment can be used in their child support assessment in a much broader range of circumstances. The changes mitigate the need for parents to pursue complicated and time consuming administrative (and in some extreme cases, costly legal) remedies to have their income accurately reflected in their child support assessment.

What's changing?

All higher amended tax assessments, and all lower amended tax assessments where the parent sought the amendment within a timely manner or in certain circumstances (see below) will be applied to the relevant child support period **retrospectively** and for all the remaining days in the relevant child support period.

If a lower amended income cannot be applied retrospectively, it will be applied to the child support period **prospectively** provided the relevant assessment has not already ended.

A parent will be considered to have acted in a timely manner if they sought the amendment to their tax assessment within their ordinary tax return lodgement period or within 28 days of being notified of their preceding tax assessment.

A lower amended income can also be applied retrospectively if the parent was prevented from seeking the amendment sooner for reasons beyond their knowledge or control and they subsequently took action within 28 days of becoming aware that the preceding tax assessment was incorrect.

Lastly, even where the parent has not applied for amendment of the tax assessment within the timeframes mentioned above, if the Child Support Registrar is satisfied that **special circumstances** exist, the child support assessment can be amended retrospectively to take account of the amended tax assessment. What constitutes special circumstances is not defined in the legislation, however the policy intent is that this provision will operate similarly to section 11 of the *Child Support (Assessment) Regulations 2018.*

These changes apply to all amended incomes issued by the Australian Taxation Office (ATO) on or after 23 May 2018 regardless of the year of income amended.

Example

Jane and Stephen have a child support case for their child Debra.

On 28 April 2018, Stephen lodged his 2017 tax return. As a child support assessment was not yet in force using Stephen's 2017 taxable income, a new assessment was made based on his 2017 taxable income of $75,000.

Upon being notified of the new child support assessment on 18 May 2018, Stephen realised he had erroneously included his taxable income twice in his tax return. He was advised to lodge an amended return so the error could be fixed.

On 20 May 2018, Stephen lodged the amended return and two weeks later, the ATO issued the amended tax assessment and sent the details to the department. Given the correction made by the ATO, Stephen's amended taxable income was significantly less than his original taxable income.

Legislation prior to 23 May 2018

Under the previous legislation, Stephen's amended income would not be used in his child support assessment and he would be required to pay the significantly higher child support assessment based on the original (now incorrect) taxable income.

New legislation

As Stephen sought the amendment to his taxable income within 28 days of receiving notification of his original tax assessment, the amended income would be taken into account in his child support assessment from the start of the child support period. This means his child support assessment would be more accurate, being based on his actual (amended) income. This also ensures Jane receives the correct Family Tax Benefit payments.

Key changes

- A parent's amended income will be used in their child support assessment in most cases.
- All higher amended incomes will be applied retrospectively.
- Lower amended incomes will also be applied retrospectively if the parent took prompt action to seek the amendment. If they didn't, the amended income will apply prospectively.
- A lower amended income can also be applied retrospectively where the parent did not seek the amendment sooner due to reasons beyond their knowledge or control or where there are special circumstances.

Changes to date of effect provisions for taxable incomes for periods before 1 July 2008

From 1 July 2018, new date of effect provisions came into effect where a parent's taxable income is determined or ascertained for a period prior to 1 July 2008.

These changes mean a parent's lower adjusted taxable income (ATI) will not be used to amend a child support assessment for a period earlier than 1 July 2008 except in prescribed circumstances as set out in section 11 of the Child Support (Assessment) Regulations 2018.

Changes to interim periods in child support and Family Tax Benefit assessments when care is disputed

Generally, a child support or Family Tax Benefit (FTB) assessment uses the actual amount of time a person has a child in their care to determine the person's care percentage for that child. The care percentage is used to calculate the amount of child support transferrable between parents, and FTB payable to a person.

An interim period is an exception to this general rule. In an interim period, the amount of care specified in a written care arrangement, rather than the care actually provided, is used to determine the care percentage. A written care arrangement is a court order, parenting plan, or other written care agreement.

An interim period may apply where:

- A written care arrangement specifies the amount of care of a child that each party to the arrangement should provide; and
- Care is not occurring in accordance with the written care arrangement; and
- The person with reduced care (less actual care than the amount specified in the written care arrangement) is taking reasonable action to have the written care arrangement complied with.

Interim periods before 23 May 2018

Until 23 May 2018, interim periods began on the day the care change occurred and ended 14 weeks later (up to 26 weeks later in special circumstances).

The 'day the disputed care change occurred' was the day the written care arrangement ceased to be complied with.

Neither the type nor the age of the written care arrangement affected the duration of the interim period.

The person with reduced care was required take reasonable action to have the arrangement complied with for an interim period to be applied. Reasonable action (for the person with reduced care) included actions such as negotiating with the other party in a genuine attempt to ensure compliance with the care arrangement, or filing an application to a court to have an order enforced.

What's changing?

The concept and function of the interim period is retained and the person with reduced care must still take reasonable action for an interim period to apply. However, the person with reduced care must *continue* taking reasonable action to have the care arrangement complied with throughout the interim period. If they cease doing so, the interim period will end.

The duration of interim periods is more flexible, being between 4 and 52 weeks long. The duration of the interim period will depend on:

- the type of the written care arrangement – court order, or parenting plan / written care agreement,
- how long the written care arrangement had been in place when the disputed care change occurred, and
- in some circumstances, whether or not the person with increased care is taking reasonable action within a reasonable period to participate in an approved Family Dispute Resolution (FDR) process.

The 'reasonable period' for the person with increased care to take reasonable action is discretionary to account for individual circumstances. In the absence of grounds justifying a longer or shorter time, the reasonable period is two weeks from the disputed care change.

Interim periods may be reapplied or suspended if the person with increased care stops or restarts taking reasonable action to participate in an approved FDR process.

Key changes

- Interim periods can be between 4 and 52 weeks long.
- Interim periods will generally be longer for recently made written care arrangements.
- Interim periods will generally be longer for court orders, compared to parenting plans and written care agreements.
- The duration of the interim period may be reduced if the person with increased care participates in Family Dispute Resolution.

How the duration of an interim period will be determined

The type and age of the written care arrangement affects how long an interim period will be.

An interim period starts on the day the disputed care change occurred.

Where a written care arrangement set out in a **Court Order** is not being complied with, the interim period will end on the **later** of:

- the end of the 52 week period starting on the day the court order commenced, or
- the end of 14 weeks after the day the care changed – if the person with increased care is taking continuous reasonable action to participate in an approved FDR process, or
- the end of 26 weeks after the day the care changed – if the person with increased care is not taking reasonable action to participate in an approved FDR process.

Where a written care arrangement set out in a **parenting plan** or other **written care agreement** is not being complied with, and the disputed care change occurs **within** 38 weeks of the care arrangement commencing, the interim period will end at the end of the period of 14 weeks starting on the change of care day.

Where a written care arrangements set out in a parenting plan or other written care agreement is not being complied with and the disputed care change occurs after 38 weeks, but before the end of the period of 48 weeks, starting on the day the agreement or plan first takes effect, the interim period will end on the **earlier** of:

- the end of 14 weeks starting on the day the care changed; or
- the end of the 52 week period from the commencement of the written care arrangement – if the person with increased care takes continuous reasonable action in a reasonable period to participate in FDR from 48 weeks of the written care arrangement commencing.

If the disputed care change occurs **after** 48 weeks of the parenting plan or written care agreement commencing, the interim period will end on the earlier of:

- the end of 14 weeks after the day the care changed; or
- the end of 4 weeks starting on the day the person who had increased care of the child began taking reasonable action to participate in FDR process within a reasonable period.

The person with increased care incentivised to participate in FDR

The intention of the amended interim period provisions is to provide a direct incentive for the person with increased care (more actual care than the amount specified in the written care arrangement) to participate in FDR.

