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Kennon – a history and way forward

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1. Introduction

The decision of *Kennon & Kennon* (1997) FLC ¶92-757 (***Kennon***) is a seminal case in Australian family law which signalled a dramatic shift not only in the family law courts' consideration of family violence in property settlement disputes, but conduct of the parties during the relationship generally. To understand why the shift was dramatic, it is necessary to consider the original societal concerns underpinning the *Family Law Act 1975* which was itself seen by judges at the outset as a dramatic shift in how family law financial disputes should be resolved and the role conduct played in the resolution of family law financial disputes.

In the last 5-6 years, a number of decisions have refined and modernised the *Kennon* principle. It is important that practitioners understand the current state of the *Kennon* principle as a result of these decisions in light of the *Family Law Amendment Act 2024* which comes into effect on 10 June 2025. These amendments, among other things, explicitly make family violence and other conduct necessary considerations in the decision-making process for property adjustment and spousal maintenance disputes. It is hoped that a review of these cases will assist practitioners to better identify issues and frame their client's evidence and submissions in cases involving *Kennon* claims.

2. History of family violence in property cases

2.1 1976 to 1990: conduct not relevant unless it has financial consequences

The *Family Law Act 1975* came into effect on 5 January 1976. It replaced the *Matrimonial Causes Act 1959-1966* and various Stated-based legislation dealing with maintenance. The older legislation contained specific reference to the conduct of the parties as being matters the court could or should consider in making orders upon the breakdown of a marriage. maintenance orders. For example, the *Matrimonial Causes Act 1959-1966* provided at section 86 that:

> "*Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of a child of the marriage … make such orders as it thinks proper, having regard to the means, earning capacity* ***and conduct of the parties*** *to the marriage and all other relevant circumstances*"
>
> (emphasis added)

Some of the State-based legislation dealing with maintenance included as grounds for maintenance claims things such as "*wilful neglect*" and "*unlawful desertion*".

The *Family Law Act 1975* contains no specific references to "*conduct of the parties*" in Part VIII dealing with property adjustment and spousal maintenance. As a direct response to this, there was an immediate series of cases in which judges grappled with, on the one hand, what they perceived as a clear intention of the legislature to remove marital conduct from being a relevant consideration in financial disputes and, on the other hand, the fact that cases were still being presented to them involving serious examples of family violence including assault and coercive control. The following cases illustrate this tension.

In *Barkley v Barkley* (1977) FLC ¶90-216 (***Barkley***) which was delivered in September 1976, a trial judge of the Supreme Court of New South Wales (exercising jurisdiction under the *Family Law Act 1975*) was asked to determine a property adjustment between a husband and wife, where the husband had struck the wife permanently deafening her in one ear. Coincidentally, she was already seriously deaf in the other ear. The wife had already prosecuted the husband successfully in a private criminal law proceeding and obtained compensation. However, she sought that the judge take into account, among other things, the potential loss of future employment as a result of her deafness and argued that she should retain 100% of the former matrimonial home by way of property adjustment. The husband made numerous arguments in opposition to this including that: the conduct of the parties cannot be considered in deciding what is "just and equitable"; the court could not effectively order damages for an assault

because it was not a "matrimonial cause" and it would not prevent the wife bringing a private claim for damages.

The trial judge in *Barkley* agreed with the husband that the "conduct of the parties" was no longer a consideration in the legislation and that therefore the court should not look at marital conduct in determining what property adjustment is just and equitable. However, the trial judge reasoned that the new legislation did not prohibit the court from considering the financial consequences of marital conduct. The trial judge ultimately took account of the wife's potential loss of income owing to her deafness as a section 75(2) factor and that the wife receiving the husband's half-interest in the home took into account her physical condition and prevented future claims for damages by him.

The trial judge was clearly serious about his view that the conduct of the parties was irrelevant, and that only the financial consequences of that conduct were relevant, because no where in the decision did the judge express any criticism of the husband's conduct of assaulting the wife. This is a feature we see in many of these early cases and reaffirms the desire of judges to move the court away from a court of fault and misconduct in light of the new legislation.

There were a number of other cases like *Barkley* in 1976 following the introduction of the new legislation, many of which grappled with whether or not "conduct of the parties" could be considered by the court, including under section 75(2)(o). By the end of 1976, the Full Court of the Family Court of Australia sought to settle the law in this regard in the decision of *Soblusky and Soblusky* (1976) FLC ¶90-124 (***Soblusky***) delivered on 29 December 1976 at Brisbane by their Honours Demack, Watson, and Fogarty JJ. In this case, a wife had brought a spousal maintenance application against a husband at the conclusion of a marriage of some 32 years. The first instance judge (a Magistrates of the Rockhampton Magistrates Court) under the ambit of s.75(2)(o), had given the parties latitude to explore evidence about their conduct and ultimately accepted the husband's evidence that the wife:

> "[S]*ubjected him to a life of constant nagging and that she completely dominated him and subjected him to frequent abuse, generally violent and aggressive conduct and in particular that from time to time she threw things at him, threatened him on one occasion with a knife, "belted him up" on a number of occasions and on at least one occasion cut up his clothing with a knife* …".

After separation, the husband transferred the wife his interest in the matrimonial home and moved into a caravan with minimal assets. The first instance magistrate took the wife's conduct into account as a section 75(2)(o) factor and also took the husband's most financial circumstances post-separation into account, ultimately declining to make any maintenance order in favour of the wife. The wife appealed to a single judge of the Supreme Court of Queensland who found that the magistrate had made an error with respect to the consideration of the wife's conduct. The husband appealed to the Full Court of the Family Court of Australia.

The Full Court in *Soblusky* distinguished English cases on marital conduct (some of which had been relied on in the early 1976 cases under the *Family Law Act 1975*) as the English legislation contained explicit references to conduct. The Full Court observed that the legislative history could not be ignored and while the previous legislation made marital conduct expressly relevant, the *Family Law Act 1975* contained no such references. The Full Court reasoned, therefore, that section 75(2)(o) only included facts and circumstances of a broadly financial nature. The Full Court said, however, that in rare and exceptional cases, marital conduct might be considered having regard to section 43 of the Act which provided that the court must consider the protection of the institution of marriage and similar concepts. While this line of reasoning meant the first instance magistrate was in error by taking into account the wife's conduct, the Full Court ultimately took account of the husband's financial circumstances and found he did not have the capacity to maintain the wife in any event.

In *Soblusky* the issue was the relevance of conduct in a maintenance dispute, which mean that the issue of whether conduct could be taken into account in property adjustment disputes remained unresolved. The Full Court sought to resolve this in *Ferguson and Ferguson* (1978) FLC ¶90-500 (***Ferguson***). This case involved an 8-year marriage. The wife petitioned for

divorce under the previous legislation on the ground of adultery. Subsequently, a trial judge determined her section 79 property adjustment under the new legislation after taking into account certain marital conduct pursuant to section 75(2)(o).

Their Honours Watson and Woods JJ delivered a joint judgment. Their Honours held that the assumptions about legislative intention discussed in *Soblusky* should apply to all applications under Part VIII of the *Family Law Act 1975* whether founded under section 72, 74, or 79, They held that conduct would "usually" only be relevant if it produced financial consequences (e.g. the destruction or dissipation of property); in rare cases where no contribution could be said to be made (here their Honours relied on the principles in section 43 of the Act and referred to the "partnership" of marriage); or in other rare cases where conduct has economic consequence for the other party such as a physical incapacity to work (citing *Barkley*). Their Honours stated:

> "*The* Family Law Act ***does not set out to punish parties*** *on any basis when it comes to deciding their financial relationships either by way of ongoing maintenance or final property settlement*".
>
> (emphasis added)

It is worth noting that Strauss J in a separate judgment expressed the view the section 43 of the *Family Law Act 1975* contained statements of principle or objects to be taken into account, as opposed to factual matters the court should consider.

Similar views to those expressed in *Soblusky* and *Ferguson* were made by Nygh J in *Sheedy & Sheedy* (1979) FLC ¶90-719 (***Sheedy***), a case which is a ruling about admissibility of evidence. The wife had filed an affidavit in the proceeding containing allegations regarding the husband's behaviour towards her. The husband argued that these allegations were inadmissible. The wife argued the allegations were relevant to contributions under section 79(4)(b) of the *Family Law Act 1975* being contributions in the capacity as homemaker and parent. Nygh J accepted that a failure to make such contributions was a relevant consideration for the court "*whether due to fault or misfortune*". However, his Honour expressed that it was not enough for parties to merely allege misconduct and expect the court to draw the inference that the misconduct resulted in non-contributions.

At this point, the line of reasoning in *Sheedy* will sound similar to the line of reasoning in *Kennon* to practitioners already familiar with the principle in the latter case. However, Nygh J took the reasoning in a different direction and, again, we see a judge grappling with what was understood to be the clear legislative intention to remove the relevance of marital conduct from the ambit of family law litigation. His Honour ultimately expressed the view that:

(a) to allege that as a result of the maltreatment, the wife's role as homemaker and parent was made more difficult would be to revive old claims for compensation for matrimonial misconduct and that the *Family Law Act 1975* ended that approach to finalising matrimonial disputes;

(b) section 79(4)(b) does not refer to contributions by spouses to each other's physical or mental well-being; and

(c) the wife needed to show that the husband's conduct resulted in his contributions being lessened and her contributions being increased. The reason for the non-contribution does not matter but the non-contribution itself is relevant.

His Honour determined that the wife's allegations were inadmissible.

The principles in *Soblusky* and *Ferguson* connect directly to *Kennon* in so far as the Full Court's view in the former cases was that conduct was not relevant unless it had consequences relevant to section 79(4) or 75(2). The key difference is how deep the earlier Court was prepared to delve into the consequences of conduct beyond. Likely as a result of the clear and explicit preoccupation the Court had with distancing itself from pre-1976 matrimonial misconduct cases, the judges in the first 10 years of the operation of the *Family*

Law Act 1975 were reluctant to make qualitative assessments of contributions. Applying the logic in *Sheedy*, it was not relevant to a property adjustment case that a homemaker might have been said to have been especially competent due to having made their contributions in spite of mistreatment by the other spouse. The court would instead focus on whether the mistreatment meant that the perpetrator spouse was failing to make homemaker contributions of their own or, in so called "rare" cases, whether the mistreatment or misconduct had some financial consequences within the confines of section 79(4) or 75(2).

