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# Adjusting for Future Needs in Property Settlements: Time to Take Out The Crystal Ball?

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## Future Needs Adjustments

Assessing the 'future needs' of each of the parties, the third step of the 'four-step process', inevitably involves some degree of crystal ball gazing, requiring that the court anticipate what each party's life is likely to look like into the future and award a percentage uplift to the party with the greater 'need'.

The factors to be considered in a future needs assessment are set out at section 75(2) of the *Family Law Act 1975* (Cth) in the case of married couples and at section 90SF(3) in the case of de facto couples and are the same as those to be taken into account when considering an application for spousal maintenance. Excluding those factors which pertain solely to spousal maintenance applications, the Act requires that the court take into account the following, insofar as they are relevant:-

(a) age and state of health of the parties;
(b) income, property and financial resources of each of the parties and their respective physical and mental capacity for appropriate gainful employment;
(c) the care arrangements for the children of the marriage under the age of eighteen;
(d) each party's commitments to enable them to support themselves and a child or another person whom the party has a duty to maintain;
(e) responsibilities of either party to support another person;
(f) eligibility of either party for a pension, allowance or benefit under Commonwealth or foreign law or any superannuation fund or scheme;
(g) a standard of living that is reasonable in all the circumstances;
(h) the extent to which one of the parties could increase their earning capacity by undertaking a course of education or training or establishing themselves in a business;
(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt;
(j) the extent to which the party seeking an adjustment has contributed to the income, earning capacity, property and financial resources of the other party;
(k) the duration of the marriage and the extent to which it has affected the earning capacity of either party;
(l) the need to protect a party who wishes to continue their role as a parent;
(m) the financial circumstances relating to any cohabitation with another person;

(n) the terms of any order for property settlement proposed to be made pursuant to section 79;

(naa) the terms of any order for property settlement proposed to be made under Part VIIIAB;

(na) the child support arrangements for the children of the marriage;

(o) any fact or circumstance which the justice of the case requires to be taken into account; and

(p) the terms of any binding financial agreement between the parties.

The court must consider each factor as it applies to each of the parties. Once weighed as a whole, if the future needs of one party outweigh the other party's the court must adjust the proposed division of assets as determined by the court upon an assessment of each party's respective contributions in favour of the party with the greater need.

**Impact of children on future needs adjustments**

One of the most common reasons that a party will receive an uplift for their future needs is that it is envisaged that they will have the predominant care of the children of the marriage into the future. Although this may be ameliorated in part by the payment of child support by the other party, even in the case of a generous child support package well above the administrative assessment it is generally accepted that the party with greater care of the children will inevitably bear the greater burden of the children's day-to-day expenses in their household.

When it is appropriate to make an adjustment in one party's favour pursuant to section 75(2)(c) as a result of their primary care of children, it is often also the case that that party has a reduced earning capacity, particularly if one or more of the children have not yet reached school age and that party has historically cared for the children during working hours and wishes to maintain that caring role (section 75(2)(l)). Even in the case of primary caregivers who have since returned to full-time work, whether because the children are all at school or have achieved financial independence in their adulthood, their caring responsibilities during the marriage may have had an impact upon their income and earning capacity such that whilst section 75(2)(c) is no longer relevant, it is nonetheless appropriate to make an adjustment for the disparity in the income and earning capacity of the parties pursuant to section 75(2)(b).

**Disparity in standards of living post-separation**

Inevitably, the breakdown of a relationship will bring about a reduction in each party's respective standard of living. It is a rare case in which both parties can continue living at the same standard as they did during the marriage once that marriage has come to an end and the spouses are maintaining separate households. As observed by Judge Brown in the matter of *Abadi & Safe* [2019] FCCA:

> *"One inevitable consequence of the end of the majority of marriages, is a drop in the standard of living of one or sometimes both the parties concerned. It is trite, but true nonetheless, that two households cannot usually live as comfortably as one. What is important, in respect of this paragraph, is that any drop in living standards should not be borne disproportionately by one party."*

The court accepts that typically both parties will be forced to reduce their standards of living, at least for some time after separation, and that the primary income earner will often recover faster than the other party. Section 75(2)(g) provides some means of adjusting for the difference in standards of living between the parties post-separation so that the overall outcome is just and equitable.

