

## SUBMISSION

Question 14. What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

The current adversarial system entrenches conflict, if parties are able to rationally negotiate, guided by express statutory terms, there is a real possibility, the dispute will not progress to the courts. However, it is advisable that consent orders be prepared. It is worth acknowledging, only an estimated 5% of separations are determined by the court under the *Family Law Act 1975*(Cth). On the face, this would seem acceptable, however, the legal costs make this option only available to relatively high wealth parties. To achieve the best outcome for children, the starting assumption must be equal care. This can be negotiated, especially in the years before school attendance. Post school attendance, the assumption must be equal care, or if impractical, significant time. The only matter that should interfere with the assumption is proven domestic violence. Domestic Violence must be redefined, actual violence must be a criminal matter with the attendant level of proof. Other non-violent behaviour should remain civil, with redefinition as, 'controlling behaviour' (CB). There should be two levels, Level 1, explicit and objective controlling behaviour which impacts directly on the other parties actions and welfare, Level 2, which would be subjective, but not explicit or objective.

When parties seek legal advice in the early stages of relationship breakdown, one of the first questions is, 'what am I entitled too?' When there are significant marital assets, this becomes the focus. The welfare of children involved becomes a collateral consequence of the adversarial nature of the dispute. Except where there is a factual determination of actual family violence, there must be a presumption of equal or significant time with each parent. If a decision other than equal or significant time is granted to one party, currently this decision has a significant impact on property division, even though the parent with less time is required to pay child support relative to their income, this creates more conflict, and is counterproductive for child/parent relationship of the non-care parent.

If the division of property is completely removed from the outcome of parenting determinations (with child and spouse support being the vehicle), much of the conflict can be removed and the children/parent relationship will have no impediment, with children valued as children.

Question 15. What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

Family violence allegations can be viewed by some parties as a strategic or tactical benefit in Family Law matters. It is therefore necessary, to remove that particular matter from the jurisdiction of the court, being solely regarded as within the criminal jurisdiction.

The definition of family violence must be narrower, must be criminal and not be determined in a family law context. Domestic Violence must be a criminal offence, must involve actual violence and must be determined in a criminal court to the beyond reasonable doubt standard of proof.

In the family law context, there needs to be recognition of bad behaviour within relationships. Allegations of family violence must be determined and a finding of fact, in a criminal court before it can be accepted as material in a family law matter. Bad behaviour, in the context of controlling or degrading behaviour, in the civil context could be found in the Family Law proceeding. I would suggest behaviour currently deemed Family Domestic Violence within the family law context, is too broad, and must be changed:

- Domestic Violence, 'actual violence being determined to a criminal standard'.
- 'controlling behaviour' level 1 (civil), found by court to an objective standard (reasonable person).
- 'controlling behaviour' level 2 (civil), found to a subjective standard, perceived by the individual, but not to the reasonable person.

Only a Domestic Violence conviction in the criminal jurisdiction and a finding of 'Controlling Behaviour Level 1', in the civil jurisdiction, can be material, in the determination of a Family Law matter.

Question 17. What changes are needed to provide fair and equitable outcomes for all parties in the property division, involved in a Family Law dispute?

Firstly, determinations for the financial support payments of children and spouse, for other than equal or significant time, be considered separately within a child and spouse support administrative agency. That aside, there must be an express statutory direction on property within the statute, detailing how under what circumstances property orders can be made in a Family Law context. The criteria to determine property orders be: property acquired during the relationship, must be divided equally, property acquired before a relationship commenced, remain with the party that acquired same, or given a relative value, property that is acquired after separation, without the use of marital pool monies or assets as security, remain with the party that acquired same. Assets acquired either during or post relationship, with marital pool assets as security, the net equity be divided equally. An appropriation to Business assets must be considered, with a homemaker's contribution to allowing the other party to devote energies to building the business be valued relatively and objectively, not excessively on a percentage basis, but objectively, with assessment of the reasonable cost of the homemaker services provided by the other party.

When the division of property is set by statute, the conflict between parties will be dramatically narrowed, therefore the legal costs will be significantly reduced, both privately and publicly, with the number of matters being determined by the courts slashed. Negotiation will be preferred. The critical fact affecting this outcome, is less judicial discretion for court determination.

Question 18. What changes are necessary to provide fair and equitable outcomes for all parties in maintenance determinations in Family Law disputes?

To address the convoluted conflicts currently before courts exercising Family Law jurisdiction, the determination must be factual and relative to circumstances experienced by like parties with intact relationships within the community. The vast majority of intact relationships, with young children, have both parents work, at least after the child starts preschool or prep. They do not have the luxury of one parent being a stay at home parent, except in high wealth relationships, or, later life

relationships. In that situation, the expectation would be a binding financial agreement in place. Therefore, in separated parties there should not be an expectation of stay-at-home parenting, with punitive penalties imposed on the other party to provide that luxury. As in other civil compensation, there must be a duty on the party claiming compensation to mitigate same. The added benefit could be that equal parenting may become the norm, because the party with whom the child lives will not determine the property settlement, benefiting the child parent relationship with both parties.

With child and spouse support being addressed by a government agency, if either party believes they have been treated unfairly, that party appeals the administrative decision. The benefit: the conflict will not be between the parties to the relationship, children will not become the focus of the conflict, an aggrieved party will direct an appeal against the agency decision, through to AAT. If a party believes, or has information, the other party is not disclosing their assets or income, they can request an investigation and reassessment. Persons found guilty of non-disclosure and fraud could have assets ceased and disposed of, to provide support for the aggrieved party

Question 25. How should abuse of process be penalized in a Family Law dispute?

I believe this is a professional conduct matter, if a party has legal representation and this occurs, the legal representative be referred to the relevant legal services commission. The duty must be on the legal representative to ensure due process. If a client will not provide appropriate and timely disclosure, the legal representative must withdraw.

If the party is self-represented, there must be a significant percentage penalty, explicitly expressed in the statute, deducted from any order, and as compensation provided to the other party. There must be a quantifiable cost expressly stated in statute for bad behaviour.

Question 43. How should professional misconduct be addressed in Family Law disputes?

There must be a duty on all judicial officers to report any professional misconduct to the relevant Legal Services Commission to ensure ethical behaviour.

Question 47. What changes to the Family Law system will improve public confidence in the process and regulatory processes.

Transparent, fair and equitable treatment of all parties, within acceptable community standards, is mandatory. A relatively high degree of proof, not, the civil standard, of any claims that have a material impact on decisions, must be required. There must be express statutory consequences for false or misleading claims in affidavits under oath, if such allegations, or claims, are positively discredited. There must be express statutory consequences for bad behaviour, by parties, supporting affidavits or legal practitioners.

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