The decision of the Full Court in *Fisher & Fisher* (1990) FLC ¶92-127 (***Fisher***) was similar to *Sheedy* in that it concerned an application by a husband in a property adjustment dispute to strike out evidence of the wife regarding assaults he allegedly committed on her. The first instance judge refused to strike out the material and gave reasons that were remarkably similar to *Kennon,* stating that if a party endured misconduct such as violence and nevertheless continued to perform their role of homemaker, it is difficult to see how those matters could be left out of consideration by the court. The Full Court who heard the appeal comprised of Nygh, Baker, and Murray JJ and the leading decision was given by Nygh J with whom the others agreed. Justice Nygh (the judge in *Sheedy*) gave reasons which can be summarised as follows:

(a) conduct of the parties can only be taken into account pursuant to subsection 75(2)(o) and must be broadly financial in nature (citing *Soblusky*);

(b) there is no justification for taking into account matrimonial misconduct (citing *Ferguson*), unless it relates to a dissipation of property that might require consideration of whether a party can support themselves adequately or whether the misconduct has affected a spouse's earning capacity (referring to *Barkley* as an example); and

(c) even if the husband's conduct in the case had financial or other consequences as per *Soblusky* and *Ferguson*, there was no evidence the wife's contributions had therefore increased or evidence that her earning capacity had been diminished.

The Full Court therefore held that the first instance judge had been in error for refusing to strike out the wife's allegations.

Justice Murray, agreeing with Nygh J, added confirmation that conduct is not relevant per se unless the conduct has had the consequence of affecting a party's contribution and needs in a financial sense.

The public policy implications of the principles in *Soblusky*, *Ferguson*, and *Fisher* while responsive to the (at the time) modern desire to move away from fault and misconduct and focus on financial outcomes for separated spouses, are problematic. One can imagine the advice a cynically minded legal practitioner in the 1980s might have given to their clients, based on the logic of the case law at the time. For example, it might have included advice such as:

(a) if you commit physical violence against your spouse, it is unlikely to impact your financial dispute unless the violence causes some earning capacity diminishment.

(Even then, see the decision of *Hack and Hack* (1980) FLC ¶90-886 in which the court considered the wife's capacity for employment after being assaulted by the husband – "*Her position … would be exactly the same if she had been knocked over not by the husband but by a bus. In each case it is her lack of employment and her inability to obtain employment that is relevant for the purposes of financial adjustment*")

(b) if you are a victim of family violence and a homemaker, you should be resilient in your homemaker duties lest it be said against you that you failed to make contributions or your contributions could be said to have decreased;

(c) similarly to (b) above, if you are the perpetrator of family violence and a financial contributor, you should try to make some homemaker and parenting contributions so there is no argument about non-contributions made against you; and

(d) just as you are unlikely to be punished for bad behaviour against your spouse, you are unlikely to be rewarded for good behaviour.

2.2 ***Kennon*: working new societal attitudes into existing legislation**

In the late 1980s and early 1990s, there was growing social and political awareness of family violence in Australia. In Queensland, the *Domestic Violence (Family Protection) Act 1989* came into effect on 21 August 1989 with the endorsement of all major political parties in at the time.[1] At the same time, the principles the family law courts had developed to interpret the *Family Law Act 1975* with respect to financial disputes were being examined and investigated by[2]:

(a) bodies such as the National Committee on Violence Against Women and the Australian Law Reform Commission (the latter published a report on 25 July 1994 titled "*Equality Before the Law: Justice for Women*"); and

(b) academics, with articles being published such:

(1) J Behrens, "Domestic Violence and Property Adjustment: A Critique of 'No Fault' Discourse", (1993) 7 *Australian Journal of Family Law*, 9;

(2) J Behrens, "Violence in the Home and Family Law: An Update", (1995) 9 *Australian Journal of Family Law*, 70; and

(3) R Graycar, "The Relevance of Violence in Family Law Decision Making", (1995) 9 *Australian Journal of Family Law*, 58).

Commentators have noted[3] that the first reported decision of the Full Court of the Family Court of Australia signalling a change in the Court's approach to considering family violence in financial disputes was *Doherty & Doherty* (1996) FLC ¶92-652 in which Baker J made the *obiter* observation about a finding that would have been open to a trial judge to make:

> "*Although the domestic violence complained of related to a relatively small period of time at the end of the marriage, nevertheless, his Honour would, in my opinion, have been entitled to have found that because of the appellant's conduct, the respondent's contribution as a homemaker was increased and the appellant's similar contribution diminished as a consequence, leading to the overall weighting based upon contribution in favour of the wife being increased, albeit only slightly, having regard to the facts of this case*."

However, this is arguably no different to the principles established by *Soblusky* and *Ferguson* which focussed on a perpetrator's non-contribution in the homemaker sphere and the victim's consequent increased contribution.

It is worth noting here that between 1987 and 1998, State-based personal injuries claims could be heard by the family law courts together with claims under the *Family Law Act 1975*. This was possible under a cross-vesting scheme that had enabled the family law courts to exercise State jurisdiction, which was determined to be unconstitutional by the High Court of Australia in *Re Wakim; Ex parte McNally & Anor* [1999] HCA 27. This meant that personal injuries claims could be brought alongside property adjustment and maintenance claims in the family law courts.

It is relevant to mention the cross-vesting scheme not only because it was one possible defence that could have been offered in response to criticisms being levelled at the family law courts in the 1990s for its approach to family violence in financial disputes, but because the

[1] S Page, "The history of domestic violence reforms in Queensland: Bryce report", https://pageprovan.com.au/the-history-of-domestic-violence-reforms-in-queensland-bryce-report/.
[2] Wolters Kluwer, *Australian Family law Commentary,* (online at 19 March 2025) ¶37-410.
[3] Wolters Kluwer, *Australian Family Law Commentary,* (online at 19 March 2025) ¶37-411.

decision of *Kennon* itself involved personal injuries claims brought by a wife contemporaneously with her property adjustment application.

In *Kennon*, the wife sought damages for a number of assaults on her by the husband and a property adjustment that would have resulted in her receiving approximately 15% of the parties' net interests by way of a payment of $1.3 million. It was a 5-year relationship with no children where the majority of the wealth was introduced into the relationship by the husband. The trial judge awarded her $43,000 in damages for personal injuries and a $400,000 payment by way of property adjustment. The latter payment was expressed to be comprised of $200,000 owing to the assessment of contributions under section 79(4) and $200,000 owing to section 75(2) factors. The trial judge determined that the wife had made no contributions under subsection 79(4)(a), limited contributions under section 79(4)(b), and that the section 79(4)(c) assessment favoured the husband who had afforded the wife a lavish lifestyle.

On appeal, Fogarty and Lindenmayer JJ delivered a joint judgment. They made the seminal statement of principle that in "*a narrow band of cases*" conduct during the relationship could be relevant if the conduct had "*a discernible impact upon the contribution of the other party*". Their Honours went on to hold that the trial judge's discretion in the contributions assessment was plainly wrong as it had undervalued the wife's homemaker contributions in circumstances where she had contributed fully to the task of wife and homemaker, where the wife brought to the marriage qualities that appealed to the husband, and where both of them understood what were to be her contributions to their married life together.

2.3 Holistic assessment and modern refinement: bringing *Kennon* up to speed

By the time of the late 2010s/early 2020s, a number of things were happening relevant to the treatment of family violence by the family law courts generally. On the outside, there was a dramatic increase in media coverage of prominent cases in several States including Queensland involving the deaths of women (and children) at the hands of their domestic partners. On 17 October 2022, the Federal, State, and Territory governments released the *National Plan to End Violence against Women and Children 2022–2032*. At the time of this paper, the media coverage and political discourse about family violence has only increased in its intensity and ubiquity.

On the inside, the Full Court had recently enunciated its preferred approach to the assessment of contributions in the decision of *Jabour & Jabour* (2019) FLC ¶93-898 (***Jabour***), emphasising the need for courts to take a "holistic" approach to the assessment of contributions. Around this time, we start to see the Full Court not only explain how the principle in *Kennon* fits into the holistic approach to the assessment of contributions, but we see the Court begin to parr back various "glosses" to the *Kennon* principle that had arisen from the cases subsequent to *Kennon*.

As many practitioners will know, *Jabour* emphasises the need for a trial judge to assess contributions globally and to avoid compartmentalising certain contributions and offsetting or comparing them in isolation to others. In *Benson & Drury* [2020] FamCAFC 303 (***Benson***), the Full Court was asked to determine an appeal in which a de facto husband asserted the trial judge had failed to assess contributions holistically due to how the de facto wife's *Kennon* claim was dealt with. In *Benson*, the trial judge had assessed the parties' contributions as equal but, according to the *Kennon* principle, found that the impact of family violence on the de facto wife had made her contributions more arduous. Due to this, the trial judge assessed an "adjustment" in the de facto wife's favour of 5%. After making a further adjustment for section 90SF(3) factors, the trial judge determined the ultimate property settlement as being 60%/40% in the de facto wife's favour.

On appeal, the Full Court cited *Jabour* and ruled that the trial judge had made an error by comparatively analysing one contribution issue, namely the wife's more onerous contributions as a result of family violence, against all other contributions. The Full Court held that the trial judge ought to have identified the wife's contributions that were made more arduous by family violence and weighted them against all other contributions. However, the Full Court determined that there did not need to be a re-hearing as the facts available to the trial judge meant a contributions-based assessment of 55%/45% in favour of the wife was open and appropriate.

A similar issue arose on appeal to the Federal Circuit and Family Court of Australia – Division 1 Appellate Jurisdiction (**Div 1 Appeal Court**) in the case of *Elmanu & Elmanu* [2022] FedCFamC2F 630 (***Elmanu***), which had a nearly identical outcome to *Benson* in so far as the trial judge's outcome was left undisturbed notwithstanding a failure to assess the *Kennon* factors holistically with other contributions factors. The Div 1 Appeal Court re-affirmed the need to assess contributions holistically in the context of *Kennon* claims in a further decision of *Gadhavi & Gadhavi* [2023] FedCFamC1A 117.

In terms of the (now) Div 1 Appeal Court parring back so-called "glosses" to the *Kennon* principle, the decision of *Martell & Martell* [2023] FedCFamC1A 71 (***Martell***) is an informative place to start, notwithstanding the fact that it was a single judge appeal, because of the dramatic shift in tone in the judgment not just compared to the 1976 – 1990s cases discussed above, but *Kennon* itself. Justice Aldridge observed that:

(a) In *Kennon*, Fogarty and Lindenmayer JJ had identified changing social attitudes in the context of forming their views in that case. Justice Alridge reasoned that societal awareness and disapproval of family violence has increased since then and referred to the insertion of the definition of family violence into the *Family Law Act 1975* in the form of section 4AB as an obvious example of this.

(b) In *Kennon*, Fogarty and Lindenmayer JJ's were expressly concerned about "opening the floodgates" and therefore referred to the principle as only applying to a "narrow band of cases". Justice Aldridge remarked wryly that while such cases might have been exceptional at the time, the prevalence of domestic violence is "wide" and attempts to limit its recognition in family law financial disputes to a narrow band of cases has no basis in principle. Terms such as "exceptional" and "narrow" add an "unacceptable gloss" to the principle.

