



SUBMISSION TO THE ALRC ENQUIRY INTO THE FAMILY LAW SYSTEM

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SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION REVIEW OF FAMILY LAW SYSTEM

INTRODUCTION

Thank you to the Australian Law Reform Commission for giving us the opportunity of making this submission to propose changes to the Family Law system. Our submission is limited to proposed changes to sub-section 79(4) and to section 65DAA of the Family Law Act 1975.

This submission is put in by two Melbourne firms, Moores and MELCA. Moores is a firm of over 30 lawyers and over 70 total staff. Its family law department has 7 lawyers and the principal in that department is Stephen Winspear who is an Accredited Family Law Specialist (from 1989), a past Chair of the Family Law Section of the Law Institute of Victoria and a past Chair of the Collaborative Practice Section of the Law Institute of Victoria. MELCA is an interdisciplinary practice initially formed by a lawyer, psychologist, and financial planner and director Marguerite Picard is a family lawyer of over 30 years' experience.

Between our firms we have very substantial experience in every part of the family law system, be it litigious or ADR. We are both of the unashamed view that the very large majority of clients prefer negotiated settlements and strongly prefer to avoid Courts. As such we believe that significant changes to simplify Part VII and VIII of the Family Law Act have great potential to make the task of negotiating settlements considerably easier. This of course will be of great benefit to all parties going through a family law process.

SIGNIFICANT REDRAFTING OF THE FAMILY LAW ACT

Considerable litigation is caused, in our view, by the extreme breadth of discretion provided by the Family Law Act in relation to property settlements and parenting matters. We will deal with these matters sequentially.

PROPERTY SETTLEMENTS UNDER PART VIII

We recommend that sub-section 79(4) be substantially re-drafted. At present it necessitates a minute and often extensive analysis of all contributions made to a marriage relationship (please note that the corresponding provisions relating to de facto relationships – sub-section 90SM(4) – are effectively the same and these comments should be read as equally applicable to the de facto relationship provisions of the Act).

As is well known sub-section 79(4) principally requires the Court to take into account various contributions: financial contributions, non-financial contributions, and contributions to the welfare of the family including as home maker and parent. It must also take into account the matters referred to in sub-section 75(2) of the Act.

There is no guidance as to how the different contributions are weighted. There is no presumption of equality of contribution between the parties (see *Mallet v Mallet* [1984] HCA 21; (1984) 156 CLR 605).

As mentioned, sub-section 75(2) lists a number of non-contribution matters that need to be taken into account such as age and state of health of the parties, earning capacity of the parties, responsibility for minor children, responsibility for any other person, standard of living that is reasonable in the circumstances, the effect of any proposed order on a

creditor, the duration of the marriage and its impact on the earning capacity of the party, etc. Again, there is zero indication of how any of these matters are to be weighted against each other. When the Act was amended to include recognition of the potential claims of creditors, they simply got a reference in paragraph 75(2)(ha) and their fairly random placement within the sub-section is very unhelpful in our submission as giving no guidance of any sort to the Court as to how that should be factored in to a settlement.

In our view it is vitally important that the legislature utilise a principle of simplicity in drafting its Family Law legislation. The number of self-represented litigants in contested cases is above 30%. Accordingly, the current provisions relating to parenting and property which are so discretion based, give no real guidance at all to lay litigants. The insertion of some concrete guiding principles into the legislation will be very helpful we say to the lay litigant, not to mention they will assist the lawyers who struggle with the vagueness of the current provisions.

The traditional argument is that every relationship is different, the minute circumstances of every family are different and it is best not to limit the jurisdiction of the Court or else individuals might suffer an unfair result.