Participating in FDR is the **only** action that qualifies as 'reasonable action' for the person with **increased** care. Doing so can reduce the length of some interim periods, as noted above.

In order for a shorter interim period to be applied, the person with increased care must take continuous reasonable action throughout the maximum interim period. The maximum interim period begins on the day the disputed care change occurred, and ends:

- for court ordered care arrangements on the later of: the end of 52 weeks starting on the day the court order first takes effect, or the end of 26 weeks starting on the change of care day;

- for written agreements or parenting plans – the end of the period of 14 weeks starting on the change of care day.

Stopping and starting reasonable action

If the person with increased care had been taking reasonable action, but ceases before a "short" interim period ends, the interim period will be extended to the end of the maximum interim period.

If the person with increased care had been taking reasonable action, but ceases after a "short" interim period ends and before the maximum interim period ends, the interim period is reinstated from the day reasonable action ceases and will end on the last day of the maximum interim period.

If the person with increased care begins or resumes taking reasonable action (but has not been taking continuous reasonable action) before the end of the maximum interim period, and continues to take reasonable action throughout the maximum interim period, then the interim period may be suspended. However, the interim period is not suspended until:

- 14 weeks after reasonable action commenced or resumed, if the written care arrangement is a court order; or
- 4 weeks after reasonable action commenced or resumed, if the written care arrangement is a parenting plan or written care agreement.

Example – contravention of a recently made court order

Rachel and James have a son, Ethan. They have a court order for the amount of care each of them provides. The court order began on 1 September 2018, and states that Ethan lives with Rachel 50% of the time, and with James 50% of the time.

On 15 December 2018, James does not allow Ethan to return to Rachel's care.

Rachel, the person with reduced care, takes ongoing reasonable action in order to get James to comply with the court order. James, the person with increased care, does not take reasonable action to participate in FDR.

The interim period starts on 15 December 2018.

The interim period will end on the later of:

- 52 weeks after the court order started – 30 August 2019
- 26 weeks after the day the care changed – 14 June 2019

The interim period ends on 30 August 2019, which is 52 weeks after the court order was made.

In this example, the length of the interim period won't change if James takes reasonable action to participate in FDR.

Example – contravention of a two year old parenting plan

Robert and Jenny have a parenting plan for their daughter Ella. The parenting plan was made 2 years ago. Under the plan, Ella lives with Robert 70% of the time, and with Jenny 30% of the time.

On 3 October 2018, Jenny does not allow Ella to return to Robert's care.

Robert, the person with reduced care, takes ongoing reasonable action to have the parenting plan complied with.

Jenny, the person with increased care, arranges for family dispute resolution meetings for her and Robert at a Family Relationship Centre.

The interim period begins on 3 October 2018. As their parenting plan is more than 48 weeks old and Jenny is taking reasonable action to participate in family dispute resolution, the interim period ends 4 weeks after the disputed care change, on 3 October 2018.

If Jenny stops taking reasonable action within 14 weeks of the care change, the interim period will be extended, or restart if it has ended. The interim period would then end 14 weeks after the disputed care change, on 8 January 2019.

Notification of changes to care arrangements

Prior to 1 July 2018, if a parent advised of a change in the care arrangements for a child more than 28 days after the change occurred, the child support assessment would be updated using the new care arrangements for both parents from the date the change was notified to the department.

In some cases this meant that where there was a delay in reporting a care change a parent who no longer had actual care of a child could continue to be paid child support as though the child was in their care for a period of time.

What's changing?

From 1 July 2018, if a care change is reported more than 28 days from the date the care actually changed, the assessment for the child will be amended:

- from the date of the actual care change, by changing the care percentage for the person who now has a lower care percentage; and
- from the date of notification, by changing the care percentage for the person who now has a higher care percentage.

This means that in some cases the assessment will be for less than 100% care of the child for a period of time.

Key changes

- A late-notified decrease in care will take effect in a child support assessment retrospectively from the date of the care change
- A late-notified increase in care will take effect in a child support assessment from the date of notification
- In some cases, less than 100% of the child's care will be reflected in an assessment for a period of time
- Where no parent or carer has 35% or more care of a child in an assessment for a period of time because of a late-notified change in care, the assessment may be suspended or ended

Suspension or termination of assessment

As a result of these changes it will be possible for there to be a period of time when no parent or carer in the child support assessment has 35% or more care of a child. In that situation:

- If the period is 26 weeks or less – the child support assessment for the child will be suspended for the period that no parent or carer has 35% care or more of the child.
- If the period is more than 26 weeks – the child support assessment for the child will end from the date the care actually changed for the child.

A suspension will always be applied retrospectively – it will be applied from the day the care actually changed, and will end the day before the care change was notified. When a child support assessment is suspended, there is no assessment in place for the child for the period of the suspension. The child won't be taken into account in assessments for any other child.

When a child support assessment has ended for a child, a parent (or third-party carer who has at least 35% care of the child) can apply for a new child support assessment. The new assessment will only start from the date the new application is made.

Grace period

The new care rules do not apply to care changes that occurred prior to 1 July 2018, provided the changes are notified on or before 30 December 2018.

> *When a child support assessment is suspended, there is no assessment in place for the child for the period of the suspension.*

Suspension and Termination of child support agreements where care of a child falls below 35 percent

This measure commenced on 1 July 2018.

Prior to 1 July 2018, if a person receiving child support under an agreement ceased to be an eligible carer of a child and the person paying child support became the eligible carer of the child (i.e. there is no child support terminating event) and the agreement did not make provision for this change, the liability under the agreement continued to be payable to the person who

ceased to be an eligible carer. If the parents could not agree to terminate the agreement, the paying parent with care would have to consider applying to a court for the agreement to be set aside under section 136 *Child Support (Assessment) Act 1989.*

What's Changed?

The amended legislation means that if the person entitled to child support under an agreement ceases to be an eligible carer (less than 35% care) of a child and the other parent is an eligible carer, the agreement for the child will be suspended for a period, and will later terminate if the former carer doesn't resume having at least 35% care.

Key changes

- An agreement will be suspended (and may later end) if a person ceases to be an eligible carer and there hasn't been a child support terminating event.
- A suspension period applies for 28 days or up to 26 weeks in some circumstances.
- The agreement will restart if care changes back during the suspension period.
- An agreement can provide for the roles of the parties to swap if there is a care change.

An agreement will be suspended for a child if the person ceases to be an eligible carer for 28 days or less, or it may be suspended for a period not exceeding 26 weeks if:

- the agreement states it will be suspended for longer than 28 days;
- all parties to the agreement request it be suspended for longer than 28 days; or
- the Registrar determines there are special circumstances concerning the care change which allows the agreement to be suspended for more than 28 days.

A suspension period is provided so that if the care of the child changes again in that period and the original carer again has at least 35% care of the child, the agreement can restart for the child.

An agreement will be terminated for a child at the end of a suspension period. An agreement will be terminated without a suspension first applying if the care change is notified more than 28 days (but less than 26 weeks) after the event and a longer suspension period does not apply.

The agreement termination will always apply from the date the original carer ceased to have 35% care. This will usually be the date of the care event (or the day after the end of an interim care period, if any).

If an agreement includes a clause that allows the roles of the parties to swap when there is a care change, the agreement will not be suspended or terminated. Instead, child support will be payable to the parent who is the eligible carer of the child in accordance with the agreement provisions.

When an agreement is suspended or terminated for a child, the child shall be assessed under a formula assessment. However, if the agreement has started the child support case (i.e. an 'initiating agreement'), there will be no child support payable for the relevant child (on agreement suspension) or the child support case for the child shall end (on agreement termination).

When an 'initiating agreement' is suspended, the parent with care of the child can elect to end their agreement-based assessment and then apply for a formula-based administrative assessment for the child. If the agreement is still suspended or if it has terminated, child support will then be payable for the child under the formula.

