

## **Navigating property settlements in the shadow of family violence**

Property settlements in family law are rarely straightforward, but when family violence is involved, the complexity deepens. While family violence is commonly front and centre in parenting disputes, its impact on financial matters is often not considered by practitioners when preparing a case. Under the new section 79(4)(ca) and (5)(a), and s90SM (4)(ca) and (5)(a) of the *Family Law Act 1975 (Cth)* (the Act), family violence must form part of decision making and advice in all property matters.

Parliament has attempted to codify the decision of *Kennon & Kennon* (1997) FAMCA 27, along with a number of other decisions, into the new s79(4)(ca) and (5)(a) and 90SM (4)(ca) and (5)(a). According to the Explanatory Memorandum that accompanies the *Family Law Amendment Act 2024*:

“These amendments send a strong message to the community that property settlement outcomes should recognise the effect of family violence on individuals, and on the wealth and welfare of the family, where this is relevant. The amendments make clear to the family law courts, and parties negotiating outside of court, that the economic consequences of family violence can be considered when resolving the property and financial aspects of relationship breakdown.”<sup>1</sup>

For family lawyers, understanding how to identify family violence, prepare and run these cases is essential to navigating just and equitable outcomes for clients.

This paper should be read in conjunction with Chapter 25 of the Foley’s List property book which was co-authored by Geoff Dickson KC and I.

This paper will explore:

- What is family violence?
- What is a Kennon argument
- The new legislation

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<sup>1</sup> The Parliament of the Commonwealth of Australia, House of Representatives, Family Law Amendment Bill 2024, Explanatory Memorandum.

- How to prepare a property case where family violence is relevant

### ***What is Family Violence?***

As part of the amendments which commenced on 10 June 2025, the definition of family violence in section 4AB of the Act has again been expanded to try to encapsulate how broad family violence can be and now specifically includes economic and financial abuse, related conduct as well as dowry abuse. It is important to remember that the Act cannot possibly capture every type of family violence and lists non-exhaustive examples.

### **4AB Definition of *family violence* etc.**

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
  - (e) intentionally damaging or destroying property; or
  - (f) intentionally causing death or injury to an animal; or
  - (g) economic or financial abuse; or
  - (h) preventing the family member from making or keeping connections with his or her family, friends or culture; or
  - (i) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(2A) For the purposes of paragraph (2)(g), examples of behaviour that might constitute economic or financial abuse of a family member include (but are not limited to) the following:

- (a) unreasonably denying the family member the financial autonomy that the family member would otherwise have had, such as by:
  - i. forcibly controlling the family member's money or assets, including superannuation; or
  - ii. sabotaging the family member's employment or income or potential employment or income; or
  - iii. forcing the family member to take on a financial or legal liability, or status; or
  - iv. forcibly or without the family member's knowledge, accumulating debt in the family member's name;
- (b) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or the family member's child (including at a time when the family member is entirely or predominantly dependent on the person for financial support);
- (c) coercing a family member (including by use of threats, physical abuse or emotional or psychological abuse):

- i. to give or seek money, assets or other items as dowry; or
  - ii. to do or agree to things in connection with a practice of dowry;
- (d) hiding or falsely denying things done or agreed to by the family member, including hiding or falsely denying the receipt of money, assets or other items, in connection with a practice of dowry.
- 3. For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
- 4. Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
  - (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
  - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
  - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
  - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
  - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Family violence is a scourge on our society, which Australia appears to be struggling to deal with. Whilst all genders experience family violence, statistically women are more than three times as likely to experience family violence than men.<sup>2</sup> Family violence is the leading cause of “death, disability and illness in women aged 25-44 [more] than any other preventable risk factor.”<sup>3</sup>

According to the Federal Circuit and Family Court of Australia's (FCFCOA) annual report, 83% of all matters commenced in the FCFCOA allege that one partner has experienced family violence and 77% allege that a child has been exposed to or has experienced family violence.<sup>4</sup>

### **What is a Kennon Argument?**

In the words of their Honours, Justices Fogarty and Lindenmayer JJ in the case of *Kennon & Kennon* (1997) at 84,294:

“Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way,

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<sup>2</sup> Australian Bureau of Statistics Personal Safety Survey 2021-2022.

<sup>3</sup> Australian Institute of health and welfare 2018, Family, domestic and sexual violence in Australia 2018m Cat. No. FDV 2. Canberra: AIHW.