Mallett v Mallett [1984] HCA 21; (1984) 156 CLR 605

The seminal High Court case which remains good law in the Family Courts is Mallet v Mallet. Interestingly Chief Justice Gibbs stated in paragraph 2:

“Conflicting opinions continue to be strongly held as to the nature of marriage, the economic consequences of divorce and the effect, if any, that should be given to the fault or misconduct of a party when a court is making the financial adjustments that divorce entails. It is not surprising that given this diversity of opinions the Parliament did not require the power conferred by s.79 to be exercised in accordance with fixed rules.” (We make a comment in passing here that we believe that society has indeed moved on a long way since the inception of the Family law Act - e.g. referral of powers over de facto relationships, and same sex marriage legislation – and it is time for change to recognise the strongly held view of the equal partnership view of marriage in particular and relationships in general).

Over the years of course many property cases came before the Court and the Court developed a rough starting point or guideline that in a long marriage consideration would usually start from the position of 50/50. Various decisions emphasised that this was not to be a fixed rule as, clearly, the legislation did not allow that. Nevertheless the High Court in Mallet & Mallet was not happy with the Full Court of the Family Court’s approach and said that even having a “rough idea” (our words) that 50/50 might be a good place to start was too prescriptive and should not be allowed under the legislation (by a majority of 4-1 on this point).

Nevertheless, in our experience, Mallet v Mallet on a day-to-day basis, in lawyers’ offices and indeed in the negotiating hallways outside the courts, has to a large extent been ignored. Clearly in a very large majority of cases a 50/50 starting point in relation to contributions is appropriate and negotiators assume that is the case. It is we say morally invidious in the large majority of cases to be arguing that a wife’s (or husband’s) contribution as home maker and parent was below par and therefore the contribution analysis should be otherwise than 50/50. On the other side of the equation it is equally unpalatable to argue that a wife’s (or husband’s) contribution as prime breadwinner was inadequate as she only earned \$50,000 per annum whereas the partner/prime carer was doing a great job looking after six children, the latter being a supposedly well above average “contribution”.

And yet this is what *Mallet v Mallet*, applying the terms of the Act, requires when the matter gets into Court and as the matter approaches final hearing in particular. Mason J says in reference to the factors under section 79(4) that there is a requirement that the Court “shall take into account” these factors and accordingly there is “a duty on the Court to evaluate them” (paragraph 18).

More particularly, Wilson J, we submit, puts his finger on precisely the problem which we are concerned about here. In paragraph 15 he says:

“...equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal. The quality of the contribution made by a wife as home maker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party.”

In other words, technically, the Court has to look at whether the home maker is inadequate, adequate or exceptionally good. Further they have to consider whether she/he has only done the minimum or has been “admirable”. Similarly, the breadwinner has to be evaluated (somehow) in comparison with the other party. We say this is invidious, conflictual, counter-productive in terms of encouraging civil future relationships between the parties, and seldom of benefit in the judicial process in any substantial way.

Amendment of s. 79(4)

We recommend that sub-section 79(4)(a)-(c) be re-written to provide along the following lines:

1. *Contributions by the parties to the relationship (be they financial or non-financial contributions, whether direct or indirect, contributions as home maker or parent, or otherwise) shall be taken to be equal unless:*

There has been a substantial external contribution to the relationship by or on behalf of one party which the justice of the case requires be taken into account, or

such presumption of equality would cause a substantial injustice.

2. *“External contribution” refers to property brought by the parties into the relationship (owned by or on behalf of them at the start of the relationship), or gifts or inheritances received by a party during the relationship. (Considerable elaboration on this would be needed to make it clear that interests held through companies and trusts etc. are intended to be covered here too).*

In our view this definition of external contributions would sufficiently enable the Court to deal fairly with short relationships where one party brings in significant assets as well as taking into account the thorny issues of gifts and inheritances whenever received.

To avoid too many people arguing that their case is outside the norm, it is vital that the exclusions from the presumed equality be very limited. Hence we propose the high bar of “substantial injustice” before the presumption does not apply.

Needs factors somewhat along the lines of those in sub-section 75(2) should continue to be available for the purposes of adjusting the 50/50 presumption although those factors would repay considerable simplification and abbreviation.