Other legislative amendments mean that an agreement cannot be accepted by the department if it provides for child support to be paid to a person when they are not an eligible carer of a child for a period – past, present or future.

Setting aside a child support agreement made before 1 July 2008

From 1 July 2018, courts will have broader powers to end 'transitional binding agreements' if a parent applies for an order to set aside their agreement under section 136 *Child Support (Assessment) Act 1989*.

> A less restrictive test will mean that if at least one of the parties did not receive legal advice when they made the agreement, the court can set aside the agreement if it would be unjust and inequitable not to do so.

'Transitional binding agreements' are agreements made before 1 July 2008 that were 'transitioned' as binding agreements into the new Child Support Scheme. Unlike binding agreements made after 1 July 2008, parents were not required to receive legal advice when making these types of agreements.

Recovery of child support overpayments

In its response to Recommendation 22 of the Parliamentary Inquiry into the Child Support Program, the Government committed to ensuring equity in the collection of child support debts and overpayments. In collecting overdue child support or child support overpayments, an appropriate balance should apply between collecting amounts in the shortest time possible and ensuring parents are not placed in undue hardship.

Overpayments of child support occur when a receiving parent has been paid child support to which they are no longer, or never were entitled to receive (for example, where a parent's lower income is used retrospectively in their child support assessment).

Prior to 1 July 2018, overpayments were not administratively recoverable where there was no longer a registered maintenance liability or a paying parent failed to:

- comply with their legal obligations to lodge tax returns; or
- advise the department of an address change that indicated they no longer met the residency requirements for child support purposes.

Before these amendments, there were limited administrative options available to recover overpayments where a person did not make voluntary repayments.

Where overpayments were not recoverable administratively, a person could seek a recovery order under section 143 of the *Child Support (Assessment) Act 1989*. If a recovery order was made in conjunction with a declaration made by a court pursuant to section 107 of the Assessment Act (a finding that a person was not a parent of a child), the order could also be registered for collection.

What's changing?

From 1 July 2018, an overpayment will be administratively recoverable except where:

- there is no longer a registered maintenance liability; or
- the paying parent ceases to be a resident of Australia or a reciprocating jurisdiction resulting in a terminating event.

Key changes

- Most overpayments are administratively recoverable.
- Administrative recovery methods to collect overpayments have been expanded.
- More types of recovery orders can be registered with the department.

Administrative methods to enforce collection of overpayments have been expanded to align more closely with methods used to enforce child support debts, the new provisions being:

- garnisheeing funds from the parent's bank accounts, employers or other organisations and third parties
- redirecting payments a person may be entitled to receive towards a debt they owe to another person
- undertaking litigation action
- Departure Prohibition Orders

If a person is owed an overpayment, they can choose to privately enforce payment of the overpayment in a court with jurisdiction, in the same way that a person can privately enforce child support debt (section 113A of the *Child Support (Registration and Collection) Act 1988*).

Where an overpayment is not administratively recoverable, the paying parent may seek a recovery order in situations where there is no longer a registrable maintenance liability. From 1 July 2018, recovery orders made:

- in conjunction with setting aside a declaration made pursuant to section 106A of the Assessment Act (a declaration that a person should be assessed in respect of the costs of a child); and
- with respect to amounts overpaid due to a variation which resulted in the child support liability being cancelled or a child being removed from the liability from the beginning of the case; can be registered for collection by the department.

Other changes

Currently, a customer who is liable to pay child support to another person can, in certain circumstances, have non-agency payments credited to their child support account. From 1 July 2018, non-agency payments can be credited against a parent's overpayment in much the same way.

A person who has been overpaid can make direct payments to the person that they owe the overpayment to, or to a third party on that person's behalf. If both parties to the child support assessment agree those amounts were paid in full or partial satisfaction of the overpaid amount, it can be credited to the overpaid person's account.

Overpayments can also now be offset against another overpayment and/or against a child support debt.

A person who has been overpaid can make direct payments to the person that they owe the overpayment to...

Section 151 election to end a child support assessment

If a parent receives Family Tax Benefits (FTB(A)) for a child from a previous relationship, they are required to take reasonable action to seek child support from the other parent of that child. This is called the Maintenance Action Test (MAT). If they don't, they may receive only the base rate of FTB(A).

What's changing?

From 1 July 2018, where a person who is in receipt of more than the base rate of FTB(A) elects to end their child support assessment, the election no longer needs to be approved by Centrelink. However, making an election to end the assessment may cause the person's FTB(A) to be reduced to the base rate (same as current).

Referral to a Centrelink Social Worker will be made if the person notes or alludes to the presence or fear of Family or Domestic Violence, for the consideration of an exemption from the MAT.

LATE INHERITANCES AND THE FAMILY LAW COURTS

Written by Devin M. M. Sanghavi*

Devin Sanghavi

Joanna and Simon commence living together in July 1994. They marry in 1996, and separate in February 2009. Joanna and Simon have 2 children, 6 and 9 years old at the time of separation. Shortly after separation, Simon inherits $3 million. Besides the inheritance, Joanna and Simon have accumulated property worth $4.8 million. Property settlement proceedings commence. Is the inheritance part of the property the Family Law Act *takes into account? If it is, how does its receipt effect the assessment of contributions? If it's not property but just a financial resource to Simon, should Joanna receive a greater share of the other property because Simon also has the inheritance?*

Introduction

In property settlement proceedings in relation to a marriage (or de facto relationship), a family law court (a court exercising family law jurisdiction) shall not make an order altering interests in property unless it is just and equitable to do so.[1] The court determines a party's entitlement to property settlement by what is effectively a 5-step enquiry.[2] First, the court must identify all existing legal and equitable interests of the parties in property and their financial resources. Second, it must consider whether, having regard to the identified existing legal and equitable interests, it is just and equitable to make any property settlement order.[3] Third, it must identify and assess the direct and indirect financial and non-financial and homemaker and parent contributions in relation to property of the parties. Fourth, it must take into account specific prescribed factors[4] which relate in general terms to the parties' needs in the future. Finally, it must consider whether the orders it proposes to make are just and equitable.

The facts described in relation to Joanna and Simon above, are those of a case heard in the Family Court of Western Australia in March 2013. The decision was appealed to the Full Court of the Family Court of Australia, and later the subject of an unsuccessful Special Leave Application to the High Court. The Full Court's decision, and the Special Leave Application, both are reported under the pseudonym of *"Singerson & Joans"*. The Full Court's decision, left undisturbed by the High Court, resulted in the wife (Joanna in the scenario above) receiving 47.5% of all property, including the inheritance ($2.6 million at the time of trial in 2013).[5]

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I. Just And Equitable

The family law courts have broad but not unrestrained powers when exercising the discretion to alter interests in property. As recently as 2012, the High Court made clear in the seminal decision of *Stanford,*[6] a family law court must not do, and is not entitled to do, what could be described as *"palm tree justice"*[7] when exercising its broad discretion. Instead, it must exercise its discretion in accordance with the statute and existing legal principles. Key legal principles affecting late inheritances are discussed below by reference to the decisions in which they arose.

When the outcome and trajectory of a decision such as *Singerson* are analysed, one could be forgiven for feeling a sense of injustice for the spouse for whose benefit the inheritance was bequeathed. That being said, it is not, in the author's view, inconsistency in uniform decision-making that is the cause, but rather the exercise of discretion when applied to the individual facts.

II. In or Out – Property or a Resource?

Can an inheritance be left out of the identified 'property', or be immune from consideration by a family law court (whether as part of the property or even as a financial resource) due to it being received late in a relationship or after separation?

