**SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FMAILY LAW SYSTEM ISSUES PAPER**

**By Neil Jackson, Barrister**

**Question 20: What changes to Court processes could be made to facilitate and cost-effective resolution of Family Law disputes?**

**\*Senior Registrars greater role, and more of them.**

For a period from the late 1990’s and the early 2000’s, the Family Court of Australia was greatly assisted by Senior Registrars. These officers of the Court were responsible for determining disputes involving interlocutory related matters such an interim parenting matters, injunctions, and spousal maintenance applications.

It is submitted that their assistance to the Court during this past period of two decades ago greatly aided in ensuring that Judges were responsible almost exclusively to determine final hearings or trial. This in turn I suggest ensured that the listing period between the filing of Applications and the final trial was considerably shorter than it presently is.

In my recent years the Family Court of Australia in the Sydney registry has had the assistance of one single Senior Registrar. There are no other Senior Registrars in New South Wales. Further there are none appointed to the Federal Circuit Court, apparently throughout the Commonwealth.

It is submitted that the Family Law Court system would greatly be aided by the appointment of several Senior Registrars, with responsibilities akin to what they had more than 15 years ago. Such appointments should be considered whether or not the Family Court and the Federal Circuit Court are to merge. If a merger does not occur, such appointments should be considered for both existing Courts in their present form.

\***Arbitrators re interim hearings**

Arbitration has been possible in property cases under the under the *Family Law Act* for over 25 years. But it is only since new rules were introduced from April 1 2016 that all the elements have been put in place to provide a comprehensive system. These Rules are the Family Law Amendment (Arbitration and Other Measures) Rules 2015 and amend the Family Law Rules 2004 to insert a new Chapter 26B on arbitration

As a long-standing Sydney based family law practitioner, it appears that only in 2018 has the Federal Circuit Court in the Sydney Registry referred matters to Arbitration. That appears to have been a very beneficial policy for the community. Herein parties are able to have their disputes determined on a final basis considerably quicker than having to wait many years in the Court lists.

I have observed that delays in the Court are often created by parties engaging in multiple interlocutory or interim disputes. These disputes require the involvement of busy Federal Circuit Judges, thereby further delaying the listing of final hearings or trials. In essence, their dockets become increasing difficult to manage. Considerable delays become inevitable.

It is submitted that it is highly likely that if the Family Law Arbitration process were to extend to the hearings of interlocutory or interim disputes, this would greatly ease the judicial workload of judges, thereby greatly shortening the time parties’ disputes relating to final or substantive trials were listed.

**Question 14: What changes to the provisions of the Family Law Act could be made to produce the best outcome for children**

\***Codification *Rice and Asplund***

In 1979 the Full Court of the Family Court in *Rice and Asplund* (1979) FLC ¶90-72 set what could be best described as a guild line to parties in parenting matters seeking to reagitate proceedings in the Court system. In simple terms, has there been material changes in circumstances since the making of the parenting orders sufficient to warrant this court's considering afresh where these children's long-term interests lie?

The jurisprudence that have developed since 1979, particularly since the 2006 Amendments to the *Family Law Act*, *(Family Law Amendment (Shared Parental Responsibility) Act* 2006), have led to a confused and unclear interpretation of what is the required threshold for a party to seek to vary an existing final parenting order.

In *SPS and PLS* (2008) FLC ¶93-363 there was an extensive consideration of the rule in *Rice and Asplund* required. The Full Court concluded that a more extensive and subtle consideration of the *Rice and Asplund* rule in the case than was given by the federal magistrate was necessary. (See also *Barrett & Plant* [2009] FMCAfam 417).

The Full Court provided a detailed review and application of the rule in *Rice & Asplund* (1979) FLC ¶90-725 in *Searson & Searson* (2017) FLC ¶93-788. The Full Court allowed the mother's appeal after finding that the trial judge, in considering the application of the rule in *Rice & Asplun*d at the preliminary stage of the proceedings, was bound to assume the acceptance of the mother's evidence on the question of whether a sufficient change in circumstances was demonstrated. The Full Court further found that the conclusion reached by the trial judge, that there was no material change in circumstances, was not reasonably open to her on the evidence. Their Honours noted that in *SPS & PLS,* the Court held that the discussion of the rule in the various authorities had "not always used consistent terminology". In *SPS & PLS* the Court noted, in particular, that the term "threshold" has had different connotations.

It is submitted that the legislation should be amended to provide a clear and unambiguous position as to what is the required threshold in seeking a variation.