Another "gloss" that was parred back was the supposed need to prove some "quantification" of the effect of family violence on a parties' ability to make contributions, which is a term that came from the Full Court's decision in *Spagnardi & Spagnardi* [2003] FamCA 905 (***Spagnardi***). The Full Court addressed this in a decision of *Keating & Keating* [2019] FamCAFC 46 (***Keating***). The trial judge referred to the need for "quantification" according to *Spagnardi* and concluded that there was a lack of evidence from the wife from which the Court could be satisfied hers was one of the small number of cases where her contributions were made more onerous in the *Kennon* sense. The trial judge appeared to place significant weight on the fact that a number of separations had occurred between the parties totalling some 2 years. Curiously, the wife's evidence included that the husband had broken her nose, beat her until she passed out and suffered serious bruising, broke her ribs, frequently abused her which undermined her self-worth, she had been confined her to bed due to her injuries, the husband's abuse undermined her parenting, the violence and abuse impacted her mental health, and three domestic violence orders were made for her protection. The trial judge also appeared to place weight on the fact that only the wife's broken wrist was corroborated by other evidence (a topic discussed separately below).

On appeal in *Keating*, Ainslie-Wallace and Ryan JJ held that the use of the word "quantification" in *Spagnardi* suggested a need for expert or actuarial evidence in relation to the impact of family violence on contributions, however, firstly, it is difficult to understand what that evidence might be and, secondly, that adds an unintended gloss on the principle in *Kennon*. Ultimately, their Honours ruled that the trial judge should have focussed on whether there was a "discernible impact" of the husband's violence on the wife's capacity to make contributions, as opposed to whether there was evidence "quantifying" that effect.

Now that we have outlined the current state of the case law with respect to *Kennon*, it is relevant to consider the upcoming amendments to the *Family Law Act 1975*.

3. Issues for practitioners preparing financial cases involving family violence

3.1 Family Law Amendment Act 2024

The *Family Law Amendment Act 2024* comes into effect on 10 June 2025. It brings with it a raft of changes to the *Family Law act 1975* but this paper only summarises the changes to the property adjustment power and spousal maintenance power of the court as well as an expanded definition of "family violence".

With respect to property adjustment, in summary the amendments provide that:

(a) a new consideration after subsection 79(4)(c)/90SM(4)(c) will be inserted stating:

"*the effect of any family violence, to which one party to the de facto relationship has subjected or exposed the other party, on the ability of a party to the de facto relationship to make the kind of contributions referred to in paragraphs (a), (b) and (c);"*

(b) the link back to section 75(2)/90SF(3) is removed and replaced with a standalone "(current and) future needs" section which is largely the same as the previous list of factors but with notable changes including:

(1) the first factor is "*the effect of any family violence … on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection*"; and

(2) there is a new factor referring to "*material wastage, caused intentionally or recklessly … of property or financial resources*".

With respect to spousal maintenance, in summary the amendments:

(a) insert as a new factor "*the effect of any family violence, to which one party has subjected or exposed the other party, including on any of the matters mentioned elsewhere in this subjection*"; and

(b) slightly modify the "catch all" provisions being section 75(2)(o)/90SF(3)(r) which stated "*any fact or circumstances which, In the opinion of the court, the justice of the case requires to be taken into account*" with "*any **other** fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account*".

With respect to the expanded definition of "family violence", the amendment gives 4 examples of behaviour that might constitute economic of financial abuse including denying the family member financial autonomy, unreasonably withholding financial support, coercing a family member to give or seek money or do things in connection with a practice of dowry, or hiding or denying things done or agreed to by the family member in connection with a practice of dowry.

Other changes coming into effect that are not discussed in this paper include matters to do with the duty of disclosure, the courts power in relation to making orders about companion animals, protecting confidentiality of communications made in the course of professional services including health services and specialist sexual health services, and other things.

One can only speculate how the court will interpret the amendments to the provisions regarding property adjustment and spousal maintenance, however, it seems reasonable to assume that the Div 1 Appeal Court will try to maintain consistency between its current application of the *Kennon* principle and the new legislation. We saw this last year with respect to the insertion of section 65DAAA into the *Family Law Act 1975* when, after a number of trial decisions[4] grappled with the fact that a literal interpretation of that section was at odds with what some would say was an obvious intention of the legislature to codify the *Rice and Asplund* principle, the Div 1 Appeal Court ultimately found a way to give effect to the

[4] See, e.g., *Rasheem & Rasheem* [2024] FedCFamC1F 595.

legislature's intention, notwithstanding that some would also say the way in which they did so involved a degree of grammatical awkwardness (see *Radecki & Radecki* [2024] FedCFamC1A 246). It is clear from the explanatory memorandum to the *Family Law Bill 2024* of the House of Representatives that the purpose of the bill is to amend the property decision-making framework in the *Family Law Act 1975* to "codify" the approach in property decisions.

We may also see, like we saw between 1976 to 1990, an initial period in which trial judges react firmly to the perceived intention of the legislature that family violence must be taken into account in property and maintenance cases where relevant and make observations in their decisions about society's current intense and ubiquitous disapproval of family violence. As we saw back then, this may result in an initial period of zealous and possibly harsh applications of the new legislation. Perhaps decisions such as those of the trial judge who decision was appealed in *Pickford & Pickford (No 2)* [2024] FedCFamC1F 500 are a preview of this (see the discussion below about the conduct of litigants in the course of the proceeding itself as a form of family violence).

3.1 Evidence in *Kennon* cases

The issue of double counting

Practitioners preparing for cases involving *Kennon* claims need to give consideration to whether the evidence of the applicant reveals not only the occurrence of family violence, but the effect of the family violence on:

(a) the ability of a party to make contributions under subsections 79(4)(a) – (c)/90SM(4)(a) – (c); and

(b) the current and future circumstances of a party particularly on what practitioners have traditionally referred to as "future needs" factors which will now appear in subsection 79(5) and 90SM(5).

Given that the new legislation inserts a requirement to consider family violence into *both* the contributions-assessment stage and the future-needs assessment stage of the decision-making process, a question arises: is it impermissible to "double count" the occurrence of family violence in a case by considering it at both stages? The Div 1 Appeal Court in *Boulton & Boulton* [2024] FedCFamC1A 132 (***Boulton***)[5] held that it is permissible.

In *Boulton,* the parties commenced cohabitation in 2005 and after multiple separations and reconciliations separated finally in 2021. The net property interests of the parties were approximately $10.6 million. Following separation, the children lived with the wife and the final parenting orders contained no specification about the children spending time with the husband. The husband was a medical professional with an earning capacity of at least $1 million per annum. The trial judge found the wife would not be able to return to her former media career but might re-train in real estate. The trial judge also found that the wife's contributions were made more arduous by the husband's conduct (including her having to have additional care of the children and experiencing anxiety as to financial matters). What is interesting about the trial decision is that notwithstanding the wife's successful *Kennon* claim, contributions were still assessed overall as slightly favouring the husband. However, at the section 75(2) stage the trial judge determined that the husband's behaviour had adversely affected her earning capacity. The result was a 62.5% overall division in the wife's favour after an adjustment for section 75(2) factors.

On appeal, the husband argued that the trial judge had made an error of principle because a *Kennon* claim should be evaluated only at the contributions-assessment stage in the decision-making process, not the section 75(2) assessment stage. In a joint judgment of Austin, Jarrett, and Campton JJ, the Div 1 Appeal Court held that there is no error of principle taking into

[5] The trial judgment of *Boulton* is a useful case for practitioners to read because it involves property adjustment, parenting, and child support departure issues all in the context of serious allegations of family violence.

account findings of family violence in evaluating contributions and then considering its impact on future earning capacity.

Given that *Boulton* was decided prior to the commencement of the new legislation which explicitly inserts the need to consider family violence where relevant into both stages of the process, the correctness of this principle would appear to be an inescapable conclusion. What that means is that obviously practitioners must consider not only whether family violence impacts a party's contributions but whether it impacted any matters in the new section 79(5) and/or 90SM(5).

Expert, medical, and corroborative evidence

The Full Court and Div 1 Appeal Court has held that neither expert/medical evidence nor corroboration evidence showing the impact of the family violence on a person is a requirement in *Kennon* cases.

With respect to corroborative evidence, subsection 164(1) of the *Evidence Act 1994* explicitly states that "*It is not necessary that evidence on which a party relies be corroborated*". This point was raised by the Full Court in *Keating*, where the trial judge made specific reference to need for "*quantification*" of evidence and pointed to the lack of corroborative evidence to support the wife's allegations of family violence.

With respect to expert and medical evidence, it is worth recalling that the Full Court in the decision of *Keating* criticised the use of the term "quantification" in earlier applications of the *Kennon* principle precisely because it suggested a need for expert or actuarial evidence. In *Martel*, the trial judge made findings of family violence having occurred over a period of 16 years that included the husband hitting the wife over the head with a pillow and pouring a drink on her, the husband pushing the wife and her head hitting the window of the car, the husband shouting at the wife about her parents, the husband punching the wife causing bleeding, the husband pushing the wife on the shoulder with his hands, and the husband grabbing the wife's face with both hands. The wife's evidence about the effect of the conduct on her was that she was scared at the time, could not eat for a few days after being hit in the face, and stayed a night away from the home on one occasion.

On appeal, the husband argued that the trial judge's reasons did not discuss how the acts of violence made the wife's contributions more onerous. In response to this argument, Alridge J stated the principle that the adverse impact of family violence on the victim's contributions is capable of being inferred from the lay evidence of the parties (this was later reiterated by the Div 1 Appeal Court in *Benson*). However, his Honour was unable to identify where in the trial judge's reasons there was any explanation of how the husband's acts of violence led to the wife's contributions being made more arduous. This was an appealable error.

While it is clear that medical or expert evidence is not a requirement, that does not mean it is not beneficial to a case. Obviously, medical evidence of physical violence, where it is available, would be relevant. And while the lay evidence of the parties is sufficient, family violence may have impacts on parties that they find difficult to articulate in lay terms, particularly in the context of mental health. In these scenarios, it may be useful for a party to seek some form of therapy with a view to assisting them to explore and articulate how the other party's conduct has, for example, caused anxieties in ways that might struggle to explain. It should not be taken for granted that a party will be able to easily put to words their subjective experience of their own emotions.

Definition of "family violence"

It is relevant here to talk about the recent Div 1 Appeal Court decision of *Pickford & Pickford* (No 2) [2024] FedCFamC1F 500 (***Pickford***). The Court in this case was comprised of five justices, which is important because there was a 3:2 majority ruling about the interpretation of the definition of "family violence" in section 4AB of the *Family Law Act 1975*. How the parties conducted the litigation in *Pickford* was unusual, not least because they had an 11-day trial largely exploring the issue of family violence even though the only competing outcome in dispute was whether the children as little as 3 nights per fortnight with the father or as much as

7 nights. Even more unusually, neither party raised the issue of family violence as a major issues in their case outlines filed prior to the trial.