The 1991 decision of *Bonnici* is a frequent reference point.[8] *Bonnici* involved a 17-year marriage which produced 2 children. The husband inherited $20,000 before separation and $500,000 within a year of separation. Notably, the wife had made significantly greater financial and welfare contributions compared to those of the husband (besides his inheritance). What is significant about *Bonnici* is not so much its outcome, rather what the Full Court stated at paragraph 44 of its decision:

> **The other party cannot be regarded as contributing significantly to an inheritance received very late in the relationship and certainly not after it has terminated, except in very unusual circumstances.** Such circumstances might include the care of the testator prior to death by the husband or wife as the case may be or other particular services to protect a property…
>
> **Accordingly, we think that in the present case the monies received by the husband from the sale of the freehold and from his uncle's estate should not be brought into account.** (emphasis added)

Paragraph 44 of *Bonnici* has been relied upon to make arguments to the following effect:

1. late inheritances ought not to be taken into account, and so excluded, in a property settlement, and remain the sole benefit of the spouse that brought it in;[9]
2. the non-inheriting party could not be said to have contributed in any significant way, to a late inheritance given the nature of the asset and the timing of such a contribution and so the inheritance must be treated differently to other assets;[10]
3. contributions made prior to the receipt of an inheritance bear no relevance to it;[11]
4. contributions need be made by the non-inheriting party towards the person who bequeathed assets to the inheriting party – if not, then that factor should suffice to exclude the inheritance from being brought into account in assessing contributions;[12]

In the author's view, arguments to the effect of, or any permutation of, those in paragraphs 1, 2 and 4 above are incapable of being sustained if made today. The argument in paragraph 3 could be accepted in an appropriate case.[13]

Paragraph 44 of *Bonnici* may have created confusion (apparent in some of the cases referred to in this article) about the approach to be taken. The Full Court clarified this issue 20 years later – in their 2013 decision in *Bishop,*[14] and then in their 2017 decisions of *Calvin*[15] and *Holland.*[16]

Bishop involved a relationship of 23 years. There were 3 children. The wife received an inheritance 3 years prior to separation from an aunt in England. Once received the inheritance was kept separate from all other assets. The trial judge excluded the inheritance from calculation of the property available for distribution because he considered he was *"constrained by [Bonnici] in leaving the inheritance…out of the*

calculation of the pool". The Full Court held the *Bonnici* decision did not give rise to such a constraint.[17] The Full Court's clarification was somewhat succinct, but was expanded upon in their decision in *Calvin*.

In *Calvin,*[18] the marriage was of 8 years duration and produced one child. The husband received an inheritance 4 years after separation. The primary issue on appeal was whether the trial judge erredin including the inheritance amongst the property to be divided. The Full Court made clear, unequivocally, that *"property acquired after separation can be the subject of division".*[19] The Full Court also confirmed, in relation to reliance by the husband on paragraph 44 of *Bonnici*, that the earlier Full Court in *Bonnici* was not *"purporting to lay down a guideline as to the approach the court should take to inheritances received after separation"*.

Both these key points were made again by the Full Court in its subsequent decision in *Holland.*[20] *Holland* also concerned the issue of whether an after-acquired inheritance could be excluded from a court's consideration. A secondary issue in this case was whether the inheritance (upon its exclusion from the pool of available assets) could instead be treated as a financial resource. The Full Court explicitly confirmed that *"it is wrong as a matter of principle to refer to any existing legal or equitable interests in property of the parties or either of them as "excluded" from, or "immune" from consideration…".*[21] The Full Court also re-iterated that use of the expression "resource" or "financial resource" should be *"confined to those interests which do not fall into the definition of property as such to which the parties have a present entitlement".*[22]

Put simply, an inheritance, or what is left of it, if existing at the time of trial cannot be excluded or ignored from consideration in the determination of the property of the parties. Care ought to be taken in refraining from using the term "financial resource" to describe or refer to existing property interests of the parties.

III. The Assessment of Contributions and Factors Affecting Needs Of The Parties in the Future

A different but equally important aspect of cases involving late inheritances is the assessment of each spouse' contributions. Once a trial judge has identified existing legal and equitable interests of the spouses in property and considered how those assets were acquired, used or improved, they then have a discretion as to whether contributions made by spouses are assessed as against all property, or on an asset-by-asset basis,[23] or a two or three pool approach,[24] or a hybrid of those approaches.

Conventional case law wisdom has until recently been that an inheritance is likely to be regarded as a contribution by the party for whose benefit it was bequeathed.[25] However, as moe recent case law shows, the task of assessing contributions is less mathematical or siloed against particular assets, and is more holistic.[26] This becomes increasingly important where contributions other than financial contributions are prominent over a long marriage or relationship. Factors such as whether the relationship produced children, and the length of the relationship, can be critical.

One of the earliest decisions of a family law court concerning a late inheritance is the 1978 decision of *James.*[27] It involved a 13-year marriage which produced 2 children. Shortly after separation, the husband inherited farming land from his father. Of substantial relevance was that during the marriage both spouses worked on the farming land in their own way, and made their respective contributions on the basis of a reasonable expectation to inherit the property *"in the fullness of time".* At first instance, it was found that but for the parties having dependent children, the wife would not have been entitled to any portion of the husband's inheritance. On this aspect of the findings, the Full Court took the view that proper consideration had not been given, amongst other circumstances, to the contributions the wife made during the marriage.[28]

Overzealous focus on the lateness of an inheritance, and on who receives the inheritance, can lead to inadequate consideration of other contributions made prior to the receipt of the inheritance.[29] Comments by Cronin J, in a first-instance decision in 2012, are particularly apt in this regard:

> Isolating or quarantining an inheritance must be cautiously done to ensure that earlier important contributions to the family in particular, are not ignored. As will be seen…there is a distinct possibility of that happening if the focus is entirely on the assets received by the wife from inheritances and gifts.[30]

Also apt is the "gold bar" analogy used by Kay J in the case of *Aleksovski,*[31] as follows:

> 90. …The Judge must weigh up various areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital. **A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship.** What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements. (emphasis added)

The wife received $143,000 in compensation as a result of a motor-vehicle accident shortly before separation.

One of the arguments by the wife's counsel in *Aleksovski*, was that monies received by the wife from her motor-vehicle accident were "peculiarly personal" to the wife. It is not difficult to imagine such an argument lending itself to a case involving a late inheritance. Kay J emphasised the following as to the "peculiarly personal" argument:

> 93. I am not entirely convinced that the analogies used by his Honour are all apposite. The moneys are peculiarly personal to the recipient. This is almost always true of inheritances although often the parties both change their spending and saving habits in anticipation of an inheritance. The parties may both work a farm property or in a business owned by the parent of one spouse in anticipation of eventually inheriting it and in so doing may forgo entitlements such as wages (see James v James (1978) FLC 90-487). A lottery win is of a different dimension. ... With damages for pain and suffering or with an inheritance, the other s 79 considerations required to alter the ownership of that fund need to be all the more powerful before it could be said to be just and equitable and proper to make such an order.

Aleksovski was a 1996 decision of the Full Court which concerned compensation, not after-acquired inheritance, but is nonetheless relevant. It involved an 18-year marriage. The wife received $143,000 in compensation as a result of a motor-vehicle accident shortly before separation. The Full Court found error in the trial judge giving full weight to the wife's contributions (including the compensation received by her), and failing to give proper weight to those of the husband. The decision of the trial judge to order the wife to retain the property purchased from her compensation monies and also to retain 75% of the matrimonial home resulted in a significant imbalance in the property each party would have retained, and this imbalance was overlooked, leading to an unjust result.