Evaluating each party's standard of living is not as simple as merely comparing their respective levels of income. An analysis pursuant to section 75(2)(g) usually involves an evaluation of the standard of living of the applicant and of the respondent at the time of trial, as well as of the standard of living of the applicant both before and after separation.

There is no general rule that where the respondent spouse has a significantly higher income, an "open pocket" if you like, that the other spouse must be maintained at their pre-separation standard of living. This idea was rejected by the Full Court in *Wilson & Wilson* (1989) FLC 92-033 in favour of the test of what is reasonable. In *Wilson* the wife appealed against an interim maintenance order of $900 per week together with the payment of household expenses including utilities and wages for a housekeeper and gardener. She sought an increase to $2,750 per week as well as additional wages for an ironing lady and part-time gardener. Strauss J observed at 77,543:

> *"A standard of living that in all the circumstances is reasonable for the party claiming maintenance is not necessarily the same standard as that enjoyed by the*

> *party who is ordered to pay maintenance. […] Similarly, the standard of living that in all the circumstances is reasonable for the wife in this case, is not necessarily the same standard as that enjoyed during cohabitation."*

His Honour found that the orders made were proper and within the ambit of the trial judge's discretion.

The Full Court in *Bevan & Bevan* (1995) confirmed the decision of Strauss J in *Wilson*, stating that there was *"no fettering principle that pre-separation standard of living must automatically be awarded where the respondent's means permit"*. In *Mitchell & Mitchell* (1995) 120 FLR 292 the Full Court confirmed that a reasonable standard of living will vary from case to case, stating:

> *"the question whether the applicant can support herself "adequately" is not to be determined by reference to a fixed or absolute standard but having regard to the matters referred to in section 75(2) and more specifically the paragraphs of that subsection identified above".*

More recently, in *Hurst & Hurst* [2018] FamCAFC 146 the Full Court considered whether the trial judge had failed to take account of the wife's future needs, the length of time over which they were likely to arise and a standard of living that is reasonable in the circumstances, including by reference to the nature of the orders made by the trial judge. Justices Thackray, Ainslie-Wallace and Murphy found merit in the wife's submission that the trial judge had failed to adequately consider the parties' respective standards of living in circumstances where the husband was to retain an unencumbered home, chattels, vehicles and $470,000 in available cash whilst he was paying negligible child support and the wife was to be responsible for housing herself, the parties' teenage son and their mentally ill adult son for whose support the husband made no contribution. The appeal was allowed and the matter remitted for rehearing.

The financial circumstances of each party (s 75(2)(b)) is a relevant factor that must always be considered in conjunction with section 75(2)(g), noting that there is no concept of compensation for loss of the expectation of a wealthy lifestyle (*Beck & Beck (No 2)* [1983] FamCA 47; *Anton & Meek* [2017] FamCAFC 257).

**Income rich, asset poor and the clean break principle**

Matters in which the matrimonial pool of assets is insufficient to adequately provide for each party's future needs present their own particular challenges.

Section 81 of the Act, or section 90ST in the case of de facto relationships, provides that in proceedings for property settlement the court has a duty to *"as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage* [or de facto relationship] *and avoid further proceedings between them"*.

Also known as the 'clean break principle', the practical effect of the legislation is that the party with the greater financial need will typically receive a larger proportion of the matrimonial assets than they would otherwise have received on an assessment of contributions alone in lieu of an order for ongoing spousal maintenance. The principle reflects the idea that where a relationship has broken down and the parties have separated, it is in the parties' interests to also separate their financial relationships so that each can move on with their lives without having any enduring financial ties to their former spouse. In situations where the asset pool is insufficient to meet both parties' future needs however, it is not always possible for the court to terminate the parties' financial relationships as at the time final orders are made.