On appeal, one of the issues was whether or not it was open to the trial judge to have made findings of coercive control and financial control against the father. In particular, one of the issues was the extent to which the husband's intentions behind his actions in question and/or the mother's subjective experience of the father's conduct was determinative about whether family violence in the form of coercive control had occurred. The mother had alleged she experienced the father's control in the form of, among numerous other things, refusing to agree to the mother using funds in a joint offset account to pay for school fees, even though there was a interim consent order containing a restraint about how the funds were to be used.

Section 4AB provides:

> "*(1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.*
>
> *(2) Examples of behaviour that may constitute family violence include (but are not limited to):*
>
> *(a) an assault; or*
>
> *(b) a sexual assault or other sexually abusive behaviour; or*
>
> *(c) stalking; or*
>
> *(d) repeated derogatory taunts; or*
>
> … " (continues)

The Court in *Pickford* was divided about whether or not subsection (1) meant "family violence' can only be either conduct that controls or conduct that causes fear. Ultimately, a majority of the Court held that the definition is broader than only those two categories. Their Honours Carew and Aldridge JJ in a joint judgment pointed out that to say otherwise would mean that violent conduct that does not cause either control or fear would not be family violence and stated:

> "*It might be, for instance, that a female punches her male partner but the punch neither coerces nor controls nor causes the male to be fearful. The behaviour may nevertheless be an act of family violence.*"

Their Honours Austin and Williams JJ thought differently. They interpreted subsection 4AB(1) to define "family violence" as either conduct that coerces or controls a family member (being an objective concept) versus conduct that causes a family member to be fearful (being a subjective concept). Using this reason, the mother's subjective experience of control about the issue of school fees payment did not by itself meet the definition of "family violence" without evidence that the mother had actually being coerced or controlled in an objective sense.

All of the judges in *Pickford* dismissed the view that intention of the perpetrator was an essential element.

An obvious consideration for practitioners preparing evidence in these types of cases is that while a party might seek to assert they were ignorant or oblivious to the effect of their conduct on the other party, or that they were just following a religious or cultural practice without malicious intent, these matters are unlikely to carry much weight and heavy reliance on such evidence should be avoided. Another consideration for practitioners is that while a party might have subjectively experienced feelings of being controlled or coerced and while this is relevant, care should also be paid to evidence of their actions and conduct in response to their subjective feelings.

3.2 Post-separation conduct & litigation conduct

An important thing for practitioners to understand is that the evidence relevant to a *Kennon* claim does not stop at separation. Post-separation conduct can obviously be relevant. It is not difficult to imagine the same types of coercive or controlling conduct that occurred during the relationship, for example, continuing to occur post-separation. In fact, the writer suggests that in some cases such conduct can become even more pronounced. A less obvious and important consideration, however, is a party's conduct in the litigation itself.

Returning to *Pickford*, the trial judge in that case made findings that the husband's conduct in the litigation by, among other things, opposing the mother's multiple interim litigation funding applications, maintaining an application for equal time with the children, and pressing arguments about waiver of legal professional privilege was coercive and controlling. While the Div 1 Appeal Court did not agree with this for various reasons (e.g. because the trial judge appeared to overlook some of the facts including that the husband had in fact consented to most of the mother's interim litigation funding application), it is a stark reminder to practitioners that when acting for a party facing allegations of family violence, decisions that are made during the course of the litigation may have unintended consequences at a trial when the cumulative affect of that party's conduct might be under scrutiny.

In *Elmanu & Elmanu* [2022] FedCFamC2F 630, the Div 1 Appeal Court was faced with another case in which a trial judge erred in applying *Kennon* to justify an "uplift" to the wife's contributions where the parties' contributions where otherwise assessed as equal (i.e. the same failure to assess contributions holistically discussed in *Benson*). However, in making findings about the husband's family violence, the trial judge said this about the husband's conduct during the trial itself:

> "*The husband frequently talked back to and over counsel and made large and sudden gestures that were physically intimidating. The wife, on the other hand, largely maintained her composure, and gave her responses to questions in a forthright manner. I find that the wife's account of events was plausible and internally consistent and* ***corroborated, in part, by the husband's performance in the witness box****.* (emphasis added)

Importantly, the expanded definition of "family violence" that will come into effect on 10 June 2025 defines family violence in the form of economic or financial abuse to include:

> "*unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family members' child…*"

This should be given serious consideration by practitioners in cases when advising clients seeking to oppose spousal maintenance applications as well demands for child support when family violence is in issue.

3.3 Negative "pools"

An interesting issue that may from time to time arise in cases involving a *Kennon* claim is how practitioners should frame submissions to the court when the parties' net interests in property are in deficit or where a party's financial contributions said to have been made more arduous by family violence resulted in a loss. For example, a party's case might be that their spouse's coercive and controlling conduct impacted their ability to make financial contributions to a business; however, the court might find that the business in question has a deficit value having regard to its net assets and liabilities.

This was the scenario in *Keating*, although the comments about it came from Austin J who was in the minority in that case. In that case, the family business the wife had worked in, while being mistreated by the husband, was found by the trial judge to have a negative value. Austin J disagreed with the majority that the trial judge had erred in considering the evidence about domestic violence and held that no matter how much more onerous the wife's contributions were found to have been on account of family violence, it could not result in any tangible increase in her share of the net assets.

3.4 Personal injuries and family law

Practitioners should be aware that in family law cases involving family violence, their clients may have grounds to make personal injuries claims against the other party. In *Warby and Warby* (2002) FLC ¶93-091, the Full Court found that the court's had jurisdiction in certain cases to hear a common law claim concurrently with a family law claim. The Full Court determined that the court had "accrued jurisdiction" where the two claims cannot be separated and arise out of a "*common sub-stratum of facts*". While this issue is beyond the intended scope of this paper, the writer suggests that any consideration of whether to pursue a personal injuries claim concurrently with a *Kennon* claim, for example, would need to take into account:

(a) the fact that personal injuries litigation has become highly specialised. There are procedural issues such as time limitations, specialist medical evidence, and the assessment of damages for example, that will likely be unfamiliar to family law practitioners;

(b) without having the specialised knowledge to prosecute a personal injuries matter, a family lawyer will realistically have to work collaboratively with a personal injuries lawyer. This raises the need to consider and advise clients about costs proportionality. There is also an issue about whether legal professional privilege over the personal injuries advice will need to be waived and how communications between the two sets of practitioners are therefore managed; and

(c) a successful damages claim might have unintended consequences in property cases where, for example, it might mitigate against a loss of earning capacity, diminishing a "future needs" adjustment.

3.5 Quality of contributions and the social engineering concern

As discussed above, one of the statements in the early decision of *Sheedy* was that while subsection 79(4) to refers to contributions in the capacity as homemaker and parent, it does not refer to contributions to the physical or mental well-being of the other spouse. Viewed charitably and in historical context, Nygh J was saying that not only was marital conduct no longer relevant as it had been prior to the *Family Law Act 1975*, but that matters such as "conjugal" responsibilities had no bearing on the assessment of contributions. In any event, the jurisprudence of the court between 1976 and 1990 can be fairly described as taking a binary approach to contributions—in other words, did a party make contributions, or did they fail to make them. This was a logical consequence of court seeking to distance itself from descending into the minutiae of marital conduct.

By the time of *Kennon*, however, we see a Full Court more willing to descend into that minutiae. Fogarty and Lindenmayer JJ, when scrutinising how the trial judge had in their view undervalued the wife's non-financial contributions, stated:

> "*Marriage involves a myriad of matters, large and small, which go to make up that union and differentiate it from more casual, transitory relationships. It involves sharing the minutiae of daily life, support during good and bad times, care and intimacy. These and other matters are intended to be encompasses by the matters in s 79, the actual balance of those components varying from marriage to marriage. Essentially it is an intimate sharing of mutual but diverse talents for their joint benefit*".

Lest it be thought that his comment in *Kennon* had only passing relevance, the Full Court in *Hunter & Borman and Anor* [2020] FamCAFC 250 considered it relevant, in the assessment of the parties' non-financial contributions, that:

> "[T]*he fact that these parties were in such a lengthy de facto relationship means that each had the benefit of the mutual comfort, society and support derived from such a relationship, quite apart from financial aspects.*"

By broadening the definition of contributions to include things such as mutual comfort and the sharing of the minutiae of daily life, the question arises as to whether the courts are

reinvigorating the type of family law litigation about parties' conduct in and of itself that the judges between 1976 and the 1990s were at pains to avoid. One retort to this is that the assessment of contributions has always implied the recognition of spouses engaging in conduct that benefitted the physical and mental well-being of the other spouse, notwithstanding the statement about this in *Sheedy*. What is paying for a spouse's living expenses other than a contribution to the physical and mental wellbeing of that spouse? Another retort to this is that there is no direct requirement in the legislation to assess the quality of contributions—in other words, trial judges are not being asked to assess whether parties were good or bad spouses in their respective roles in the relationship and the approach to assess contributions remains binary (i.e. did contributions occur or not and if so what was the effect?). This is generally consistent with the court's rejection of the concept of special contributions. On the other hand, judges are human, and they are exercising broad discretion based on their own lived experience. Therefore, evidence of a spouse who was able to remain a highly competent homemaker and parent in spite of the adversity they confronted in the form of family violence from the other spouse is likely to be compelling and, if weight is placed on that in the decision-making process, it is arguably a recognition of the quality of that spouse's contributions. It is worth pointing out here that Fogarty and Lindenmayer JJ in *Kennon* stated that there was no reason the principle in that case applied only to domestic violence but that it could apply to conduct generally.

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Schedule 1 Case summaries

1. Federal Circuit and Family Court of Australia – Division 1 Appellate Jurisdiction

1.1 *Pickford & Pickford* (No 2) [2024] FedCFamC1F 500

The trial judge found that cohabitation commenced in early 2014. The parties had two children born 2015 and 2017. The parties separated under one roof in 2018. The mother commenced proceedings in 2019.

The father sought equal time parenting orders and sole decision making. The children had been spending 4 nights per fortnight with the father for several years. The mother sought they spend 3-4 nights per fortnight with him, the ICL said 5 nights, and the father said 7 nights. It was agreed the children should spend half school holidays with the father and special occasions. The only dispute was therefore whether the children's best interests were served by them spending time with the father for as little as 3 nights per fortnight to as much as 7 nights per fortnight. Neither party raised the issue of family violence as a major issue in their case outlines. The single expert family report writer did not consider the children had been exposed to any family violence. However, the parties subsequently conducted an 11 day trial and made contested allegations of family violence the centrepiece of the dispute.

The trial judge made orders for the mother to have sole decision making and the children to spend 4 consecutive fortnights with the father in school terms and half of all school holidays. The trial judge also determined the property settlement 55%/45% in the father's favour.

The trial judge made/rejected the following findings about family violence:

(a) Rejected – an assault alleged by the mother in 2018 which had been the subject of a family violence order and criminal proceeding, both of which were dismissed.

(b) Rejected – infantilising conduct amounting to emotional abuse alleged by the mother. This was rejected because it was made for the first time in final submissions and not the subject of evidence.