In 2000, the Full Court delivered the decision known as *Farmer and Bramley*[32] It concerned lottery winnings received after separation. The parties commenced living together in 1983, married in 1984, separated in January 1995, and divorced in April 1997. There was one child of the marriage, and both parties also had children from prior relationships. After separation but before the parties divorced, the husband won $5 million in lottery – this was the only asset of significance. The trial judge awarded the wife $750,000 due to her contributions made in her role as home-maker and parent during the relationship. It was also significant that the wife's contributions during the relationship were found to

have been made more arduous due to the husband's heroin addiction. The husband appealed. The majority of the Full Court found no merit in the appeal. Finn J made the following observation (particularly apt for this article):

> 57. Secondly, if it was to be determined that a majority of the community considered that one spouse should, as a general rule, have no entitlement to share in property either by good fortune or good management acquired after separation by the other spouse, then the Act would need to be amended to make this clear. As the Act currently stands, the jurisdiction conferred by s79(1) to alter the interests of spouses in property extends without limitation to all the property which either spouse is entitled.

In the Full Court's 2010 decision of *Polonius,*[33] the parties commenced cohabitation in 1975, married in 1980 and separated in 1997. The marriage resulted in 2 children. Around separation, the husband was on the verge of being made bankrupt. Shortly before separation, the wife received $10,366. Shortly after separation, the wife received $281,000. Both amounts were received by way of inheritance. The wife applied part of these funds to assist the husband in his bankruptcy proceedings, and by doing so, the husband's interest in the family home was saved from being divested. The balance of the inheritance was used by the wife to fund the purchase of two properties, pay expenses related to bankruptcy proceedings, and pay for household expenses. Notably, the parties lived together after separation for 10 years. Given the wife's extensive contribution, it was decided the husband should receive virtually none of the property. This was held by the Full Court to be an error, as it effectively ignored the contributions of the husband, both before and after separation.

In *Singerson*, like in *Polonius*, the wife was found to have contributed significantly towards building up the assets of the relationship and towards the care of the 2 children of the relationship. The relationship spanned 15 years. By the time the inheritance was received (around separation), the bulk of the various contributions identified had already been made by the wife. Following separation, the wife was found to have made significant contributions towards the children. Looking forwards, the trial judge could not ignore that the wife would have the children primarily in her care for a further 5 – 8 years. Several errors were identified by the Full Court as having been made in the approach taken by the trial judge in assessing contributions. In re-exercising its discretion, the Full Court decided it was appropriate to assess contributions as against all of the property (including the inheritance), and effectively gave significant weight to the wife's contributions made towards the children during the entire relationship. On this aspect of the findings, the Full Court observed that the trial judge had *"misled himself…in identifying only the four years between separation and trial as being the appropriate time upon which to assess contributions to the inheritance rather than across their 15 year relationship".*[34]

Subsequently the husband in *Singerson* made a Special Leave Application to the High Court. The Special Leave Application, at its essence, could be said to have agitated the very argument Finn J in *Farmer* expressed disapproval of – that special rules or guidelines are necessary for cases involving after-acquired property. The crux of the Special Leave Application, in terms of an asserted error of law, was that the wife made no contribution towards the inheritance, and therefore, it was erroneous to effectively treat it in the same manner as all of the other assets (to which the parties had made their respective contributions). In developing that argument further, the husband's counsel expressed the error made, to be treating the wife's welfare contributions (towards the children and the family) prior to receipt of the inheritance, as a contribution towards the inheritance. During the course of exchanges between bench and bar during the Special Leave hearing, French CJ cautioned against giving overzealous attention to *"ascertainment of contributions"*, and against creating *"rules out of what are guidelines appropriate to particular cases".*[35]

The wife's counsel submitted that no error had been demonstrated by the Full Court and that no further appellate guidance was necessary in relation to after-acquired property. As counsel for the wife submitted, in relation to the question of the assessment of contributions made prior to the receipt of an inheritance:

> …The husband in this case obviously feels a great injustice that his wife did not have anything to do with [the inheritance]. You might say that is right. There are lots of factual things that might emerge; he did not have any debts when he left home because she had been supporting him – had he, the value of his inheritance might have been reduced by the debts. You just cannot assume that this little treasure box was something to which no contribution had been made. In this myriad of potential factual analysis that the court has to undertake, we submit that it has exercised its discretion appropriately.

On 8 August 2018, the Full Court delivered a decision known as *Hurst & Hurst*.[36] In *Hurst*, the marriage was of 38 years duration. The marriage produced 4 children. One of the children was under 18 years of age and lived with the wife at the time of trial. One of the adult children also lived with the wife and required ongoing care which was provided by the wife (this arrangement was at the time anticipated to continue into the future). The husband had a modest income, and the wife relied on Centrelink benefits.

Relevantly, the husband received a number of inheritances and gifts throughout the marriage. The final of the inheritances was received in 2003, being a block of vacant land. It was valued at $400,000 at the time it was received, but increased in value to $1.82 million by the time of trial. The block of vacant land was unencumbered and only rates and slashing costs were paid on an ongoing basis during the marriage.

The net value of property available for distribution at the time of trial was $2.66 million (including the value of the inherited land).

At first instance, the trial judge found that each spouse worked very hard in their respective roles during their lengthy marriage. However, the trial judge made a separate finding as regards contributions in relation the inheritance, to which it was determined as follows:

> It cannot be said that the wife has made any contribution to this property other than indirectly by the rates and slashing costs being paid.[37]

No evidence was put forward at the time of trial as to whether any factors other than market forces had led to the increase in value of the vacant block of land. The trial judge, in the author's view, perhaps to give recognition and adequate weight to the husband's contribution given the value of the block of land at trial, assessed the division of property on the basis of contributions as 72.5 / 27.5 % in favour of the husband.

The Full Court found this to be an error. In finding that only indirect financial contributions had been made by the wife towards the inheritance, the other types of contributions made both prior to and after the receipt of the inheritance, were effectively quarantined from applying to the inheritance. This error, it was said by the Full Court, *"wreaks an injustice upon the wife"*.[38] Additionally, the Full Court found the trial judge had effectively failed to properly and sufficiently consider several relevant factors in assessing the future needs of the spouses. The errors in failing to properly assess contributions and factors affecting each spouse' needs in the future, were critical in the Full Court moving to allow the appeal and remitting it for further re-hearing.

...the Full Court found the trial judge had effectively failed to properly and sufficiently consider several relevant factors in assessing the future needs of the spouses.

CONCLUSION

Anecdotal experience continues to show that clients are often disbelieving when confronted with legal advice by their family lawyer that their inheritance from Great Aunt Betsy (who their less than beloved ex-spouse or partner barely knew) may be the subject of a claim for property settlement at the end of a relationship.

Family lawyers are tasked with the difficult role of endeavouring to explain to those clients how this has come to pass.

The provision of that legal advice is often met in equal measures by expressions of exasperation from clients, queries about how that case law can be just or fair, and lay-person arguments with the lawyer about the logic of it all.

In the author's view an inheritance, or what is left of it, existing at the time of trial will not be excluded from consideration as part of the 'property', when a family law court is to determine what, if any, order for alteration of property interests should be made.

A late inheritance is likely to be considered as but one fact of contribution to be assessed along with all other contributions made during **the whole** of the relationship. In appropriate cases, it is open to a court to consider that the receipt of a late inheritance by one party, should be treated highly favourably in the assessment of contributions for the recipient spouse. On the other hand, it is also open to the court to treat a late inheritance as simply another asset of the parties, and then assess all types of contributions of both spouses throughout the whole of the relationship as against all available property and without distinction between categories of property.