Absent a binding financial agreement terminating each party's right to seek spousal maintenance from the other, the court maintains jurisdiction to make an order for spousal maintenance for one party as against the other. Since the decision of the Full Court in *Mitchell & Mitchell* (1995) 120 FLR 292, the Court has been prepared to utilise spousal maintenance as a means of not only providing the recipient with support for a limited period of time to enable them to re-train and enter the workforce, but also to compensate for economic advantage.

In *Mitchell*, the parties' net asset pool had a value of approximately $300,000 at the conclusion of their 27 year marriage. The wife was working two days per week at the time of trial and the husband's taxable income exceeded $100,000 per annum, although the Full Court was satisfied that his real income was much higher. The trial judge awarded the wife 90% of the net property, which excluded the $130,000 in superannuation to be retained by the husband and dismissed the wife's spousal maintenance claim. Both parties appealed.

The Full Court accepted that a party's future income stream may be a significant resource which one spouse leaves the marriage with and it may be inequitable if they are to retain all of it to the exclusion of the other when there are few assets to divide between them. The Full Court found that the property division did not disqualify the wife from spousal maintenance and remitted the wife's application to the trial judge, awarding her $150 per week by way of interim spousal maintenance.

When spousal maintenance is ordered it must be at a level which is sufficient to enable the applicant to support themselves adequately. An order for spousal maintenance which is below that level would not remove the need for maintenance as required by section 72 of the Act *(Wilson & Wilson* (1989) FLC 92-033). Spousal maintenance is generally ordered for a limited period of time, such as two or three years, which will allow the applicant time to re-train so that they may re-enter the workforce and resume supporting themselves.

**The risk of 'double dipping'**

Although the matters to be taken into account by the Court when assessing future needs are the same as those to be considered upon a determination of a party's application for spousal maintenance, it is important to remember that they are an entirely separate and distinct process. The Court must be careful to avoid the risk of 'double dipping' when compensating one spouse's lost earning capacity, which can potentially occur at each of the following stages:-

(a) an order for property settlement pursuant to section 79 of the Act;
(b) an order for spousal maintenance pursuant to section 74 of the Act; and
(c) an order for child maintenance pursuant to section 66G (and particularly section 66K(1)(d).

The Court ought only consider a party's claim for spousal maintenance after they have arrived at a determination of the orders to be made pursuant to section 79 of the Act, i.e. the four step process, remembering that the future needs assessment is just one part of the process – the outcome must be just and equitable in all the circumstances. The Court may thereafter consider whether the applicant has established their need for spousal maintenance, remembering to take into account pursuant to section 75(2)(n)(i) the terms

of the orders proposed to be made under section 79 of the Act. Similarly, an application for child maintenance must be considered separately to applications for property settlement or spousal maintenance.

***Trevi & Trevi***

*Trevi & Trevi* [2018] FamCAFC 173 presents a timely reminder of the two differing approaches to dealing with legal fees as a claimed 'addback'.

In *Trevi* the Full Court was required to consider the trial judge's decision not to 'addback' the sum expended by the wife on legal fees. An unusual feature of the case was that the wife had expended $437,628 in legal fees, whereas the husband was a lawyer and had only incurred costs of $142,587, largely comprising counsel's fees. The husband's firm had represented him during the proceedings and the trial judge had found that there was *"no clear evidence"* that fees attributed to him within the firm would ever be required to be paid, a finding not disturbed on appeal. The trial judge had found that the husband had met his legal fees from his income whereas the wife had paid her legal fees from the proceeds of sale of the former matrimonial home which the wife had received by way of interim distributions of property.