(c) Rejected – financial control alleged by the mother during the relationship. The trial judge found the parties agreed the father would be responsible for managing the family's financial affairs.

(d) Rejected – financial control alleged by the mother post-separation in the form of ceasing to make mortgage contributions. The trial judge noted the father had already contributed $1.4 million into the account and there were sufficient funds in the account to keep it in credit. The father was also paying child support.

(e) Accepted – financial control alleged by the mother post-separation in the form of the father's objection to the mother using offset account funds for school fees. The trial judge found this objection to be unreasonable and unnecessary and a form of exerting control over the mother which she experienced as such.

(f) Rejected – coercive control in the form of isolating the mother from her family. This was rejected on the basis it was unproven.

(g) Accepted – the way the father conducted the litigation was controlling and coercive:

(1) The mother brought several interlocutory litigation funding applications. Two of which resolved by consent one of which the husband sought orders to give the mother half of the amount she sought. The trial judge found that because the father did not consent to the orders sought, hearings were necessary.

(2) The trial judge found the father maintaining an application for equal time with the children was coercive and controlling, on the basis of the mother's subjective reaction to this.

(3) The trial judge found it was coercive and controlling for the father to press evidentiary arguments about wavier of legal professional privilege.

(4) The trial judge found it was coercive for the father to have sought a restraint against the mother allowing the children to see Mr B, despite the single expert and ICL supporting the father's application.

(5) The trial judge found the father's refusal of certain therapeutic treatments for the children was coercive and controlling, despite the single expert saying the father's response was measured and appropriate.

(6) The trial judge found the father's concerns about the mother's mental health were a controlling strategy, despite evidence that the mother intermittently sought psychiatric and psychological treatment.

The trial judge made an order appointing a new ICL for 12 months with liberty to re-list the matter the proceeding regarding the implementation of the final orders.

The father appealed both the parenting and financial orders but withdraw the latter challenge. The central theme of the father's appeal was in relation to the findings of family violence by the trial judge.

A summary of the reasons of Austin & Williams JJ is as follows:

(a) Described this appeal as an opportunity to clarify the principles that govern findings with respect to family violence at least in parenting matters.

(b) Their Honours remarked that the purpose of litigation under Part VII of the Act is to determine orders that serve children's best interests and that it is not a medium to make definitive findings between vengeful/conflicted parents or to make punitive orders against perpetrators.

(c) Grounds 1 – 5 alleged by the father related to the findings of family violence.

(d) Their Honours remarked that it is not clear why the trial judge allowed the parties to litigate for 11 days about family violence when the family violence allegations did not seem genuinely material to the outcome of the narrow parenting issue left to decide.

(e) Their Honours referred to the High Court decisions of *M v M* and *Eastley & Eastley* which cautioned against unnecessary factual findings in the context of risk assessment, both of those cases involving the risk of sexual abuse to a child. Their Honours noted that there is a statutory imperative to prioritise assessment of future risks over factual findings about past events. However, the trial judge gave no attention to the existence of prospective risks of harm, focusing instead on findings about historical events. Such findings should inform the task of risk assessment, however, the trial judge did not use the factual findings to make any predictions.

(f) It was implicit in the mother's case that the children were at risk of harm should they spend more than 4 nights per term with him, however, it was unclear how they were at risk of harm if they spent 5, 6, or 7 nights with him. This issue was accentuated by the mother seeking half school holiday orders.

(g) Their Honours noted there was only a small connection made between the ultimate factual findings about family violence and the orders that were ultimately made. The trial judge instead appeared more influenced by the parental conflict when making orders for 4 nights per fortnight with the father, whereas parental conflict and family violence are not the same thing.

(h) Their Honours held it was not open to the trial judge to make a finding of financial control about the father refusing to agree to the mother using offset account funds for school fees, because there was an agreement between the parties documented in an interim injunctive order about how the funds in the account would be used – it was the mother departing from the earlier agreement not the father. The mother's perception of control was not determinative. **Their Honours held that there were two ways behaviour amounts to family violence. Either it coerces or controls a family member (objective) or it causes the family member to be fearful (subjective).** Their Honours held that the mother's perception of the father's behaviour was irrelevant, because whether someone is coerced or controlled is an objective concept focusing on the nature of the conduct by the perpetrator.

(i) Their Honours held it was not open to the trial judge to make a finding of coercive and controlling conduct because of the way the father conducted the interim applications about litigation funding. Firstly, they noted the trial judge was incorrect to say the father refused to consent to the first application – consent orders were made on the first return date 4 days after the mother's application was filed. The trial judge was also incorrect to say both praties received $100K on that occasion, as only the mother did. Secondly, the trial judge failed to acknowledge that the mother had consented to the mother's second application. Thirdly, against this background, the father's subdued response to the mother's third application was benign.

(j) Their Honours stated that a litigant does not commit family violence by refusing to consent or submit to orders which the other party applies for. Part XIB of the Act enables the court to dismiss or injunct harmful proceedings. This case was far removed from that type of case.

(k) Regarding the mother's allegation about the father refusing therapeutic treatment for the children, there were no interim orders about parental responsibility – the mother could have taken the children. Her unilateral pursuit of therapy was inconsistent with her being coerced or controlled by the father.

(l) Regarding the mother's allegation about the father expressing concerns about her mental health, their Honours held it was "hardly" a deliberate "controlling strategy" as found by the trial judge, when the father merely reasoned that his concerns about the mother's mental health were mitigated by the equal time orders he sought.

(m) Ground 6 alleged by the father was that the primary judge erred in making findings about the father influencing the children's expressed views. The trial judge found that the father had repeatedly created opportunities from which the elder child's views could be inferred. However, in this case, the children had only been spending 4 nights with the father and they were therefore more susceptible to influence by the mother.

(n) Ground 7 alleged by the father was that his application to reopen evidence while judgement was reserved was dismissed, even though the trial judge ultimately took into account fresh evidence adduced by both parties with no cross-examination. Their Honours held that this was an error of law. Therefore, ground 7 succeeded.

(o) Ground 8 alleged by the father was that orders were made for the children to spend time with each parent on the parent's birthdays and that neither party had sought this or been heard on it. Their Honours referred to the principle that procedural fairness requires parties to be heard about orders that are unheralded and could not be reasonable contemplated. However, the birthday orders did not fall into that category. Therefore, ground 8 was dismissed.

(p) The order appointing an ICL for a further 12 months was made without power. The cause of action between the parties was finalised by the other orders made by the trial judge. Their Honours stated that ICLs cannot be used like family consultants to help implement the orders, their role is to represent children's interests in proceedings. The order was aspirational and unenforceable.

A summary of the reasons of Aldridge and Carew JJ is as follows:

(q) Aldridge and Carew JJ disagreed with Austin and William JJ's interpretation of the definition of family violence on the basis it limits family violence to conduct that coerces or controls and conduct that causes fear. The definition of family violence in s.4AB should not be read down. "Violent" behaviour is a stand-alone behaviour that can be separate to "other behaviour that coerces or controls … or cause fear". A person can commit violence which does not cause fear or coercion or control and that would still be family violence.

(r) In relation to whether conduct coerces or controls, the intention of the perpetrator may be relevant but does not need to be proved. A person who engages in family violence may be oblivious to the impact their behaviour is having.

(s) Alridge and Carew JJ described the trial judge's forensic task as follows:

(1) Identify the behaviour about which complaint is made;

(2) Identify the full context of the behaviour including any explanation that may be given by the alleged perpetrator;

(3) Identify the impact of the behaviour on the alleged victim (mere assertion by the alleged victim that they felt coerced or controlled is insufficient);

(4) Make all relevant factual findings; and

(5) Explain why the behaviour in question is or is not family violence that coerces or controls the family member and if the alleged behaviour does not entail a course or pattern of conduct, explain how the behaviour can nevertheless be characterised as behaviour that coerces or controls, of so found.

A summary of the reasons of McClelland DJC is as follows:

(t) McClelland DJC agreed with the conclusions in the joint judgments by Aldridge and Carew JJ and Austin and Williams JJ respectively. McClelland DJC also agreed:

(1) that intentionality of the perpetrator is a decisive but not essential element to a finding that a party has been subject to coercive behaviour (as per both joint judgments); and

(1) that the definition of family violence should not be limited to two types of behaviour namely that which coerces or controls and that which causes fear (as per Aldridge and Carew JJ).

(u) McCllelland DJC expressed a view that the key to determining whether a person has been the subject of such behaviours is an appreciation of a pattern/series of facts the impact of which will be intersective and cumulative rather than incident specific.

(v) McClelland DJC found that the trial judge was in error to the determined he found the existence of coercive or controlling behaviour could be found simply on the basis of the victim's perception. McClelland DJC held that when determining whether coercive or controlling conduct exists, the court should evaluate the form, intensity, and context of the behaviour as well as the impact on the respondent.

(w) McClleland DJC endorsed the guide to fact finding in the joint judgment of Aldridge and Carew JJ.

1.2 *Boulton & Boulton* [2024] FedCFamC1A 132

The wife appealed from child support departure orders, but then discontinued her appeal. The husband cross appealed from parenting and property adjustment orders, but then discontinued

his appeal in relation to parenting orders. The specific order the subject of the husband's appeal was a cash-adjustment order that contemplated the wife receiving 62.5%. Contributions were assessed as slightly favouring the husband, before adjustments to the contributions-based assessment were made. The husband had sought 55% in his favour whereas the wife had sought 70% in her favour.

The parties commenced cohabitation in 2005. The entered into a financial agreement prior to marriage in 2006, but it was set aside by consent in 2022. The parties separated and reconciled on multiple occasions, but final separation occurred in 2021. At the time of appeal, they had three children aged between 14 and 8. The net property interests of the parties was approximately $10.6 million. Following separation, the children lived with the wife and the final parenting orders contained no specification about the children spending time with the husband. The husband was a medical professional with an earning capacity of at least $1 million per annum. The trial judge found the wife would not be able to return to her former media career but might re-train in real estate. The departure orders required the husband to pay $450 per child per week, private school fees, incidental school expenses, private health insurance premiums, and gap medical costs.

One of the husband's grounds of appeal was that the trial judge had double counted the effect of the family violence on the wife, both as a factor increasing the wife's contribution assessment and as a s.75(2) factor adversely affecting the wife's capacity to earn an income. The husband did not dispute that family violence occurred. His conducted included coercion and control during the relationship, cancelling/cutting up credit cards, delaying payment of school fees after separation, and delaying paying other invoices.

The trial judge made a finding that the wife's contributions were made more arduous by the husband's conduct (including additional care of the children and managing anxiety as to financial affairs) but considered the impact "must be quite modest". The trial judge then considered the matters in s.75(2) and said the marriage and care of the children in addition to the behaviour of the husband has adversely affected the wife's earning capacity. The husband cited *Loncar* which said that the *Kennon* claim happens at the contributions assessment not the 75(2) adjustment step in property settlement determinations.