Endnotes

1. Section 79(2) of the Family Law Act 1975 (Commonwealth) ("FLA"); s205ZG(3) of the Family Court Act 1997 (WA). The power to make a property settlement order is contained in s79 of the FLA, and for de facto relationships in Western Australia, in s205ZG of the FCA. The Family Court of Western Australia exercises both federal jurisdiction and non-federal jurisdiction. In its non-federal jurisdiction, it can hear and decide, amongst other matters, applications in relation to de facto relationships for orders with respect to property and maintenance: s36(4) of FCA. The FCA contains provisions which mirror the FLA for the most part in relation to children, property settlement and maintenance..
2. *Stanford v Stanford (2012) 247 CLR 108.*
3. In most cases this requirement is "readily satisfied" because the parties' relationship is at an end and so common use of property will cease: Stanford (Note 2 above) at paragraph 42..
4. These factors are listed in s75(2) of the FLA; s205ZD(3) of the FCA..
5. *[2014] FamCAFC 238.*
6. Refer Note 2 above.
7. *Stanford (note 2 above)*, at paragraph 38 where the majority refer to the observations made in the earlier High Court decision of *R v Watson; Ex parte Armstrong (1976) 136 CLR 248..*
8. *In the Marriage Of: Anthony Milton Bonnici Appellant/Husband and Jacqueline Angela Bonnici Respondent/Wife [1991] FamCA 86; (1992) FLC 92-272.*
9. See for examples: *Calvin & McTier [2017] FamCAFC 125; Holland & Holland [2017] FamCAFC 166; Madden v Madden [2006] FLC 93-294; [2006] FamCA 1391; Nikas & Anthis [2015] FCCA 1871.*
10. See for examples: Bishop & Bishop [2013] FamCAFC 138; Singerson (refer note 5 above); Karllsson v Karllsson [2018] famca 305; Nikas (refer note 9 above).
11. *Singerson (refer Note 5 above); Calvin (refer Note 9 above).*
12. *See Holland (refer Note 9 above) at paragraph 17; See also Cobb & Cobb [2015] FCCA 2653* for an example of a decision where such an argument was made.
13. See the reasoning at paragraph 49 of *Holland (refer Note 9 above).*
14. *Bishop (refer Note 10 above).*
15. Calvin & McTier (refer Note 9 above).
16. Holland (refer Note 9 above).
17. Paragraph 28 of Bishop (refer Note 10 above); Surprisingly perhaps, no reference was made to the Stanford decision.
18. *Calvin & McTier (refer Note 9 above).*
19. At paragraph 25 *(refer Note 9 above)*; The Full Court made extensive reference to relevant parts of the Stanford decision (refer Note 1 above) including reference to the requirement for all existing legal and equitable interests in property, to be identified.
20. *Holland (refer Note 9 above).*
21. *Holland (refer Note 9 above) at paragraph 25.*
22. *Holland (refer Note 9 above) at paragraph 21.*
23. *Norbis v Norbis (1986) 161 CLR 513.*
24. *Coghlan v Coghlan (2005) FLC 93-220; For an example of this approach in relation to a late inheritance, see Marcel & Garrigan [2013] FamCAFC 94.*
25. *Kessey and Kessey (1994) FLC 92-495.*
26. *Dickons v Dickons (2012) 50 Fam LR 244.*
27. *In the Marriage of James, R.D. AND JAMES, M.O. (1978) FLC 90-487.*
28. *In the Marriage of James (refer Note 27 above) at paragraph 29.*
29. See for example: *Figgins & Figgins (2002) FLC 93-122; (2002) 29 Fam LR 544.*
30. *SINCLAIR & SINCLAIR [2012] FAMCA 388.*
31. *Between: Vlade Aleksovski Appellant/Husband and Gail Aleksovski Respondent/Wife [1996] FamCA 111.*
32. *[2000] FamCA 1615.*
33. *Polonius v York [2010] FamCAFC 228.*
34. Paragraph 65 of *Singerson (refer Note 5 above).*
35. *Singerson & Joans [2015] HCATrans 195.*
36. *[2018] FamCAFC 146.*
37. *Hurst (refer note 37 above) at paragraph 16.*
38. Hurst (refer note 37 above) at paragraph 32.

CASE NOTE:

ELLISON V SANDINI PTY LTD [2018] FCAFC 44 PER SIOPIS, LOGAN AND JAGOT JJ

Written by Sheridan Emerson

Sheridan Emerson

Sheridan Emerson is a partner of Pearson Emerson Meyer in Sydney with a practice focused on financial cases involving substantial asset pools, including matters with complex company, trust, partnership and valuation issues.

Don't Know Where It's Going, Don't Know Where It's Flowing: the Full Court of the Federal Court of Australia considers the limits of CGT roll-over relief arising from a marriage break-down.

First instance decision: *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 per McKerracher J

Whether the upbeat sentimentality of *"Finding You"* from the Go Betweens' ninth studio album, *Oceans Apart*, is to your liking or not, the lilting chorus *"Don't Know Where It's Going, Don't Know Where It's Flowing"* could not be more apt for a note on the uncertainty surrounding the availability of CGT roll-over relief under the *Family Law Act* where related entities are involved. Even harder to beat is the representation of an ATO tax audit in the lyrics of this under-rated Brisbane band: *"Then the lightning finds us/burns away our kindness/we can't find a place to hide."*

This case has been reported as an important decision where the Full Federal Court held that the CGT roll-over relief does not apply where CGT assets are transferred to a discretionary trust or other related entity effectively controlled by a party to the marriage. For CGT roll-over to apply, the CGT assets must go to the spouse or former spouse personally. This Full Federal Court decision overturned the decision of the single judge in *Sandini Pty Ltd & Ors v FC of T & Ors* [2017] FCA 287).

A warning for family lawyers

Family lawyers should be aware of this case not because of what it says about CGT roll-over relief where CGT assets are transferred to a discretionary trust, although that is important, but because of what is said in the case regarding the drafting of orders in property settlements more generally.

Logan J's judgment warns that the application for orders under s79 in this case and and their approval by the Family Court *"all, seemingly, without any attention to the possible federal revenue law consequences of the order proposed, made and later amended, gives pause for thought about the risks of over-specialisation in both the practising profession and the judiciary."*

In terms of the CGT roll-over relief, the message from the case is that specialist taxation advice should be sought and extreme care taken in the drafting of the orders. There were a number of defects in the orders in this case, explained further below. From the family lawyers' perspective, this is not so much a case about CGT but a case about precision in drafting.

In this note shorthand is adopted and terms are used from the *Income Tax Assessment Act 1997* (Cth) ("ITAA97") without further explanation, in an attempt to make the note readable. Specific reference is needed to the terms of the legislation and the judgment itself.

CGT roll-over relief: a reminder

In general terms, CGT roll-over relief is available where there is a transfer of an asset to your spouse or de facto partner under an order made or financial agreement entered into pursuant to the *Family Law Act* and arising from the breakdown of the marriage or relationship. "Roll-over relief" means the CGT that would otherwise arise on the transfer may be disregarded, and the transferee receiving the assets takes the asset with its original cost base. The transferee will then be assessed for the full capital gain and payment of CGT if they later sell the asset. The roll-over relief applies automatically when the transfer is between parties to the marriage or de facto relationship and is because of a court order or agreement and parties cannot elect to waive it (unless the disposition of the Act takes place outside of the parameters of the court order or agreement).

Factual background

An application was made to the Family Court of Western Australia for orders pursuant to s79 following the breakdown of Mr and Ms Ellison's marriage. The orders directed that Sandini Pty Ltd, an entity controlled by Mr Ellison, transfer 2,115,000 shares in Mineral Resources Limited ("shares") to Ms Ellison. The orders required Sandini Pty Ltd to "do all acts and things and sign all documents necessary" to transfer the shares to the wife.

After the orders were made but before the transfer of the shares, Ms Ellison provided a written direction to Mr Ellison requesting that he instead cause Sandini Pty Ltd to transfer the shares to the corporate trustee of her family trust, and not to her personally. Mr Ellison agreed and both the entity transferring the shares (Sandini Pty Ltd) and the corporate trustee of Ms Ellison's family trust signed a share transfer form to that effect.

