THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: FLC/CLIC:JWsh250621

25 June 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: nathan.mcdonald@lawcouncil.asn.au

Dear Mr Tidball,

A New Decision-making Framework for Property Matters in Family Law

Thank you for the opportunity to comment on the Attorney-General's Department (**AGD**) proposal for a new decision-making framework for property matters in family law. Our responses to the questions set out in the AGD Consultation Paper are set out below.

An approach to specifying the decision-making steps

Question 1
Do you agree that there would be benefit in more clearly articulating the decision-making steps to be followed in determining family law property matters? What is your view on the approach outlined in this paper? What risks and issues should be considered as part of this reform process?

We support more clearly articulating the decision-making steps in determining family law property interests. As stated in our submission dated 15 April 2021, sections 79 and 90SM of the *Family Law Act 1975* (Cth) (FLA) should make it possible for a lay person to understand the approach that a court would take in determining whether to make an order altering property interests and the considerations taken into account in doing so. There is merit in removing the need to cross-refer between FLA provisions and in clarifying the effect of relevant case law. Simplifying the expression of the approach would assist self-represented litigants, and those assisted by lawyers, to understand their position and move towards resolution.

It is well established that the powers conferred by ss 79 and 90SM are not to be "exercised according to an unguided judicial discretion"[1] and that a principled approach should be taken. However, we would not support altogether replacing this approach of guided judicial discretion with a rigid set of rules, as, given the variety and complexity of circumstances that arise in family law disputes, it would likely lead to unjust outcomes, both within and outside of the courtroom.

[1] *Stanford v Stanford* [2012] HCA 52 at [38].

We agree with the Consultation Paper that *Stanford v Stanford [2012] HCA 52* creates uncertainty as to whether, and in what circumstances, the court should decline to make any order changing the parties' property interests. Our members report that in matters where a *Stanford*-based argument is run by one party, a great deal of extraneous evidence is often brought, which is otherwise outside the scope of matters to be considered under s 79, and which may not be necessary. This can detract from the main issues and add unnecessary cost and delay to the proceedings.

Accordingly, we support articulating the existing jurisprudence that applies to determining property matters by clearly expressing the process applied by the courts in practice and clarifying the legal impact of *Stanford*.

We broadly support the proposed six-stage process outlined in this paper, as an expression of the courts' powers and current approach relating to property distribution, but make the following comments:

Examples

We note that the examples provided in the six-stage process would not necessarily be included in the legislation. Our view is that they should not be included, as they could be construed as limiting or misleading, but rather, each stage of the process should be described in general terms. For example, the inclusion of examples in 3(a) to 3(e) may imply that the examples given should be given equal weight, whereas the correct approach is to apply a discretion as to the weight given to each factor, according to the circumstances. In 3(b), instead of "direct and indirect financial contributions", it would be more helpful to set out the relevant types of financial contributions such as initial contributions (brought into the relationship), contributions generated during the relationship, and contributions received from external sources. If examples are considered necessary, they would more appropriately be placed in supporting material or in a legislative Note.

Step 1 / Step 6 - Stanford

The proposed Step 1 would seem a reflection of the decision in *Stanford*, as interpreted in subsequent decisions including *Bevan v Bevan* [2014] FamCAFC 19. Our understanding is that *Stanford* and *Bevan* serve as a reminder that the bare fact of a separation does not create a right to an order altering property interests. There will be unusual cases with particular circumstances where it may not be just and equitable to make an order, such as in some cases where only one party seeks an order, and/or where the party seeking the order made longstanding representations to the other that no order would be sought. Where these types of unusual circumstances exist, applying Step 1 as a threshold question may be appropriate.

However, in the majority of cases, the appropriateness of any order to be made will depend on the parties' existing property interests, contributions, future needs and the impact of the order. The question need not – and possibly could not – be determined as a threshold issue. In these cases, the parties should not be required or even encouraged to run *Stanford* as a threshold argument.

Accordingly, we suggest Step 1 and Step 6 be retained and Step 1 reworded along the following lines:

1. *Consider whether there are particular circumstances due to which it would not be just and equitable for the parties' respective interests in their property to be altered.*

Step 3 - Contributions

The inclusion at 3(d) of "debts incurred before, during and after the relationship" is appropriate, but could more clearly be classified under "direct and indirect financial contributions" at 3(b). This would reflect the current judicial approach of treating debt as a type of 'negative contribution'.[2]

Consideration could also be given to including in 3(b) any financial losses that were incurred during or after the relationship, such as investment losses or property that was 'dissipated' by one party. The decision in *Bevan* would tend to support regarding such items as 'negative contributions' if they directly reduced the parties' property interests.