In their joint judgment, their Honours Austin, Jarrett, & Campton JJ held that there is no error of principle taking into account findings of family violence in evaluating contributions and then considering its impact on future earning capacity.

1.3 *Gadhavi & Gadhavi* [2023] FedCFamC1A 117

The trial judge had determined the property settlement 55%/45% in the wife's favour. The trial judge assessed contributions at 60% to the wife which was adjusted by 5% having regard to "future needs" factors. The trial judge gave additional weight to the contributions made by the wife during the period of and subsequent to the relationship as a result of conduct engaged in by the husband – in doing so the trial judge made findings that the husband had engaged in a pattern of coercive and controlling conduct towards the wife and the parties' children including several incidents of physical violence.

The husband conceded that the unchallenged factual findings justified a contributions based entitlement being made in favour of the wife. However, The husband challenged the adequacy of the reasons in explaining her determination of the *Kennon* issue and in particular that the trial judge had failed to articulate the percentage assessment applied in relation to the wife's successful *Kennon* argument.

The parties' property at trial had a net value of $24,230,275. The parties were married about 20 years before separating and had two children.

The husband's initial contributions were approximately seven times that of the wife's in dollar terms which had foundational significance to the accumulation of the parties' current wealth.

A summary of the of McClelland DJC and Tree & Hartnett JJ is as follows:

(a) The exercise of discretion pursuant to s.79 involves value judgments and matters of impression and is therefore not a mathematical exercise (citing *Petruski v Balewa* (2013) 49 Fam LR 116 at [49]).

(b) The court must assess contributions holistically and therefore not adopt an "accounting" or "scoring" approach to each separate contribution (such detailed calculations would not realistically be possible on the evidence generally available in property settlement cases, putting to one side the problem of converting qualitive factors in s.79(4) into dollar terms) (citing *Blandford & Esmore* [2022] FedCFamC1A 67 at [14]).

(c) When assessing contributions in the context of *Kennon* claims, it remains necessary to assess contributions holistically and not segment or compartmentalise them or weigh one against the remainder (citing *Benson & Drury* (2020) FLC 93-998 at [35]).

(d) While the holistic approach makes appellate review more difficult, the appellate court must still determine whether the trial outcome was reasonably open and not outside the reasonable ambit of discretion. Here, the trial judge should have explained why the husband's substantial initial contribution was subsumed by the wife's contributions such that her contribution-based entitlement exceeded his by a differential of 20%. In other words, the trial judge failed to explain how she has weighed the impact of the husband's conduct on the wife's contributions

(e) The appeal must be allowed either due to a lack of adequate reasons or due to being a decision that is unreasonable within the bounds of discretion.

1.4 *Martell & Martell* [2023] FedCFamC1A 71

The trial judge found that the parties' net property interests were approximately $2 million and ordered a property adjustment of 60%/40% in favour of the wife. The trial judge assessed contributions during the relationship as equal safe for the wife being subject to family violence by the husband. The findings of family violence occurred over a period of 16 years and included the husband hitting the wife over the head with a pillow and pouring a drink on her, the husband pushing the wife and her head hitting the window of the car, the husband shouting at the wife about her parents, the husband punching the wife causing bleeding, the husband pushing the wife on the shoulder with his hands, and the husband grabbing the wife's face with both hands. The trial judge also found that the husband was aggressive and controlling. The wife's evidence about the effect of the conduct on her was that she was scared at the time, could not eat for a few days after being hit in the face, and stayed a night away from the home on one occasion.

The husband argued on appeal that the trial judge had erred in the assessment of the property adjustment. In relation to family violence, he argued the trial judge applied the wrong test and failed to consider the materiality of the family violence found to have taken place. He argued that the trial judge's reasons did not discuss how the acts of violence made the wife's contributions more arduous.

The reasons of Justice Aldridge can be summarised as follows:

(a) His Honour observed that in *Kennon*, Fogarty and Lindenmayer JJ identified changing societal attitudes towards the "pervasiveness and destructiveness of domestic violence". His Honour observed that societal awareness and disapproval has continued to increase since then, noting the insertion of the definition of family violence being inserted into the Act in 2011 in the form of s.4AB. His Honour observed that Fogarty and Lindenmayer JJ were concerned with opening of "floodgates" which might return the Court to one of fault and misconduct in property matters, therefore referring to the principle only applying to "exceptional cases" and a "narrow band of cases" in which these considerations apply. His Honour said that such cases might have been exceptional at the time, but the prevalence of family violence is wide and attempts to limit its recognition to a narrow band of cases has no basis in principle. The words "significantly" and "more arduous" in cannon should not be interpreted as needing to

meet a threshold of "exceptionalism". Terms such as "exceptional" and "narrow" add an unacceptable gloss to the principle. The threshold is conduct that has a discernible effect on the contributions of the other party.

(b) His Honour observed that recent cases have softened the harshness of the original application of *Kennon* and gave the example of how the adverse impact of family violence on the contributions of a party can be inferred from the lay evidence of the parties (citing *Maine*).

(c) His Honour identified that the trial judge did not explain how the husband's acts of violence led to the non-financial contributions of the wife being made more arduous. The impact can be inferred from the evidence (citing *Maine*). In particular, the trial judge's findings did not deal with the extent of the effect of the conduct on the wife. His Honour found this to be an appealable error.

1.5 *Elmanu & Elmanu* [2022] FedCFamC2F 630

The trial judge determined a 61%/39% property adjustment in favour of the wife after assessing contributions 55%/45% in the wife's favour and assessing the matters on 75(2) as warranting a further adjustment. The relationship was a 32-year marriage with three children. The net property interests of the parties was found by the trial judge to have a value of $3.9 million.

The husband argued that the trial judge erred by considering the *Kennon* argument independently of the other contributions of the parties and that the trial judge had given inadequate reasons as to the 10% differential in the assessment of contributions.

The wife identified four instances of physical violence (or threats of physical violence including slapping the wife in the wife, backhanding the wife, punching and kicking the wife during an argument, and lunging at the wife breaking her phone. The wife also gave evidence of verbal abuse almost every day while the parties ran the business together, making her loathe going to work and causing difficulties in her concentration. She would also retreat to her bedroom and isolate herself for days at a time. The husband did not respond to or challenge any of the allegations except the phone lunging incident. In cross-examination he give non-responsive answers or denied the events or accused the wife of lying.

The trial judge identified the husband in cross-examination as being belligerent, impatient, and aggressive and making large and sudden gestures that were physically intimidating.

The trial judge found that the incidents of physical violence, which were sporadic, did not have the requisite effect on the wife's capacity to contribute. However, the trial judge found that the husband's verbal abuse which made the wife loathe going to work and so on, did impair her capacity to contribute.

The reasons of Tree J can be summarised as follows:

(a) The trial judge did not assess contributions holistically but instead applied *Kennon* to justify an "uplift" to the wife's contributions where contributions were otherwise assessed equally (i.e. the same error identified in *Benson*). However, the error had no influence upon the result as the percentage adjustment was open to the primary judge on the evidence.

2. Full Court of the Family Court of Australia

2.1 *Benson & Drury* [2020] FamCAFC 303

The trial judge assessed the parties' contributions as equal but found that the impact of family violence on the wife both during the relationship and post-separation more arduous and therefore "assessed the adjustment at 5%" in the wife's favour. The trial judge made a further adjustment on the basis of section 90SF(3) factors, so the ultimate property division was 60%/40% in favour of the wife.

The trial judge determined the property of the parties as having a net value of $2,259,053. The period of cohabitation was about 11 years from 2004 to late 2014. There were two children born 2005 and 2008. The husband had argued that his initial contributions warranted a 65% adjustment in his favour. The wife had argued that she suffered family violence warranting a 60% adjustment in her favour.

The trial judge had adopted findings by another judge made in parenting proceedings between the parties which included findings that there had been physical altercations and coercive and controlling conduct both during the relationship and post-separation notwithstanding after separation there was no longer a physical component. The husband had relied on a report by the wife's therapist indicating the wife was able to compartmentalise the emotional dysregulation caused by the family violence so that it did not impact her work – the trial judge found this was in fact evidence of how the wife had been impacted by family violence. The husband relied on the wife's success in obtaining qualifications and her professional career as evidence that she had not been adversely affected by family violence – the trial judge said the fact that she achieved these things did not mean she did so without burden.

The husband alleged on appeal inadequacy of reasons, among other things, and complained that the trial judge gave inadequate weight to his initial contributions.

One ground alleged by the husband was that the trial judge considered the *Kennon* argument independently of other contributions of the parties (i.e. contrary to the principle in *Jabour* requiring contributions to be assessed holistically). In particular, the trial judge erroneously referred to the "adjustment" made in relation to the *Kennon* argument.

A summary of the reasons of Strickland, Watts & Austin JJ is as follows:

(a) It is an error to segment and comparatively analyse one contribution as against the other contributions (citing *Jabour & Jabour* (2019) FLC 93-898). In this case, the trial judge did so by finding that on the one hand the parties' overall contributions were equal but that on the other hand the *Kennon* claim warranted an "adjustment" in the wife's favour. The trial judge ought to have identified the contributions made significantly more arduous by family violence and weighed them against all other contributions. Ground 1 of the appeal therefore succeeded. However, notwithstanding this, there should be no re-hearing as there the trial judge's error produced no miscarriage of justice – the evidence was such that a contribution-based assessment of 55%/45% was appropriate.

(b) The principle in *Kennon* requires the conduct of one party to have had a "significant" adverse effect on the contributions of the other party or to have made that party's contributions "significantly more arduous" than they ought to have been. The conduct has to have had a "discernible impact" upon the contributions of the party.

(c) The use of the word "quantification" of the effect of violence by the Full Court in *S & S* should not be interpreted as requiring something other than a nexus between a finding of family violence and the significant adverse effect on the victim's contributions capable of being inferred from the lay evidence of the parties (citing *Keating & Keating* (2019) FLC 93-894).

2.2 *Keating & Keating* [2019] FamCAFC 46

The wife contended that she had been exposed to significant family violence by the husband during their relationship as well as after the relationship concluded. The husband accepted an incident during which the wife suffered a broken wrist, but otherwise denied the allegations of family violence generally.

The trial judge cited the Full Court's decision of *Spagnardi & Spagnardi* [2003] FamCA 905 to conclude that there was a lack of evidence from the wife which made it one of the small number of cases where the Court can be satisfied the wife's contributions were made more onerous in a *Kennon* sense. The trial judge also noted that that the number of separations

that occurred between the parties reduced the length of the actual relationship of cohabitation by nearly 2 years.

This meant that the wife's evidence that the husband had broken her nose, beat her until she passed out and suffered serious bruising, broke her ribs, frequently abused her which undermined her self-worth, she had been confined her to bed due to her injuries, the husband's abuse undermined her parenting, the violence and abuse impacted her mental health, and three domestic violence orders were made for her protection, was given no weight by the trial judge.