Sandini Pty Ltd relied upon the roll-over relief provisions in s126-5 of the ITAA97 and no capital gain was declared on the transfer. The ATO later audited Sandini Pty Ltd and the husband and assessed Sandini Pty Ltd as due to pay CGT on the basis that the roll-over relief did not apply, because Sandini Pty Ltd had transferred the assets to the trustee of Ms Ellison's family trust and not to Ms Ellison personally.

Declaratory relief was sought in the Federal Court of Australia regarding the applicability of the relationship breakdown CGT roll-over relief.

At first instance in the Federal Court

The trial judge granted the declaration sought by Sandini Pty Ltd and held that roll-over relief was available, notwithstanding that the transfer of the shares had not been to the wife but a trust she controlled.

It was important to find that there was a change in beneficial ownership to bring the transfer within CGT event A1, because the transfer of an asset into a trust is not listed as a CGT event to which roll-over relief applies.

McKerracher J held that CGT event A1 happened when the Family Court of Western Australia orders were made, as the effect of the orders were to vest beneficial ownership of the shares in Ms Ellison. CGT event A1 happens even where there is a transfer of beneficial ownership only; it need not be a transfer of both beneficial and legal ownership. CGT roll-over could apply to that CGT event. The beneficial interest was vested in Ms Ellison upon the orders being made.

There was another basis for relief. If it were not the case that Ms Ellison acquired the beneficial ownership because of the Family Court of Western Australia order, an alternative section of the ITAA says that if money or property is applied for the benefit of a taxpayer or as directed by the taxpayer, the taxpayer is taken to have received the money or property for the purpose of the roll-over relief. Ms Ellison was sufficiently involved in the share transfer to Wavefront as trustee for her family trust, as she had authorised the transaction and it had been made pursuant to her direction. Even were the CGT event A1 not triggered by the orders themselves, Ms Ellison acquired the beneficial interest at the point the shares were transferred to a trust at her direction.

The Federal Court held at first instance that Sandini Pty Ltd was entitled to the roll-over relief even though the transferee was the wife's family trust not the wife.

This decision was widely reported as one extending the circumstances when CGT roll-over relief would be available, to transfers not only to a transferee spouse but also to the related entities of a transferee spouse.

Full Federal Court decision

The ATO successfully appealed the decision to the Full Court of the Federal Court. The Full Court held that CGT roll-over relief is only available if the assets are transferred from a company, trust or spouse to a spouse.

Ms Ellison's written direction to transfer the shares into her family trust was not a sufficient connection for the roll-over relief to apply. Sandini Pty Ltd was required to pay CGT on the transfer to the trust.

The Full Court needed to determine which CGT event had occurred and when.

When did the change in beneficial ownership occur?

A change in beneficial ownership is sufficient to trigger CGT event A1, as it constitutes a disposal of a CGT asset. At first instance it had been found that the change in beneficial ownership happened upon the making of the orders.

A couple of notable points regarding the orders:

1. The orders did not specify the correct parties to the orders, to the extent they required that Sandini Pty Ltd in its capacity as trustee for one trust transfer the shares, when Sandini Pty Ltd actually held the shares as trustee for another trust.
2. The orders required Sandini Pty Ltd to do all acts and things to transfer the shares to the wife within 7 days of the date of the orders. The time period in which Sandini Pty Ltd could comply with the order was significant to the Full Court.
3. The orders did not make any declaration with respect to the existing title or rights in respect of the property. The terms of the orders themselves did not alter the interests in property of the parties to the marriage or either of them.

The majority of Jagot and Siopsis JJ considered that for there to be a "change in (beneficial) ownership", a person other than the legal owner of the asset must be entitled in equity to receive a transfer of that property. To be a beneficial owner, a person must have rights which a court of equity would enforce involving "full dominion" over the asset [at 99].

The majority found that the making of the Family Court of Western Australia orders themselves did not effect a change in beneficial ownership. There were various aspects to this. For a share to be subject to a trust there must be certainty regarding the property bound by the trust, but shares are considered fungible or interchangeable [paragraph 120]. Sandini Pty Ltd owned a larger parcel of shares than the number it was obliged by the orders to transfer to the wife and the orders themselves did not refer to any specific bundle of the shares. The orders could have referred to "2,115,000 of the MIN shares owned by Sandini" but instead referred only to "2,115,000 [MIN] shares".

The fact that Sandini Pty Ltd had 7 days in which to comply with the order and was not subject to any restraint in dealing with the shares in the meanwhile was also significant. It was theoretically possible that it could sell all of its shares in that time period and then buy another bundle, and still comply with the order. The rights created were personal to the wife as the order required Sandini Pty Ltd to do all things necessary to "transfer to the wife" the shares; they did not specifically give the wife the power to direct the transfer to another entity.

This didn't mean that Ms Ellison did not have rights arising from the orders, as if Sandini Pty Ltd failed to transfer the shares then it would be in contempt and Ms Ellison could seek relief under s 106A of the Family Law Act, only that the orders did not provide her with beneficial ownership of the shares as required by CGT event A1. Ms Ellison only acquired beneficial ownership of the shares when Sandini Pty Ltd executed the share transfer form, or the corporate trustee of Ms Ellison's family trust was registered as shareholder. The effect of this is that the parties to the CGT event A1 were Sandini Pty Ltd and the corporate trustee of Ms Ellison's family trust, not Ms Ellison herself.

Was the roll-over relief available?

The difficulty with this situation was that the CGT marriage breakdown roll-over relief did not apply. There is a roll-over pursuant to section 126-5 ITAA97 if a CGT trigger event happens "involving" the transferor and his or her spouse as transferee "because of" a court order. So there were two aspects to be established, (1) that Ms Ellison was involved in the CGT event, and (2) that the transfer was "because of" the order.

The Full Court held that Ms Ellison could only be "involved" in the CGT event if she were the transferee. She was not the transferee; the shares had been transferred to the corporate trustee of her family trust and this did not meet the requirements of ITAA97.

Further, the trigger event did not occur "because of" the order. The orders required that the transfer be to Ms Ellison herself. If the trigger event is to occur "because of" the order then the order would need to both require (1) the event to occur; and (2) the event would then need to occur. The transfer between Sandini Pty Ltd and the corporate trustee of the wife's trust, which was the CGT trigger event, did not occur because the orders required it.

Lessons for family lawyers

1. CGT roll-over relief does not apply where the transfer is to a trust or company. The transfer must be to a spouse or former spouse in their individual capacity if it is to apply.
2. Do not deviate from the terms of the orders. Any transfer should take place strictly in accordance with the terms of the orders. If a variation is needed then seek a variation to the orders from the Court.
3. Take care in the drafting of orders and obtain specialist accounting and taxation advice at an early stage.

Considerations in the drafting of orders

1. Where orders provide for the transfer of shares within a specified time period and not simply forthwith upon the making of the orders, consider the insertion of a restraint preventing the owner of the shares from dealing with the shares pending compliance with the order.
2. Take care in ensuring that obligations contained within the orders are imposed on the correct party and where that party operates in several different capacities, that the orders are precise in terms of in which capacity that party is bound by the orders.

NOTE: On 14 September 2018, the High Court dismissed with costs an application for special leave to appeal from the decision of the Full Court of the Federal Court.

CASE NOTE:

HARRIS & DEWELL AND ANOR [2018] FAMCAFC 94

Written by Sheridan Emerson

Sheridan Emerson

The House that Jack Kerouac Built: The Full Court considers questions of ownership and control in the context of a unit trust in *Harris & Dewell & Anor* [2018] FamCAFC 94 (25 May 2018)

First instance decision: Rees J, 4 November 2016 | Appeal: Strickland, Murphy and Johnston JJ, 25 May 2018

"You and I together, with nothing showing at all."