<sup>4</sup> Federal Circuit and Family Court of Australia Annual Reports 2023-2024.

to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which the trial judge is entitled to take into account in assessing the parties respective contributions within s79.”<sup>5</sup>

If the Court assesses that one party’s contributions have been made “significantly more arduous than they ought to have been”<sup>6</sup>, due to family violence it can then make an adjustment in favour of that party when assessing contributions. In the new sections of the Act, the word significantly no longer appears. It is important to note that the Court should not prescribe a specific percentage adjustment for a “Kennon argument.”

## The Law

Most of you will be familiar with the following sections, which set out how the Court can alter property interests in a marriage or de facto relationship and what they should consider when doing so.

### 79 Alteration of property interests

#### *Orders in property settlement proceedings*

1. In property settlement proceedings, the court may, subject to subsection (6), make such order as it considers appropriate:
  - (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or
  - (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage—altering the interests of the bankruptcy trustee in the vested bankruptcy property;including:
  - (c) an order for a settlement of property in substitution for any interest in the property; and
  - (d) an order requiring:
    - i. either or both of the parties to the marriage; or
    - ii. the relevant bankruptcy trustee (if any);to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

Note: Subsection (6) relates to property that is a companion animal.

2. The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

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<sup>5</sup> *Kennon & Kennon* (1997) at 84,294.

<sup>6</sup> *Ibid.*

3. In considering what order (if any) should be made under this section in property settlement proceedings, the court:
- (a) is to identify:
    - i. the existing legal and equitable rights and interests in any property of the parties to the marriage or either of them; and
    - ii. the existing liabilities of the parties to the marriage or either of them; and
  - (b) is to take into account (except for the purpose of making an order with respect to the ownership of property that is a companion animal):
    - i. the considerations set out in subsection (4) (considerations relating to contributions); and
    - ii. the considerations set out in subsection (5) (considerations relating to current and future circumstances).

Note: See subsections (6) and (7) in relation to orders with respect to property that is a companion animal.

*Considerations relating to contributions*

4. For the purposes of subparagraph (3)(b)(i), the court is to take into account the following considerations, so far as they are relevant:
- (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
  - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them;
  - (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent;
  - (ca) the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the ability of a party to the marriage to make the kind of contributions referred to in paragraphs (a), (b) and (c);**
  - (d) the effect of any proposed order upon the earning capacity of either party to the marriage;
  - (f) any other order made under this Act affecting a party to the marriage or a child of the marriage;
  - (g) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage has provided for a child of the marriage.

*Considerations relating to current and future circumstances*

5. For the purposes of subparagraph (3)(b)(ii), the court is to take into account the following considerations, so far as they are relevant:

- (a) the effect of any family violence, to which one party to the marriage has subjected or exposed the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;**
- (b) the age and state of health of each of the parties to the marriage;
- (c) the income, property and financial resources of each of the parties to the marriage and the physical and mental capacity of each of them for appropriate gainful employment;
- (d) the effect of any material wastage, caused intentionally or recklessly by a party to the marriage, of property or financial resources of either of the parties to the marriage or both of them;
- (e) any liabilities incurred by either of the parties to the marriage or both of them, including the nature of the liabilities and the circumstances relating to them;
- (f) the extent to which either party to the marriage has the care of a child of the marriage who has not attained the age of 18 years, including the need of either party to provide appropriate housing for such a child;
- (g) commitments of each of the parties to the marriage that are necessary to enable the party to support themselves and any child or other person that the party has a duty to maintain;
- (h) the responsibilities of either party to the marriage to support any other person;
- (i) the eligibility of either party to the marriage for a pension, allowance or benefit under:
  - i. any law of the Commonwealth, of a State or Territory or of another country;  
or
  - ii. any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;
- (j) if either party to the marriage is eligible for a pension, allowance or benefit as mentioned in paragraph (i)—the rate at which it is being paid to the party;
- (k) if the parties to the marriage have separated or divorced, a standard of living that in all the circumstances is reasonable;
- (l) the extent to which an alteration of the interests of the parties to the marriage in any property would enable a party to undertake education or establish a business or otherwise obtain an adequate income;
- (m) the effect of any proposed order on the ability of a creditor of a party to the marriage to recover the creditor's debt, so far as that effect is relevant;
- (n) the extent to which each party to the marriage has contributed to the income, earning capacity, property and financial resources of the other party;
- (o) the duration of the marriage and the extent to which it has affected the earning capacity of each party to the marriage;
- (p) the need to protect a party to the marriage who wishes to continue that party's role as a parent;
- (q) if either party to the marriage is cohabiting with another person—the financial circumstances relating to the cohabitation;