Murphy J (with whom Alstergren DCJ and Kent J agreed) concluded that the trial judge's discretion had miscarried by applying the considerations relevant to 'adding back' the relevant sum to the pool of matrimonial assets but purporting to treat the sum as a matter relevant to section 75(2)(o).

Murphy J noted that the Full Court established in *Omacini & Omacini* (2005) FLC 93-218 that addbacks fall into three clear categories:-

(a) where the parties have expended money on legal fees;
(b) where there has been a premature distribution of matrimonial assets; and
(c) "waste", or wanton, negligent or reckless disposition of assets (see also *Kowaliw & Kowaliw* (1981) FLC 91-092).

Nonetheless, the Full Court had also made it clear that there is no general principle that an addback should occur *"whenever a party has expended money realised from the disposition of assets that existed at the date of separation"*, noting that the Full Court had

already established in *Cerini & Cerini* [1998] FamCA 143 that an addback is *"the exception rather than the rule"*.

His Honour observed that the two fundamental propositions to emerge from *Omacini* and the preceding authorities were that:-

(a) first, addbacks are discretionary. When the discretion is exercised in favour of adding back, it reflects a decision that justice and equity requires it in the particular circumstances of the case; and

(b) second, in cases that are not "exceptional", justice and equity can instead be achieved by the exercise of a different discretion, typically by taking the matter into account pursuant to section 75(2).

Further, his Honour considered the authorities such as *Chorn & Hopkins* (2004) FLC 93-204 which established that the trial judge, when determining how to exercise their discretion as to the treatment of legal fees, should have regard to the source of the funds used. His Honour quoted the Full Court in *Chorn* which said:

> *"If the funds used existed at separation, and are such that both parties can be seen as having an interest in them (on account, for example, of contributions), then such funds should be added back as a notional asset of the party, who has had the benefit of them.*
>
> *If funds used to pay legal fees have been generated by a party postseparation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance), they would generally not be added back as a notional asset; nor would any borrowing undertaken by a party post-separation to pay legal fees be taken into account as a liability in the calculation of the net property of the parties. Funds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement may need to be looked at differently from other postseparation income or acquisitions."*

Murphy J also referred to section 117 of the Act and stated that an order which fails to addback legal costs is a *"pre-emptive decision about one party paying the other's legal costs"* in circumstances where the legislation establishes a default position whereby neither party contributes to the other's legal costs.

His Honour concluded that the trial judge had been led into error, not simply because her Honour had determined not to addback the wife's legal fees, but because she found that the fees should be considered pursuant to section 75(2) and then referred to and quoted from the various authorities including *Chorn* which relate to the entirely separate discretion of adding back legal fees to the pool of assets.

Murphy J concluded that her Honour's reasons *"evidence a confusion between two different approaches to the question of money expended on legal fees from property that would otherwise form part of the existing interests in property available for division between the parties"*. Essentially, her Honour had undertaken what should occur at 'stage one' rather than 'stage three' of the oft-cited 'four step process'. As a consequence, her Honour *"had in fact ignored the expenditure as a relevant s 75(2) factor"* which resulted in a miscarriage of the discretion.

The Full Court's decision in *Trevi* presents a useful summary of the case law in respect of whether a party's legal fees paid from matrimonial property existing at separation are likely to be added back to the pool of matrimonial assets or whether they ought be taken into account as part of the future needs assessment pursuant to section 75(2).

**Family violence**

Unfortunately, family violence has historically played quite a limited role in the court's consideration of an adjustment of future needs. Unless family violence has contributed to poor physical or mental health on the part of the victim or has had an impact upon their income and earning capacity, for example, if they have been forced out of the workforce because of a financially controlling spouse, it is unlikely that victims will obtain economic redress pursuant to section 75(2). Consequently, victims of family violence often struggle to obtain a fair division of property under the Act and may suffer long-term financial disadvantage

Since the decision of the Full Court in *Kennon v Kennon* (1997) FLC 92-757, the court has had a wider discretion to assess the impact of family violence upon the victim's contribution to a marriage pursuant to section 79 provided that the victim can satisfy the three limb test requiring that a *'course of conduct'* in the marriage has made a *'discernible impact'* upon

the victim such that the victim's contributions were *'significantly more arduous'* as a consequence.