The minority Judge in *Mallet v Mallet* (on the principal point) was Deane J. Interestingly he supported the idea of at least having a rough rule or starting point at 50/50 because, as he said, unless there was some starting point:

“the law would, in truth, be but the “lawless science” of a “codeless myriad of precedent” and a “wilderness of single instances” of which Lord Tennyson wrote in his poem “Aylmer’s Field”. (paragraph 6 of his judgement).

In our view, having a legislated 50/50 starting point for contribution analysis would take 10% to 20% out of the complexity, length and associated legal costs in connection with contested property cases. It is so common during negotiations and court processes that we argue over very little – and that is what the legislation requires us to do!

When we do argue over contributions, we often find ourselves arguing over 2% or 3% in contributions and the ultimate settlement percentages. And yet 2% of a \$10 million pool is a mere \$200,000 which in a fully contested matter is highly likely to be spent on legal fees. To make matters worse, in the more average contested matter of \$2 million, 2% is only \$40,000 which we say makes it an obscene nonsense to argue over this, and yet the current form of the legislation encourages this.

Perhaps even more importantly, the effect of introducing a 50/50 presumption would be that much of the criticism by one party of the other about their supposedly inadequate contributions would be removed from most affidavit material and from most trials. This is highly recommended given the ongoing need to maintain a level of workable relationship after separation in all families, especially where there are children, whether they are minors or adults at the time of the dispute.

PARENTING ORDERS – S. 65DAA

In our view the first part of Division 6 of Part VII of the Act, namely Section 65DAA in particular, should be repealed. It is of no use to parties, lawyers or the Court. The essential principle in parenting matters is making an order which is in the best interests of the child. The section complained of was fatally flawed in its original conception as it was formulated substantially in response to the pressure at the time of the father’s lobby, represented by various protesters including the infamous “Black Shirts”, who claimed that the Family Courts were biased against fathers. The new provision was seen to respond to that pressure.

It introduced a presumption of equal shared parental responsibility and from day one litigants were erroneously saying that the Act consequently meant their time with the child should be 50%. The Act encourages this thinking by setting out the, in our view, ridiculous three-step sequence of thinking which a Court must go through before making a parenting order. The Court must consider whether equal shared time is appropriate or, if not, whether substantial and significant time is appropriate or, if not, in any event what order is in the best interests of the child.

In our view, Courts by and large make orders which are in the best interests of the child, end of story. They look at all the evidence, they decide what is in the best interests of the child and then they make a decision. However, before they can publish their decision, they have to do what we submit is a superfluous and possibly even insincere analysis of those three steps above, just to get to the result which they always intended to arrive at anyway.

Again, in a context where more than 30% of litigants are self-represented, the mental gymnastics imposed by Section 65DAA contribute nothing which is helpful.

The same legislation helpfully introduced the idea that parents do not have rights in relation to children but they have responsibilities. We applaud that sentiment. However, the sequence of thinking in Section 65DAA reverses, we say, that general principle. It implies that the Court should consider, as a first step, equal time which implies that 50/50 is often appropriate. That can easily be misread to mean that parents have 50/50 rights. We say it potentially devalues the best interests of the child principle and simply confuses and drags out the litigation and judgment writing process.

Accordingly, s. 65AA should be repealed.

CONCLUSION

We respectfully submit that the “experiment” which was how quite a number of people described the Family Law Act at its inception is well over. The system is understood and its faults are evident. Our proposals, we submit, will significantly simplify the system.

They will remove considerable uncertainty around property settlements which has been there since the beginning and which perhaps evidenced the extreme difficulty for parliament at the time of making any value judgments about what should happen upon settlements and resulting in them leaving such decisions to lawyers and the Courts, subject to many guidelines that were not very helpful (eg. section 79(4)(a) – (c)).

Section 65DAA was introduced for the wrong reasons, under pressure from highly biased lobbyists, and in our view complicates the parenting provisions of the Act with no corresponding benefit to stakeholders under the Act.