- (r) the terms of any order or declaration made, or proposed to be made, under Part VIIIAB in relation to:
  - i. a party to the marriage; or
  - ii. a person who is a party to a de facto relationship with a party to the marriage; or
  - iii. the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - iv. vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii);
- (s) any child support under the Child Support (Assessment) Act 1989 that a party to the marriage is to provide, or might be liable to provide in the future, for a child of the marriage;
- (t) the terms of any financial agreement that is binding on the parties to the marriage;
- (u) the terms of any Part VIIIAB financial agreement that is binding on a party to the marriage;
- (v) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

*Considerations relating to companion animals*

6. In property settlement proceedings, so far as they are with respect to property that is a companion animal, the court may make an order (including a consent order or an interim order):
  - (a) that only one party to the marriage, or only one person who has been joined as a party to the proceedings, is to have ownership of the companion animal; or
  - (ab) that the companion animal be transferred to another person who has consented to the transfer; or
  - (b) that the companion animal be sold.

The court may not make any other kind of order under this section with respect to the ownership of the companion animal.

Note: For companion animal, see subsection 4(1).

7. In considering what order (if any) should be made under this section with respect to the ownership of property that is a companion animal, the court is to take into account the following considerations, so far as they are relevant:
  - (a) the circumstances in which the companion animal was acquired;
  - (b) who has ownership or possession of the companion animal;
  - (c) the extent to which each party cared for, and paid for the maintenance of, the companion animal;
  - (d) any family violence to which one party has subjected or exposed the other party;
  - (e) any history of actual or threatened cruelty or abuse by a party towards the companion animal;
  - (f) any attachment by a party, or a child of the marriage, to the companion animal;

- (g) the demonstrated ability of each party to care for and maintain the companion animal in the future, without support or involvement from the other party;
- (h) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

## **90SM Alteration of property interests**

### *Orders in property settlement proceedings*

1. In property settlement proceedings after the breakdown of a de facto relationship, the court may, subject to subsection (6), make such order as it considers appropriate:
  - (a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them—altering the interests of the parties to the de facto relationship in the property; or
  - (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the de facto relationship—altering the interests of the bankruptcy trustee in the vested bankruptcy property;
 including:
  - (c) an order for a settlement of property in substitution for any interest in the property; and
  - (d) an order requiring:
    - i. either or both of the parties to the de facto relationship; or
    - ii. the relevant bankruptcy trustee (if any);
 to make, for the benefit of either or both of the parties to the de facto relationship or a child of the de facto relationship, such settlement or transfer of property as the court determines.

Note 1: The geographical requirement in section 90SK must be satisfied.

Note 2: The court must be satisfied of at least one of the matters in section 90SB.

Note 3: For *child of a de facto relationship*, see section 90RB.

Note 4: Subsection (6) relates to property that is a companion animal.

2. The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
3. In considering what order (if any) should be made under this section in property settlement proceedings, the court:
  - (a) is to identify:
    - i. the existing legal and equitable rights and interests in any property of the parties to the de facto relationship or either of them; and
    - ii. the existing liabilities of the parties to the de facto relationship or either of them; and
  - (b) is to take into account (except for the purpose of making an order with respect to the ownership of property that is a companion animal):
    - i. the considerations set out in subsection (4) (considerations relating to contributions); and
    - ii. the considerations set out in subsection (5) (considerations relating to current and future circumstances).

Note: See subsections (6) and (7) in relation to orders with respect to property that is a companion animal.

### *Considerations relating to contributions*



4. For the purposes of subparagraph (3)(b)(i), the court is to take into account the following considerations, so far as they are relevant:
- (a) the financial contribution made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
    - i. to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
    - ii. otherwise in relation to any of that last-mentioned property; whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them;
  - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the de facto relationship, or a child of the de facto relationship:
    - i. to the acquisition, conservation or improvement of any of the property of the parties to the de facto relationship or either of them; or
    - ii. otherwise in relation to any of that last-mentioned property; whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the de facto relationship or either of them;
  - (c) the contribution made by a party to the de facto relationship to the welfare of the family constituted by the parties to the de facto relationship and any children of the de facto relationship, including any contribution made in the capacity of homemaker or parent;
  - (ca) 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);**
  - (d) the effect of any proposed order upon the earning capacity of either party to the de facto relationship;
  - (e) any other order made under this Act affecting a party to the de facto relationship or a child of the de facto relationship;
  - (f) any child support under the Child Support (Assessment) Act 1989 that a party to the de facto relationship has provided for a child of the de facto relationship.