In its inquiry into the family law system published in March 2019 the Australian Law Reform Commission stated that few cases successfully establish the *Kennon* argument and, of those which are successful, the average adjustment is only 7.3%. The ALRC recognised that the *Kennon* approach has been criticised for being complex and vague, resulting in judicial indeterminacy, and for effectively determining damages based upon a percentage of the parties' combined wealth rather than a determination of the actual harm caused by the family violence.

A recent example which appears to confirm the criticism of the *Kennon* approach to addressing family violence is *Keating & Keating* (2010) FamCAFC 46. In that matter the trial judge determined that the wife had failed to establish that the husband's family violence, which included breaking her ribs and her wrist on different occasions, had made her contributions during the marriage more arduous. The Full Court took the opportunity to clarify the law and the matter was ultimately remitted for rehearing, however *Keating* demonstrates that there may be some truth to the criticisms reported in the ALRC's report that some judicial officers appear to be unclear about the test in general and whether it fits the facts in a particular case.

**Potential reforms to the *Family Law Act***

One of the reforms recommended by the ALRC is that, rather than maintain the *Kennon* approach, the Act ought be amended to include *"a tort of family violence giving rise to the ability to claim compensation for both physical and psychiatric injury and any consequent economic loss"* (paragraph 7.102) which recognises that the harm comprises *"a cumulative pattern of abuse, domination, coercive control, and violence over the course of the relationship"* (paragraph 7.108). The ALRC has acknowledged that this would result in a statutory reversal of the *Kennon* approach.

The ALRC's recommendation envisages that family law courts will determine claims for compensation for family violence at the same time as property settlement proceedings. Ironically, this is what had occurred in the decision in *Kennon* at first instance - the trial judge had also awarded the wife $43,000 in response to her application for damages at

common law for assault and battery pursuant to the cross-vesting legislation, which sum was disregarded for the purposes of the section 79 assessment.

Further, the ALRC has recommended that the statutory provisions relating to property settlement be disentangled from those relating to spousal maintenance such that the factors for future need with respect to property settlement be separate and distinct from the factors for spousal maintenance. This recommendation reflects an earlier recommendation made by the ALRC in 1987 and received broad support for reasons which included that it would make the legislative provisions simpler for the many self-represented users of the Act.

The ALRC proposed that the list of factors which a court may take into account when considering what order should be made by way of property settlement should be simplified in order to direct parties' interests to those matters relevant to their future financial needs. The ALRC proposed that there be a broad overarching discretion to consider any matter relevant, akin to the existing section 75(2)(o), but that the matters listed be directed to the following four broad circumstances that are likely to be relevant to an assessment of future needs in the vast majority of cases:-

(a) caring responsibilities for children;
(b) differential income earning capacity;
(c) issues attributable to age and health; and
(d) obligations to third-party creditors.

The ALRC's view is that simplifying the legislation would not change the substantive law, however would result in shorter judgments and fewer appeals because the failure of the trial judge to mention every factor listed would no longer be at risk of a claim of appellable error.

It is clear that the ALRC's recommendations are directed at remedying the failure of the Act to adequately compensate for the impact of family violence during a relationship. In addition, whilst the ALRC does not propose to vary the existing substantive law regarding future needs adjustments, they recommend that the legislative provisions be simplified which will result in the Act becoming more user friendly for the majority of separated parties whom never obtain legal advice. If the ALRC's recommendations are legislated by the recently re-elected Coalition government, there will still be a degree of crystal ball

gazing required in an assessment of each party's future needs, however it will largely be conducted through the lens of the four main factors proposed by the ALRC, rather than the long list of factors currently contained within section 75(2).