Step 4 – current and future needs

In relation to current and future needs (Step 4), in our view the criteria should include the provision for a standard of living that in all circumstances is reasonable (see s 75(2)(g) FLA) which would cover needs such as access to appropriate housing. This is a critical factor which is not captured elsewhere.

Question 2
What alternative approaches (if any) to specifying and simplifying the decision-making steps should be considered?

Subject to our comments on the suggested process, we consider it adequate.

Question 3
In this paper, the term 'just and equitable' has been used in step 1 and also step 6. Do you consider this terminology should be retained? Would other terminology such as 'fair' or 'reasonable' be preferable?

Noting our comments about Steps 1 and 6 in response to Question 1, in our view there are two different processes involved and it may be appropriate to apply different tests.

Step 1 is a threshold question as to whether it is 'just and equitable' to make any order at all to alter property interests. The words 'just and equitable' in the strict legal sense are appropriate in this context.

If the answer to Step 1 is 'yes', Step 6 is a question, having examined the factors in Steps 2-5, as to whether the proposed order will deliver an appropriate division of property. This question concerns ordinary notions of fairness, reasonableness and practicality, in view of the contributions and future needs of the parties and the impact of the order. This suggests that words such as 'fair and reasonable' may be appropriate.

Against this, we note that both questions stem from the application of s 79(2) which provides a test of 'just and equitable' and that introducing a new test could create confusion. Care would need to be taken to ensure that any amendments clarified the impact of *Stanford* rather than added further complexity.

Question 4
If clearer articulation of the decision-making steps is pursued, what is the appropriate order of the steps?

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[2] See for example, *Watson v Ling* (2013) FamCA 57; *Bevan v Bevan* [2014] FamCAFC 19.

Subject to our comments in response to Question 1 concerning Steps 1 and 6, we agree with the order set out.

<u>*Question 5*</u>
Are there any contributions or needs factors that have not been canvassed in this paper that should be expressly provided for in the FLA? Are there any contributions or needs factors that have been canvassed that should not be expressly specified?

See our response to Question 1.

<u>*Question 6*</u>
Should any of the contribution or needs factors be weighted above others? In other words, should there be a hierarchy of needs and/or contributions in the FLA?

In general terms, financial contributions should be given equal weighting with non-financial contributions. Otherwise, however, it is important not to indicate or imply that one factor should be weighted above others. The appropriate weighting of factors will depend on the circumstances.

<u>*Question 7*</u>
Should the FLA provide more clarity on quantifying the 'homemaker contribution' as set out at step 3(c)? If so, how?

In our view, anything more specific would be unhelpful, given that the circumstances around homemaking will vary from case to case.

Spousal Maintenance

<u>*Question 8*</u>
If the spousal maintenance provisions are de-linked from the property division framework, should the existing spousal maintenance provisions (i.e. the future needs factors in existing s 75(2)) be amended or retained in their current form?

In our view, the same principles should apply to both. This will enable the court, in cases where both applications are made, to consider the most appropriate outcomes overall based on the full set of circumstances.

<u>*Question 9*</u>
Should the same future needs factors apply to both the property division and the spousal maintenance provisions?

Yes.

<u>*Question 10*</u>
What, in your view, explains the currently (anecdotally) low number of applications for spousal maintenance orders?

In our experience there may be a range of factors at play, including that:

- the cost and delay of bringing these proceedings is a deterrent;
- there may be a general lack of financial capacity to pay spousal maintenance once child support and other expenses are covered;
- both spouses may be relatively financially independent, or the property settlement may enable them to become so; and

- the parties may be reluctant to bring a spousal maintenance application given its inconsistency with the broad family law principle of ending financial relations (s 81 FLA).

Question 11
To what extent would additional guidance material be helpful to self-represented litigants and lawyers in making applications for spousal maintenance orders?

This type of guidance would be helpful as long as the material is clearly distinguished from the law itself.

Child support

Question 12
Should the FLA retain child support as an express contribution and/or needs factors in the proposed codified decision-making steps?

We support the inclusion of child support as a consideration in relation to contributions and future needs. In many cases, the provision of child support will help the parties to move on with their lives while ensuring the children are provided for. Its inclusion as a factor ensures it is given appropriate consideration in the context of the parties' overall financial situation.