In addition, there should there be a mandatory threshold hearing heard early in the Court proceedings. This would avoid a common feature of present parenting applications before the Court that seek a variation of an existing final parenting orders, whereupon the threshold test is not considered until a final trial, often after several years of drawn out litigation.

**\*Welfare matters-merge with State Courts**

It is submitted that consideration should be made for the transfer the state jurisdiction related to the care and welfare of children in respect to the state Children’s Court, to the existing Federal Family Law Courts, (being the Family Court of Australia (FCA) and the Federal Circuit Court (FCC)), or an anticipated merged court, namely the Federal Circuit and Family Court of Australia (FCFCA).

Section 91B of the *Family Law Act* (FLA) states that the FCA or FCC may request the intervention in the proceedings of an officer of a State being the officer who is responsible for the administration of the laws of the State in which the proceedings are being heard that relate to child welfare. Further, where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

The necessary appearance in the state Department of Family and Community Services in the FFLCs have involved potential confusion associated with two different but not dissimilar statutory laws (Federal and State) and legal principles. There are also clearly different cultures that lawyers who regularly participate in the FFLC, compared with the lawyers who regularly appear in the state Children’s Court.

Ultimately there is a uniform object that both jurisdictions thrive to achieve: the best interest of children. Hence the need for a singular forum to determine issues in dispute.

**Question 17: What changes could be made to the provisions of the Family Law Act governing property for parties to promote fair outcomes**

**\*Presumption of equality of contributions for lengthy marriages/de facto relationship of say 12 years in duration, in the absence of ICs, windfalls, gifts, inheritances.**

In recent years the Full Court of the Family Court has examined the argument about drawing a nexus with so called “big money” cases and the weight of contributions.

The husband in a Full Court of the Family Court case of *Field and Smith* (2015) FLC ¶93-638 submitted that households “with wealth that exceeded $10M represent a mere 0.3% of Australian households. What we have here is a net pool of $32M - $39M, none of which arises from inheritance or windfall and all of which was created from very little when the business commenced in 1990”.

The Full Court responded by stating that the fact that the parties find themselves in the upper echelons of wealthy Australians says nothing about the contributions that each of them made during the course of a lengthy marriage to the acquisition and conservation of their wealth.

Such broad statements such as this are inconsistent with the obligation of the court to weigh the respective contributions to the acquisition, conservation and improvement of the parties' assets acquired, in this case, over a very lengthy marriage, and to give appropriate weight to contributions of each of the parties.Similarly, the Full Court rejected the submissions of the husband made at that a 20 per cent disparity between what the parties received “paid no proper regard to the massive disparity in the true worth of the contribution of each.”

Finally, the Full Court gave emphasis to a link that can commonly arise, regardless of the size of the matrimonial pool between the length of a relationship and an ultimately tendency towards contribution related equality. In *Mallett* (1984) 156 CLR 605, 608, the High Court said that equality was not the starting point, that much can be readily accepted. That is not to prevent equality from being the conclusion once contributions and other relevant factors have been evaluated. Here the parties had organised their financial affairs in a manner which strongly pointed to a joint endeavour, at least during the continuance of the marriage and up until their separation. All their financial dealings were consistent with that position.

**“Whilst the exercise is a holistic one and the contributions are to be considered up until the time of trial, it is important to give appropriate weight to the contributions made by the wife in all of the spheres, including to the welfare of the family…..In this case, the contributions of both parties over a lengthy period were substantial and significant. The wife's contributions to the welfare of the family are in themselves significant contributions and section 79 does not suggest that one kind of contribution should be treated as less important or valuable than another. As his Honour noted at [78] of his reasons, and we confirm, references to one party freeing up the other party in the maintenance and stability within the business are examples of one party being rendered more able to make contributions with in their role by reason of the contributions made by the other party within their role.”**

Ultimately each of the parties was held to have contributed over a lengthy marriage to the acquisition, conservation and improvement of the assets which they owned at the date of hearing.

**“In our view, to place greater weight on the contributions made by the husband in his sphere does not do justice to the wife's contributions in the various capacities that we have outlined. Giving appropriate weight to the contributions of both parties and where, as the trial judge also found, the nature and form of their partnership was that of a “practical union of lives and property” (at [79]), that leads us to conclude that the contributions made by the parties should be treated as equal.”**

*Kane and Kane* (2013) FLC ¶93-569 was a decision of the Full Court of the Family Court. In the context of an almost three-decade long marriage, with the exception of superannuation, a 50:50 position was agreed by the parties in relation to their respective contributions.

The critical aspect of the matter arose in the final year of the marriage. Herein the Husband had against the position taken by the Wife.