There were various grounds of appeal including about how the trial judge dealt with single expert business valuation evidence, but this summary will focus on the wife's ground of appeal in relation to the trial judge failing to consider her evidence about family violence.

The reasons of the joint judgment of Ainslie-Wallace & Ryan JJ in relation to family violence can be summarised as follows:

(a) While the use of "quantification" by the Full Court in *Spagnardi* suggests a need for expert or actuarial evidence in relation to the impact of the family violence on contributions, it is difficult to understand what that evidence might be. It adds a gloss to the principle in *Kennon* which was presumably not the intention of the Full Court. The Full Court was merely emphasising the need for evidence connecting the conduct complained of with the capacity to make contributions. As this point was not argued on appeal, their Honours did not express a final view about it.

(b) The trial judge did not consider the inferences he could have drawn from the wife's evidence about the effect of the violence on her in conjunction with her evidence about the severity of the violence. The trial judge focused on the wife's broken wrist apparently because her other evidence was uncorroborated. However, a party does not require their evidence to be corroborated for it to be accepted (citing *Amador*).

(c) The trial judge should have focussed on the "discernible impact" of the husband's violence on the wife's capacity to make contributions instead of whether there was evidence of "quantification" of that effect.

The reasons of Austin J in relation to family violence can be summarised as follows:

(d) His Honour disagreed that the trial judge erred in his consideration of the evidence concerning family violence. That is because having found that the parties' liabilities exceeded their assets, there was no equity in assets in respect of which their proportionate entitlement to those assets could be assessed. No matter how much more onerous the wife's contributions were found to be on account of family violence, it could not result in any tangible increase in her share of the net assets.

(e) His Honour did not agree that the trial judge gave no consideration to inferences that could have been drawn from the wife's evidence. The trial judge was faced with two irreconcilable versions of history – there was evidence that the wife was also violent towards the husband including having homicidal feelings towards him. The periods of separation totalling 2 years also indicated the wife was able to leave the relationship when intolerant of the conditions in it. It was apparent the trial judge did not accept the wife's allegations as being more reliable than the husband's denials. Therefore, corroboration would have been persuasive.

(f) Section 164(1) of the *Evidence Act 1995* abolished the need for evidence to be corroborated and therefore *Amador* takes the debate no further. However, the absence of corroborate evidence when it would ordinarily be expected enable an adverse inference to be drawn that the evidence would not have advanced the party's case (citing *Katsilis v Broken Hill Pty Ltd*).

(g) The guidelines for *Kennon* are reserved for what the Full Court called a "relatively narrow band of cases".

2.3 *Kennon & Kennon* (1997) FLC ¶92-757

The facts of *Kennon* are extensive but can be summarised as follows:

(a) The parties cohabited for approximately 5 years. They had no children. The parties' net interests were approximately $8.8 million most of which was held in the husband's sole name. The husband had an advertising business which the work wife worked in part-time. During the relationship, the husband's children from a previous relationship spent time with the parties. At the time of trial, the husband's income was approximately $1 million per annum and the wife's income was approximately $36,000 per annum. Her income had been approximately $45,000 per annum at the commencement of the relationship. After separation, she was employed in a similar role to that which she had performed in the husband's business.

(b) The wife brought a damages claim in the Family Court of Australia as part of a property settlement application, with respect to a series of assaults including 11 specific instances of assault. The trial judge accepted 4 of these instances and assessed damages, totalling $43,000. The wife had medical evidence, including that from her general practitioner who swore an affidavit diagnosing the wife as suffering from anxiety among other things including a marked change in her personality over the period of her marriage. The husband has required the wife to see a different doctor whose affidavit and report generally supported the wife's medical evidence.

(c) The wife sought a property adjustment order requiring the husband to pay her $1.3 million (i.e. approximately 15% of the parties' net interests), whereas the husband sought that the payment be only $150,000. The trial judge ordered the payment be $400,000, with $200,000 being attributed to the contributions-based assessment and a further $200,000 being an adjustment for section 75(2) factors.

(d) In reaching the conclusion as to property adjustment, the trial judge determined that the wife had:

    (1) made no financial contributions under subsection 79(4)(a);

    (2) made limited non-financial contributions under subsection 79(4)(b);

    (3) had benefitted the lifestyle afforded to her by the husband's wealth, as a factor to be taken into account under subsection 79(4)(c);

    (4) the family violence during the marriage had not affected the wife's contributions and to the extent they had affected her health she was compensated by the damages award; and

    (5) not had her earning capacity affected by the duration of the marriage.

The reasons of the joint judgment of Fogarty and Lindenmayer JJ can be summarised as follows:

(a) The trial judge's discretionary assessment of the wife's contributions was wrong and her contributions within subsection 79(4)(c) had been undervalued. The wife contributed fully to the task of wife and homemaker. She brought into the marriage qualities that appealed to the husband and which both understood were to be her contributes to their married life together. Marriage involves a myriad of matters, large and small, which go to make up that union and differentiate it from more casual, transitory relationships. It involves sharing the minutiae of daily life, support during good and bad times, care and intimacy. These and other matters are intended to be encompassed by the matters in section 79.

(b) Domestic violence (and conduct) can be relevant (in a narrow band of cases) if the conduct that occurred during the course of the marriage and had a discernible impact

upon the contributions of the other party. It is not directed to conduct related to the breakdown of the marriage.

(c) With respect to section 75(2) factor, there was a clear diminution in the wife's income comparing it at the commencement of the relationship versus at the time of trial. This is attributable to a significant degree to the marriage and mutual decisions made by the parties during the marriage.

(d) their Honours observed that:

(1) The definition of "domestic violence" has received little attention in the case law.

(2) It has only been recently that the "*pervasiveness and destructiveness*" of domestic violence had at least been "*partly acknowledged*" in Australia. Until recently both in the law and society generally, there was a "veil of silence over it" or it was considered inappropriate for society or the law to intervene in disputes within the private sphere of the home. The law has begun to explore remedies and dress consequences of domestic violence.

(3) The above principles discussed in relation to domestic violence are not confined only to domestic violence, that is just the most obvious example of a category of conduct that may be relevant within section 79 determinations.

(4) In the years leading up to the enactment of the *Family Law Act 1975*, there was increasing dissatisfaction with the connection between property settlement and conduct. The early decisions of the Court were quick to adopt the view that "conduct" was no longer relevant in disputes under section 79.

(5) With respect to damages, there is a risk of "double counting".

2.4 *Fisher & Fisher* (1990) FLC ¶92-127

The wife made a property settlement application and relied on an affidavit containing allegations that he husband had committed severe assaults on her. The husband filed an application to strike out the allegations. Cook J heard the application and refused to strike out the material on the basis that "*If a party is subjected to a situation within a marriage relationship where they endure … violence … and nevertheless they continue to perform the role of homemaker, then it is difficult to see that those matters can be left out of consideration by the court*". The husband appealed that decision.

The reasons of Justice Nygh (with whom Baker and Murray JJ agreed) can be summarised as follows:

(a) His Honour observed that the issue before the court was to what extent, if any, can conduct be a relevant consideration in applications under s.79.

(b) There is no direct reference to parties' conduct in either s.79(4) or 75(2) of the *Family Law Act 1975*. Therefore, if conduct by one party towards the other is to be taken into account, it can only be done pursuant to section 75(2)(o) (citing *Soblusky* for the principle that facts within s.75(2)(o) relating to marital history must be broadly financial in nature).

(c) His Honour referred to the Full Court in *Ferguson and Ferguson* (1978) FLC ¶90-500 for the principles that there is no justification in the legislation for taking into account matrimonial misconduct under section 75(2)(o), unless conduct results in dissipation of assets which might require consideration as to whether a party can support themselves adequately or where matrimonial misconduct has affected the other spouse's earning capacity (citing *Barkley*).

(d) His Honour referred to *Barkley* as being decided in the early operation of the *Family Law Act 1975* before the Full Court had clarified the position in *Soblusky* and *Ferguson*.

(e) In the present case, the wife's allegations in her affidavit allege misconduct but do not contain allegations that the wife's contribution was therefore increased or that she suffered any diminution in her earning capacity. **Even if the misconduct of the husband had that consequence it would not per se have been relevant**.

(f) For those reasons, the first instance judge was in error by refusing to strike out the allegations.

Justice Murray, agreeing with Nygh J, added confirmation that conduct is not relevant per se unless the conduct has had the consequence of affecting a party's contribution and needs in a financial sense.

2.5 *Ferguson and Ferguson* (1978) FLC ¶90-500

The parties separated in 1975 after 8 years of marriage. The wife petitioned for divorce on the ground of adultery. After separation, the husband continued to work for a family business, lived in a rent free home, had some of his other living expenses paid for by the business, and had other funds. The parties jointly owned a home together. During the marriage, the wife had worked part-time for the family business and made financial contributions.

The trial judge determined the section 79 property settlement claim by taking into account to marital conduct pursuant to section 75(2)(o).

The reasons of Watson and Wood JJ can be summarised as follows:

(a) While *Soblusky* determined the scope of section 75(2)(o), there remains uncertainty about the relevance of conduct in section 79 property adjustment disputes. Their Honours held that similar reasoning as was applied in *Soblusky* should apply to all applications under Part VIII whether founded on section 72, 74, or 79.

(b) Conduct is usually only relevant if the conduct itself has produced consequences that have diminished or destroyed the property of the parties, or the effect of it has bene to cause the recipient of the conduct to act in a way which has resulted in the value of the property being diminished or in the property being lost to the parties.

(c) There are rare cases where no contribution has been made whatsoever and in this context, the basic concept of a "partnership" inherent in a marriage is ignored, and by virtue of section 43 of the *Family Law Act 1975* (regarding the sanctity of marriage etc.) conduct may therefore be relevant.

(d) There are rare cases such as *Barkley* the conduct of one party has economic consequences for the other party (e.g. assault causing physical disability).

(e) The intention of the *Family Law Act 1975* which is silent on behaviour/conduct is that matrimonial fault in the general sense is not to be taken into account. **The *Family Law Act 1975 does not set out to punish parties on any basis when it comes to deciding their financial relationship…***

The reasons of Strauss J included that:

(f) His Honour rejected the notion that section 43 contained "matters" that could be imported to section 75(2)(o) – the section instead contained principles the court must have regard to when exercising its jurisdiction.

(g) Section 75(2)(o) should be read in context and taken as referring to matters germane to the matters in subsections (a) to (n) inclusive.

2.6 *Soblusky and Soblusky* (1976) FLC ¶90-124

A wife brought a spousal maintenance application against a husband at the conclusion of a marriage of some 32 years. The first instance judge (a Magistrates of the Rockhampton Magistrates Court) under the ambit of s.75(2)(o), had given the parties latitude to explore evidence about their conduct and ultimately accepted the husband's evidence that the wife:

> "[S]*ubjected him to a life of constant nagging and that she completely dominated him and subjected him to frequent abuse, generally violent and aggressive conduct and in particular that from time to time she threw things at him, threatened him on one occasion with a knife, "belted him up" on a number of occasions and on at least one occasion cut up his clothing with a knife* …".