*Considerations relating to current and future circumstances*

5. For the purposes of subparagraph (3)(b)(ii), the court is to take into account the following considerations, so far as they are relevant:
- (a) the effect of any family violence, to which one party to the de facto relationship (the subject de facto relationship) has subjected or exposed the other party, on the current and future circumstances of the other party, including on any of the matters mentioned elsewhere in this subsection;**
  - (b) the age and state of health of each of the parties to the subject de facto relationship;
  - (c) the income, property and financial resources of each of the parties to the subject de facto relationship and the physical and mental capacity of each of them for appropriate gainful employment;

- (d) the effect of any material wastage, caused intentionally or recklessly by a party to the subject de facto relationship, of property or financial resources of either of the parties to the subject de facto relationship or both of them;
- (e) (e) any liabilities incurred by either of the parties to the subject de facto relationship or both of them, including the nature of the liabilities and the circumstances relating to them;
- (f) the extent to which either party to the subject de facto relationship has the care of a child of the de facto relationship who has not attained the age of 18 years, including the need of either party to provide appropriate housing for such a child;
- (g) commitments of each of the parties to the subject de facto relationship that are necessary to enable the party to support themselves and any child or other person that the party has a duty to maintain;
- (h) the responsibilities of either party to the subject de facto relationship to support any other person;
- (i) the eligibility of either party to the subject de facto relationship for a pension, allowance or benefit under:
  - i. any law of the Commonwealth, of a State or Territory or of another country; or
  - ii. any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;
- (j) if either party to the subject de facto relationship is eligible for a pension, allowance or benefit as mentioned in paragraph (i)—the rate at which it is being paid to the party;
- (k) a standard of living that in all the circumstances is reasonable;
- (l) the extent to which an alteration of the interests of the parties to the subject de facto relationship in any property would enable a party to undertake education or establish a business or otherwise obtain an adequate income;
- (m) the effect of any proposed order on the ability of a creditor of a party to the subject de facto relationship to recover the creditor's debt, so far as that effect is relevant;
- (n) the extent to which each party to the subject de facto relationship has contributed to the income, earning capacity, property and financial resources of the other party;
- (o) the duration of the subject de facto relationship and the extent to which it has affected the earning capacity of each party to the subject de facto relationship;
- (p) the need to protect a party to the de facto relationship who wishes to continue that party's role as a parent;
- (q) if either party to the subject de facto relationship is cohabiting with another person—the financial circumstances relating to the cohabitation;
- (r) the terms of any order or declaration made, or proposed to be made, under this Part in relation to:
  - i. a party to the subject de facto relationship (in relation to another de facto relationship); or

- ii. a person who is a party to another de facto relationship with a party to the subject de facto relationship; or
  - iii. the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - iv. vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii);
- (s) the terms of any order or declaration made, or proposed to be made, under Part VIII in relation to:
- i. a party to the subject de facto relationship; or
  - ii. a person who is party to a marriage with a party to the subject de facto relationship; or
  - iii. the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or
  - iv. vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii);
- (t) any child support under the *Child Support (Assessment) Act 1989* that a party to the subject de facto relationship is to provide, or might be liable to provide in the future, for a child of the subject de facto relationship;
- (u) the terms of any Part VIIIAB financial agreement that is binding on either or both of the parties to the subject de facto relationship;
- (v) the terms of any financial agreement that is binding on a party to the subject de facto relationship;
- (w) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

*Considerations relating to companion animals*

6. In property settlement proceedings, so far as they are with respect to property that is a companion animal, the court may make an order (including a consent order or an interim order):
- (a) that only one party to the de facto relationship, or only one person who has been joined as a party to the proceedings, is to have ownership of the companion animal; or
  - (ab) that the companion animal be transferred to another person who has consented to the transfer; or
  - (b) that the companion animal be sold.

The court may not make any other kind of order under this section with respect to the ownership of the companion animal.

Note: For companion animal, see subsection 4(1).