Faulks DCJ sitting in the Full Court held that the trial judge was mistaken to the extent that he formed a position that the Court was obliged by authority to determine the contribution aspects to a division of matrimonial property by reference to the doctrine "special skills". Herein it was stated the *Family Law Act* does not require such a doctrine. Further none of the authorities according to the Deputy Chief Justice mandate any such doctrine. Even if the prior judgments of the Full Court might have been perceived to have championed such a principle, they should no longer be regarded as binding.

The error reflected the trial judge's miscarried discretion. This was because he took into account the "special skills" of the husband in accordance with what he might reasonably have thought was authority binding on him, but which in Faulks DCJ’s view, should not have been.

Even setting aside the arguable semantics of the labelling of “special skills”, the Deputy Chief Justice held on the facts that a disproportionate division of property in favour of the husband arrived had been arrived at by the Court below which could not be justified.

Faulks DCJ said:

**“7.To the extent that the trial judge believed himself to be obliged by authority to determine the division of the property of the parties by reference to some doctrine acknowledging ‘special skills’ in my opinion, for the reasons set out above, he was mistaken. The Act does not require and in my opinion the authorities do not mandate, any such doctrine and if judgments of the Full Court of this Court might be thought to have espoused such a principle in my opinion, they should no longer be regarded as binding.**

**8. It is difficult to correlate effort or skill (even if special) with result. Frequently, the financial result of a contribution (whether by physical or intellectual labour or imagination foresight and perspicacity) will be influenced by external factors beyond the control of the party contributing … ”**

Their Honours May and Johnston JJ held that the Court below had been wrongly influenced by an assessment of the husband's contribution to the superannuation assets and thus could not be said to have been just and equitable. Essentially, Their Honours also noted that by relying on a percentage in assessing the parties’ respective contributions revealed an excessive weight given to the superannuation assets. The trial judge had fallen into error in attributing to the husband skills or acumen at a level which caused his Honour's finding about contributions to be disproportionately in the husband's favour.

In *Hoffman and Hoffman* (2014) FLC ¶93-591 the Full Court stated that it did not hold a position that there is any "legitimate guideline" of "special contributions". Nor did Their Honours rally behind the ideal that a guideline pertaining to particular contributions contained any "special" factors or features that "eases the burden" in establishing a miscarriage of discretion.

In dismissing the Appeal, the Full Court emphasized the partnership impact of marriages and how that leads to a more equal assessment of the parties’ contributions at para 49:

**“Marriage is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other.”**

In *Grier v Malphas* [2016] FamCAFC 84 Murphy and Kent JJ agreed with the Chief Justice’s

reasons for rejecting the contentions of the husband as to his “skill set” and the asserted role

that should play in assessing contributions. Their Honours noted that what skill or skills a person

brings to a relationship which are said to result in the making of money or accumulation of

capital is no more or less relevant than the skill set a person brings to a relationship as a

homemaker and parent, or as the performer of two roles as a homemaker and parent and

income earner. The “skill set” or “potential” of “talent” a party brings to the role or roles which the

parties have determined each will undertake in the relationship is, for section 79's purposes,

relevant only to how those attributes manifest themselves in what section 79 says must be

considered. Herein, it is not a party's “skill set” which must be considered, but their

contributions. Contributions are the product of many things: talent, industry, selflessness and,

indeed, luck, to name a few. It is the contributions (in all senses in which that expression is used

in section 79) that fall for consideration and assessment, not the combination of factors that has

created the capacity for the making of those contributions.

*In Wallis & Manning* [2017] FamCAFC 14 (10 February 2017) the Full Court was at pains to

quote a 1998 decision of the same Court in *Dickons v Dickons* ([2012] FamCAFC 154:

**“... the requirements of the section are met by approaching the assessment of contributions holistically and by analysing the nature, form, characteristics and origin of the property currently comprising that to which section 79 applies, and, in turn, analysing the nature, form and extent of the contributions (of all types) contemplated by section 79”.**

Herein the emphasis here is that the task of assessing contributions is holistic and but part of a

yet further holistic determination of what orders, if any, represent justice and equity in the

particular circumstances of this particular relationship. It is a wide discretion, even though the

essential task is to assess the nature, form and extent of the contributions of all types made by

each of the parties within the context of an analysis of their particular relationship.