After separation, the husband transferred the wife his interest in the matrimonial home and in return received $1,000 (linked to inheritance monies he had received prior to separation) and a motor vehicle. He said this was part of an agreement by which the wife would not claim maintenance from him, which she then did. At the time of the hearing, the wife was earning social security payments of $38.75 per week and the husband was a lino layer earning $100 per week but supporting his new partner. The wife's evidence was that she "existing on" the amount she received. The first instance judge found that the conduct of the wife was "so soul destroying" as to amount to being "obvious and gross" as to excuse the husband from contributing to the wife's financial support as a section 75(2)(o) factor. The judge also took account of the fact that the husband had relinquished any claim to the former matrimonial home and was living in a caravan with his new de facto partner with minimal assets.

The wife then appealed to a single judge of the Supreme Court of Queensland. The question on appeal was whether the magistrates was entitled to take into account the matters he did take into account under s.75(2) about the wife's conduct. The appeal judge held that conduct of the parties can only be taken into account where it is "both gross and obvious" (citing an English case of *Wachtel* but expressing concerns that this case arose from a different legislative context). The appeal judge found that the magistrate made an error by categorising the wife's conduct as "so gross and obvious" as to make any order for maintenance not in the interests of justice. The appeal judge order the husband to pay maintenance of $9 per week.

The husband appealed to the Full Court of the Family Court of Australia. He argued that the conduct of the parties was still relevant absent clear intention of the legislature and was still relevant in parenting cases and cases for injunctions. He said a husband should not be compelled to support a wife, for example, who had abandoned the marriage and was living in a relationship with another man. He argued that where conduct was "obvious and gross" it should be taken into account under section 75(2)(o). He argued that section 75(2)(l) which refers to the need to protect a party' role as parent could be elide on negatively – i.e. if the other party can show the applicant had repudiated their role as parent, it would be a disqualifying circumstance.

The main issue on appeal was the scope of s.75(2)(o).

The reasons of Demack, Watson, and Fogarty JJ can be summarised as follows:

(a) Their Honours observed that the *Family Law Act 1975* which came into effect on 5 January 1976 replaced the *Matrimonial Causes Act 1959-1966* which contained a provision about the court's power to make maintenance orders which said the court could "*make such orders as it thinks proper, having regard to the means, earning capacity* ***and conduct of the parties*** *to the marriage and all other relevant circumstances*". The State based maintenance acts which were also replaced were similar and included elements of conduct of both parties such as "unlawful desertion" or "wilful neglect". Their Honours cited cases under this legislation where it was clear that marital conduct of the applicant was a factor that had disqualified the applicant from a maintenance claim or resulted in a diminished claim.

(b) Their Honours observed that it is against this background that the provisions of the *Family Law Act 1975* need to be considered. Section 72 of the *Family Law Act 1975* refers to the capacity of the respondent and the incapacity of the applicant and states that the court must have record "*only to*" the matters in section 75(2). The emphasis is therefore clearly on capacity and need. The factors in section 75(2) are mostly directed to considerations of a financial nature. Their Honours referred to some early trial decisions under the new *Family Law Act 1975* where judges had determined that conduct that was "gross and obvious" could be relied on under section 75(2), linking it to an English case called *Watchel*.

(c) Their Honours determined from the history of the legislation that:

(1) section 75(2)(o) is couched widely and should not be read down;

(2) facts within 75(2)(o) do not include facts or circumstances relating to marital history but relate only as to facts or circumstances of a broadly financial nature. The previous legislation made martial conduct expressly relevant and the fact that the new legislation makes no express reference to conduct cannot be ignored; and

(3) in rare and exceptional cases, matters falling within section 43 (which provides that the court must have regard to the protection of the institution of marriage and similar matters) may be facts or circumstances that can be taken into account. Otherwise, in maintenance proceedings, marital conduct of parties is irrelevant and inadmissible.

(d) The first instance magistrates' ruling was wrong because it was based on permitted evidence and cross examination about reasons for the disruption of the marriage.

(e) However, when looking at the financial position of the husband, his income is clearly insufficient to meet his day to day commitments and he had no real capacity to make any maintenance payments to the wife. It was unrealistic to make an order for maintenance against him. The first instance magistrate was therefore correct in dismissing the maintenance application.

3. Family Court of Australia

3.1 *Sheedy & Sheedy* (1979) FLC ¶90-719

In a property settlement dispute, the trial judge was asked to rule on the admissibility of allegations in the wife's affidavit regarding the husband's behaviour towards her. The wife argued the allegations were relevant in relation to s.79(4)(b) which referred to contributions.

The reasons of Justice Nygh can be summarised as follows:

(a) Decisions of this court mean that behaviour of the parties against each other is not relevant under ss.74 of 79 of the *Family Law Act* unless it has financial consequences. Conduct can result in waste of family assets or physical disabilities (citing *Barkley*).

(b) Section 79(4)(b) refers to contributions in the capacity as homemaker and parent – a failure to make such contributions is relevant whether due to fault or misfortune. However, it is not enough to merely allege misconduct and expect the court to draw the inference the misconduct resulted in a non-contributions. A spouse can mistreat another and yet the other can make adequate home maker and parenting contributions.

(c) Section 79(4)(b) refers to contributions to home and children, not conjugal responsibilities. It does not talk about contributions to the physical or mental well-being of the other spouse (c.f. modern cases which talk about mutual companionship).

(d) In this case, mere allegations that a husband mistreated his wife and was unfaithful to her say nothing about his contribution to the house or as a parent. To allege that as a result of the maltreatment, the applicant's job as homemaker and parent was made more difficult is to revive old claims for compensation for matrimonial misconduct. The *Family Law Act* is supposed to have ended that particular approach to finalising matrimonial disputes. The wife needs to show that the husband's conduct resulted in his contributions being lessened and her contributions being increased. In other words, it is not the reason for non-contribution but the non-contribution itself.

(e) The evidence is therefore inadmissible.

4. Supreme Court of New South Wales

4.1 *Barkley v Barkley* (1977) FLC ¶90-216

The parties were married for 18 years and had two children. Both parties worked during the relationship. The wife was a clerk and the husband was a butcher. Their primary asset was a home in South-West Sydney purchased in 1957 for £3,750 (the Australian dollar commenced about 10 years later). The husband's father loaned the parties £3,000 which was never repaid and the parties borrowed the rest from the bank which they repaid 2 years later. The market value of the home at trial was $29,000. During an argument about 3 months prior to separation, the husband struck the wife permanent deafness in her right ear. It was agreed that the assault caused the deafness ear. Her hearing in her left ear was already impaired, so this affected her employment prospects. She brought a private criminal prosecution against the husband who was found guilty of assault causing bodily harm and the wife obtained $4,000 compensation from the District Court of New South Wales.

The wife then brought a property settlement claim against the husband and sought that she retain the former matrimonial home worth $29,000 which the parties owned as co-tenants. For several months following separation, the husband paid maintenance of $40 a week and gave the wife and sons free meat.

The wife's case was that her property settlement should take into account the $4,000 compensation, her $2,000 costs of the criminal proceeding, unpaid child maintenance of $2,445 (claimed retrospectively for 3 years), $800 in council rates paid by her post-separation, $1,000 for the wife's lost wages arising from the assault, and a sum to compensate the wife for possible loss of future employment. At the time of trial, the wife was still employed in her clerk position. In summary, her case was these factors were sufficient that her entitlement should be assessed to include the husband's half-share of the $29,000 property (i.e. $14,500).

The husband's case was that the wife should have sole use and occupation of the home until their 16 year old son turned 18 and then the house sold with the sale proceeds divided equally, except that out of the husband's half-share he pay the wife the $4,000 compensation he owed.

The husband argued that the *Family Law Act* did not give the court jurisdiction to compensate a spouse for future economic loss resulting from an assault by the other spouse. He said the court's powers under the *Family Law Act* only arose with respect to the "marriage" power or the "matrimonial causes" power in the Constitution. He said a criminal assault or tort fell within neither. He also argued that:

- conduct of the parties cannot be considered in deciding what is "just and equitable".
- there was no evidence about the wife's earning capacity being effected;
- the wife's claim for her criminal law legal costs to be factored into her property settlement claim was not just and equitable, because the District Court had not ordered costs;
- the wife's claim is effectively for damages and if it was taken into account in her property settlement, there would be no issue estoppel available to the husband to prevent the wife from recovering twice.

The reasons of Justice Carmichael can be summarised as follows:

(a) The husband's argument about "matrimonial causes" is wrong and the court can consider the effects of an assault in a property adjustment case:

(1) If the *Family Law Act* did not give the court power to deal with assault or tort between spouses, then it would not be able to exercise power under s.114 of the *Family Law Act* being the power to make injunctions for the personal protection of a party to the marriage.

(2) Section s.119 of the *Family Law Act* stated that either party to a marriage could bring proceedings in contract or tort against the other.

(3) While the *Family Law Act* gives the court power to adjust the rights of parties in a matrimonial course and tells it certain matters to take into consideration, it does not mean each matter the court considers has to be a matrimonial cause itself: e.g. considerations such as the age and health of a party, a party's financial resources, a party's responsibility to support another person—things that are quite outside the scope of a matrimonial cause. In any event, considerations of matrimonial violence have traditionally been grounds for divorce.

(4) There is a difference between a power to adjudicate on an assault and take into consideration the consequence of an assault.

(b) The wife's hearing loss is clearly a section 75(2) factor relating to both her health and her capacity for gainful employment. If it was necessary for the court to have evidence that a person's deafness impacted their employability, the law would indeed be "asinine".

(c) "Conduct of the parties" was a phrase used in the repealed *Matrimonial Causes Act* which does not appear in the *Family Law Act* and **it follows the court should not look at the marital conduct of the parties in coming to a decision as to what property distribution is just and equitable. It does not follow that financial consequences of some conduct of one spouse to the other is not to be considered (e.g. where one party has stolen, or borrowed and squandered, the funds of the other party).**

(d) In this case, the wife has a claim for damages against the husband. She asks that these damages, which she could seek at common law, be taken into account in her property settlement. Doing so is a just and expedient method of finally determining the financial relationships between the parties to the marriage and avoiding further proceedings against them (citing s.81 of the *Family Law Act*).

(e) I consider the proper range for damages to be between $12,000 and $20,000. The wife should receive the benefit of about $16,000. This is slightly greater than what the husband's interest in the home is worth. The wife receiving the home also takes into consideration her need for security of a home having regard to her physical condition. Making the order she seeks also prevents any other claims by her.

(f) The legal costs incurred by the wife and the husband's failure to pay maintenance for periods when it was not sought are not relevant considerations.

The final order provides that al of the wife's rights, at common law or by statute, arising out of the assault be merged into the transfer by the husband of his interest in the home to the wife and the wife is restrained from bringing any further action against the husband for damages or compensation arising out of the assault.