In this 1987 song from their fifth album, *Tallulah*, the Go-Betweens captured perfectly the struggle of many litigants in the family law courts to bring in assets ostensibly owned by others to increase the overall value of the property available for distribution in the proceedings.

Many litigants are frustrated by the difficulty of drawing a line in any legal or equitable sense as to what is the available property, in circumstances where their spouse or partner may have referred to assets as "ours" or "mine" or even dealt with the assets as though they were his or her own during a relationship, only to find themselves at relationship end faced by third parties who assert ownership of those same assets.

In *Harris & Dewell & Anor* [2018] FamCAFC 94 the Full Court dismissed an appeal from a decision delivered by Justice Rees in 2016 in which her Honour found that the husband did not have any interest in the units in a unit trust established by his father 5 years prior to the start of the parties' relationship. The wife contended that her Honour had erred in finding that the units in the trust were not property and represented only a financial resource available to the husband. This was not accepted by the Full Court.

Background

The parties lived together for 24 years, including 19 years in which they had been married, and had two children together. The parties separated in 2010, proceedings were commenced in the Family Court in 2011 and Justice Rees delivered her judgement in late 2016. The husband's father was aged 99 years at the date of the appeal and was joined to the proceedings. The hearing of the appeal required adjournment at one point due to his ill-health. As in the judgment, the husband's father is referred to throughout this note as the "father".

The central question in the proceedings was the wife's submission that the property of the husband should be held to include units in the E Unit Trust "(EUT"). The EUT had been established 5 years before the parties started cohabiting by the husband's father. The husband did not hold any units in the EUT; his father was the sole unit holder. The husband and his father were the sole shareholders and directors of the corporate trustee, with the father holding 67% of the ordinary shares and the husband holding 33%. Ostensibly the husband held no interest in the units and did not control the EUT; all control lay with the father because of his unit holding and control of the voting rights in the trustee.

The central question in the proceedings was the wife's submission that the property of the husband should be held to include units in the E Unit Trust "(EUT").

Wife's argument for inclusion of the EUT on the balance sheet

The wife argued that the EUT should be found to be the husband's "puppet" due to the history of his decision making on behalf of the trust, and his dealings with its properties. It was contended that the ostensible ownership and control of the corporate trustee (reflected in terms of the directorship and shareholding) did not reflect the true nature of how the unit trust was controlled.

The history of the EUT was as follows:

1. From 2002 the husband had treated the trust assets as his own, he had acquired real estate on behalf of the trust and intermingled the trust assets with his own personal funds. The husband had the use of assets owned by the EUT as security for his own personal borrowing. This had been done with the agreement of the father.
2. Both the husband and his father completed statutory declarations as to joint ownership in support of various applications for bank finance and the husband undertook transactions without his father's knowledge.
3. The husband would inherit the EUT units on the death of his father.
4. The husband resigned as director of the corporate trustee not long after separation. The only director of the corporate trustee by the time of the hearing was a solicitor who it was conceded acted on the husband's instructions.

The wife contended the husband had beneficial ownership of the units in the EUT based on the history outlined above, which was said to establish the husband's control of the trustee and trust. The EUT owned assets worth $5.1 million and its inclusion on the balance sheet would have significantly increased the value of the property available for distribution between the parties.

Relying on *Ascot Investments* (1981) 148 CLR 337, the husband argued that the trust was a third party to litigation and that the reach of s79 did not extend to interfering with its substantive rights.

The father argued at trial that in order to establish the wife's central proposition, it is necessary to establish more than control including more than the control established by the findings in this case. That was true, it was submitted, even if the degree of control can be described as "complete control", as this is still insufficient to treat the assets or funds of the trust as property for s 79 purposes. Further, the father contended that the husband's actions on behalf of or within the trust were with the consent of, or as a result of delegation by, the father.

The decision at first instance

The wife's central argument regarding inclusion of the units in EUT on the balance sheet was rejected by Justice Rees at first instance.

Justice Rees found that the units in the EUT were not property of the husband. Despite making findings of the husband having the "run of the trust" and his personal use and control of EUT assets (which was effectively conceded by the husband and father) her Honour did not conclude that the trust was an alter-ego of the husband or a device for his sole benefit. Justice Rees found that the father remained owner of the EUT and the husband had no "lawful right to benefit from the assets of the trust", notwithstanding his control. The EUT was not an alter ego of the husband or used for his sole benefit.

The net value of the property in which the parties had an interest was therefore valued at approximately $16.8 million. Contributions were assessed by her Honour in the proportion 65% to the husband and 35%to the wife, and there was a significant adjustment of 17.5% in the wife's favour on account of the relevant section 75(2) factors. The effect of the adjustment was an overall division of the property in the proportion 52.5% to the wife and 47.5% to the husband, but excluding of course the EUT.

The appeal

On appeal the wife contended Rees J was in error and that the findings made regarding control should have resulted in a conclusion that the EUT was a "puppet" of the husband and its units were his property. It was not contended that the EUT was a sham. Were the wife to have been accepted, the property of the parties would have increased from $16.8 million to almost $22 million.

The Full Court upheld the correctness of Rees J's finding and dismissed the appeal on the basis of the following propositions:

1. Central to cases such as *Ashton* (1986) 11 Fam LR 457 and *Davidson* (No 2) (1990) 101 FLR 373, which both related to discretionary trusts, was the capacity of a party to the marriage to use existing powers to effect the lawful distribution of property to him or herself. In *Ashton* the husband's power of appointment meant that he was able to effect a distribution of trust assets to himself if he elected to do so.
2. The Full Court said: *"It should be accepted that the principles emerging from the High Court and from the decisions of this Court to which reference has been made permit of a finding that property ostensibly that of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the "puppet" or "creature" of that party."*(para 67).
3. The Full Court said *"Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust."* (para 68).
4. The of-cited passage from the judgment of Gibbs J in *Ascot Investments* was repeated by the Full Court: *"Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it."* (*Ascot* at 354-355) Although the husband was conceded as having the *"run of the trust"*, that alone was not enough.
5. There must be a finding both of control, and that a party has some lawful right to benefit from the assets of the trust, if the assets of the trust are to be treated as property of the party with control.

In the circumstances of this case, the Full Court found:

1. The wife characterised the EUT as "the puppet" and the husband as "the puppet master". However, it was necessary to establish that the father (who held control) was the "puppet" and the husband was the "puppet master".
2. It was only the father as sole unit holder who could obtain or effect the obtaining of a beneficial interest in the property of the trust. The husband could not do so.
3. The EUT was not the property of the husband. Although the father was 99 years of age, he continued to maintain his legal and beneficial interest in the EUT.
4. Although the husband was not found to be the beneficial owner of the EUT, the EUT was taken into account as the husband's financial resource.
5. Her Honour made a very significant adjustment pursuant to s 75(2) factors of 17.5% to the wife. The husband's income and earning capacity far exceeded the wife's, the EUT provided an asset base against which the husband could leverage to acquire property, and the EUT would fall to the husband on his father's death.
6. That adjustment reflected an increase to the wife's assessed contributions entitlement of approximately $3 million. Whilst it was not the case that the EUT assets at $5.1 million were included on the balance sheet, the categorisation of the EUT as a resource of the husband and the very significant adjustment to the wife, meant that the wife did benefit from the existence of the EUT; it was of great significance as a resource of the husband's. No error was identified in her Honour's exercise of discretion in this regard.

There were other grounds of appeal relating to her Honour's assessment of the parties' contribution-based entitlement and the relevant s75(2) factors, he regard paid by her Honour to the husband's non-disclosure and a procedural fairness argument in respect of whether her Honour had allowed the husband sufficient time to produce evidence as to the CGT that would be payable on assets he would have to sell to meet her Honour's orders. None of these grounds were successful and they are of secondary interest to the primary question in the case regarding whether or not the units in the EUT should be regarded as property of the husband for the purposes of s79.