Again, there was an emphasis on the impact of long relationships and perhaps consequentially

on the mutuality associated with such relationships:

**“Much more recently, in *Stanford*,above, the High Court spoke of the “mutuality of the marital relationship” and the (often) “unstated assumptions” upon which the mutuality of a marital relationship is built. The nature and extent of the sharing of the roles, duties and responsibilities inform, in part, the mutuality of a particular marriage relationship. So, too, the extent to which the parties, by reference to formal or informal agreements, maintain separate lives, and in particular financial lives, impacts upon the mutuality of the parties’ relationship. The exigencies to which the parties’ relationship and their property interests can be subject can also impact upon the mutuality of the relationship. The nature of a particular relationship so viewed can impact upon the manner in which the parties’ respective contributions within the meaning of s 79(4) might be viewed by a court, and of course on the determination of whether it is just and equitable to interfere with existing property interests at all……**

**The length of a marriage is important, then, in assessing the respective contributions of the parties, particularly when it is said that significant capital contributions made early in the marriage are a dominant feature of that assessment. It is, accordingly, an important consideration in seeking decisions that might assist in the assessment of contributions by reason of being “more or less similar” to the present.”**

A reading and appreciation of the recent decisions of the Full Court of the Family Court of Australia points to a move away from not only the labelling of the concept of “special skills”, but also a tendency to give particular weight to long marriages and the consequent tendency towards equality in relation to parties’ respective contributions.

It no longer appears to be apparent as it was fifteen to twenty years ago, that by virtue of one party to a marriage, (usually the husband), working outside the home for paid income; whilst the other party, (commonly the wife), largely staying at home and performing a greater role as a homemaker and parent; that the accumulation of a large matrimonial asset pool of at least $10 million should automatically favour the former in relation to his direct financial contributions.

There is an apparent constant theme in these recent Full Court decisions that reflects the importance of a long marriage. There is also an appropriate recognition of what a marriage involves in terms of a partnership and a mutual cooperative team.

It is submitted it is time for Commonwealth Parliament to reconsider the position of contributions in the context of long marriages and indeed long de facto relationships. Although the High Court in *Mallet* rejected the concept of there being a presumption of equality in relation to contributions, it may well be consistent with the judicial expressions formed by recent Full Court decisions and indeed the community at large, that there should now be a statutory presumption of equality of contributions in relation to a long marriage or relationship of say in excess of 12 years.

That presumption could be rebutted by way of the following stated ways:

* + a reasonable disparity in the parties’ respective initial contributions’
  + the injection of monies from one side through inheritances and/or windfalls.
  + any other circumstances that may be relevant

The last bullet point is to ensure that there remains adequate judicial discretion.

. However, some may argue that it has the potential of opening up cases where say, the assessment of the weight to be given to homemaker or parenting contributions, is subject to a large focus of the litigation, and where Judges are required to greatly scrutinize such non-financial contributions. This may arise where one party’s case is that the other party’s homemaker and parenting contributions were otherwise deficient.

. This of course has always been an argument that a primary bread earner could potentially rely upon. I can recall many years ago attending a Conciliation Conference acting on behalf the wife who had been the primary homemaker according to her case. The solicitor on behalf the husband, (who was a very senior solicitor), informed me at the Conference that he was intending under instructions to present photographs to the Court of the matrimonial home, that would create an impression that my client’s homemaker contributions had been deficient. This issue never arose as the matter subsequently settled.

However, from my experience it is extremely unusual for an argument to be presented successfully that a homemaker and/or parenting contributions were deficient and inadequate.

. It has also never been a strong nor common position for someone to argue that because of the couples’ strong financial position to be able to afford domestic staff, that had the effect of diluting one of the parties’ homemaker and parenting contributions. In effect, she would be reduced to “a lady who lunched”, and spend most her time socialising, rather than making any “real effort” to contribute to the matrimonial pool.

That argument of course fails to appreciate the supportive role that is usually played by spouses or partners in marriages or de facto relationships

. Returning to my submitted change in the legislation, such a presumption of equality would consequently have the effect of freeing up a considerable litigation time and effort in respect to arguments associated with the contribution’s issues, and in particular any so called “special skill” type contributions.

. It would not however take away issues that we traditionally find in the Family Law property cases such as who controls the assets, valuations, non-disclosure, premature distribution of assets, and waste. Those sorts of issues could still be relevant particularly in relation assessing the size of the net matrimonial pool as well as evaluating to the parties’ section 75 (2) (o) factors of the Act.

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And of course, section 75(2) of the Act generally would still be a relevant position where we had a situation where one party’s future needs and resources were limited compared with the other parties.

**Neil Jackson**

**Family Law Barrister and Mediator**

**53 Martin Place Sydney**

**0410403965**

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