Question 13
Should the FLA be amended to require the court to specify the specific amount of child support it has taken into account (if any) when making the property adjustment order?

No. For the court to specify the amount of child support taken into account would be a misconstruction of the way in which child support is taken into account in property matters, as well as the nature and purpose of the child support system.

The difficulty with considering quantum is that it suggests that the amount of child support is taken into account as an absolute figure. In our experience that is not the case. The amount of child support paid is one of a number of factors the court considers, and its significance will vary between cases, according to the parties' overall financial and other circumstances.

Question 14
Do you have any other comments about the consideration of child support in the property division process?

No.

Debt

Question 15
What are your views on the option of referencing debt as a separate contributions factor?

As discussed in our response to Question 1, in our view debt is properly considered an aspect of financial contribution. To include it as a separate item would be to give it undue prominence in the decision-making framework.

Question 16
What are your views on moving consideration of the effect of an order on creditors into a separate 'effect of orders' step (that is, proposed step 5)?

We suggest removing this item. While in practice, the recoverability of a debt may have a bearing on the debtor's financial position, this is beyond the scope of the family courts to consider. The recovery of a debt is a matter for the creditor to pursue through other means, including through the bankruptcy courts.

Question 17
Do you have any other comments about how debt should be provided for in an amended decision-making framework?

If debt is included as a separate item for consideration, rather than as an aspect of contributions as appropriate, this may add complexity and cost to proceedings.

Gifts and windfalls

Question 18
Should common law principles governing the treatment of gifts, windfalls and inheritances be codified in the FLA, noting the varying approaches taken by the courts? If so, what approach to legislative reform should be undertaken?

Yes, in so far as a gift is treated as a direct contribution which is not reduced over time, and which is balanced against other contributions.

Question 19
How should payments of dowry be dealt with during property proceedings under section 79 of the FLA?

As a general principle, where a dowry is a contribution to a third party it should be disregarded in property proceedings. However, the question of the distribution of a dowry in circumstances of relationship breakdown will often be culturally specific, and in our view the issue as to whether it should be taken into account should be considered in that context.

Family violence

Question 20
Would requiring courts to consider the impact of family violence as one of the contribution factors be an appropriate way to take account of the impact of family violence on a party? What would be the risks, benefits or issues associated with such an approach?

We have suggested in previous submissions that in response to Recommendation 19 of the Australian Law Reform Commission's Final Report on its Review of the Family Law System (**ALRC Report**),[3] a distinction should be drawn between creating a new compensatory tort of family violence and the codification of *Kennon v Kennon* (1997) FLC 92-757 in taking into account the impact of family violence on a party's contribution for the purpose of s 79. Legislating the principle in *Kennon* focuses on the effects of family violence on the parties, rather than addressing the wrong itself. Nonetheless, in our experience, the *Kennon* principle is applied inconsistently by the courts and we consider it requires clarification. Our members report that it can also introduce an element of fault which is unhelpful in clouding the consideration of other issues.

The ALRC Report highlights the impact of family violence, including the possible impact on the victim's earning capacity, and the relevance of such factors to displacing the presumption of

[3] Australian Law Reform Commission, Report 135, *Family Law for the Future — An Inquiry into the Family Law System*, March 2019.

equal contributions.[4] *Kennon* provides an alternative avenue for parties whose claim may not support a tortious action.

Overall, we consider codification would help to raise awareness and increase an understanding of the *Kennon* principle, with positive consequences for access to justice for unrepresented litigants. Anecdotally, *Kennon* arguments are already being run more often in the family courts.

Question 21
Should the impact of family violence instead be considered as a future needs factor? What would be the risks, benefits or issues associated with such an approach?

In our experience, family violence is already being treated as a future needs factor, as an element of physical and mental health.

Question 22
Would it be appropriate for the impact of family violence to be considered as both a contribution factor and a future needs factor? What would be the risks, benefits or issues associated with such an approach?

See our response to Question 21.

Question 23
Should family violence be accounted for in spousal maintenance applications? If so, how?

The approach to family violence in spousal maintenance applications should be consistent with the approach to determining property interests.

Question 24
Are there other approaches for recognising the impact of family violence in property settlement that should be considered? Please provide details.

See our comments in response to Question 20.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

[4] Ibid, [7.121]-[7.124].