7. In considering what order (if any) should be made under this section with respect to the ownership of property that is a companion animal, the court is to take into account the following considerations, so far as they are relevant:
- (a) the circumstances in which the companion animal was acquired;
  - (b) who has ownership or possession of the companion animal;
  - (c) the extent to which each party cared for, and paid for the maintenance of, the companion animal;
  - (d) any family violence to which one party has subjected or exposed the other party;
  - (e) any history of actual or threatened cruelty or abuse by a party towards the companion animal;
  - (f) any attachment by a party, or a child of the de facto relationship, to the companion animal;
  - (g) the demonstrated ability of each party to care for and maintain the companion animal in the future, without support or involvement from the other party;

- (h) any other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

Unfortunately, at the time of writing this paper, there are not yet any published decisions in relation to the new sections as set out above. It is hoped that soon, we will have guidance from the Full Court in relation to these issues. However, we can make some assumptions based on the previous case law in relation to Kennon arguments and this paper is based on those assumptions.

### **When Should You Consider Family Violence in a Property Matter?**

Most of you will be familiar with the four-step process, which is now also codified in section 79/90SM. The new sections have not changed the process but provide clarification and some additional considerations for legal practitioners to consider when advising our clients.

**Step 1** – Identify the legal and equitable interests and existing liabilities of the parties.<sup>7</sup>

**Step 2** – Contributions

**Step 3** – Future Needs

**Step 4** – Is it Just and Equitable?

It is during the assessment of the parties' contributions (step 2) where the issue of family violence becomes significant and must now be considered by the Court. It is not sufficient for family violence to have occurred, you must be able to show a nexus between the family violence and the impact it has had on a party's ability to make contributions to the relationship. It is not enough for a party to simply set out the conduct and allegations.

In the assessment of future needs, the issue of family violence can also be considered. A party who's experienced severe family violence may have ongoing traumatic psychological impacts and in some cases, physical impacts which impede their ability to earn an income or provide for themselves and children. The case of *Baranski & Baranski* [2012] "made clear that the effect of FV extends to post separation contributions particularly in the role of home maker and parent."<sup>8</sup>

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<sup>7</sup> Ensure you read and familiarise yourself with *Shinohara & Shinohara* [2025] *FedCFamCIA* 126 in relation to add backs.

<sup>8</sup> *Baranski & Baranski* [2012] 259 FLR 122

## How to Prepare a Family Violence Case

The key thing to keep in mind when preparing a case with a Kennon argument is that you need to do two things:

1. Identify the family violence;
2. Identify the effect of the violence on contributions and/or future needs.

It is crucial that you address both factors, as otherwise your argument is “doomed to fail”.

As barristers, we frequently review an affidavit with a large amount of space dedicated to allegations of family violence. In far less of those affidavits do we see details of the impact of that family violence on a party or child. In property matters, if you do not have the second step – there is really no point in including the allegations of family violence in your material.

It is a mistake that has also been made by the Courts, the case of *Martell & Martell* [2023]<sup>9</sup> an appeal was allowed in relation to the mis-application of the Kennon principle, as the primary judge failed to articulate how the husband’s acts of violence rendered the wife’s non-financial contributions more difficult, distressing and more arduous. An expanded view of when the court can have regard to the impact on family violence was also included in *Martell*.<sup>10</sup>

Obviously, the first step of identifying family violence and setting out family violence or a course of conduct is an important part of the affidavit. Ensure you focus on the facts of what has happened, rather than drawing conclusions about the conduct. There is often no independent evidence available to substantiate the allegations of family violence made by your client, due to the nature of family violence which so often occurs behind closed doors, is under reported. Sometimes victim/survivors feel shame about what has occurred and in some cases, a party does not realise they were in a relationship characterised by family violence. Where evidence is available to support your client’s allegations, be it photographs, police reports or text messages, they should be produced in support of your client’s allegations to strengthen them.

The second step, of showing the Court the effect of family violence on your client’s contributions is often not as simple as setting out the allegations. In a property case, this is the

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<sup>9</sup> *Martell & Martell* (2023) 66 Fam LE 650 at 31.

<sup>10</sup> *Artigas & Merino* [2025] FedCFamC2F 949 at 81.

most important part of your case if you wish to run a Kennon argument. You need to demonstrate to the Court that any contributions made by your client were made more arduous by the family violence of the other party. Being able to articulate the difficulties for your client in making contributions and having supporting evidence of same is critical for the success of your case.

For example, if your client claims to be suffering from Post Traumatic Stress Disorder (PTSD) as a result of family violence, you will require a report setting out the diagnosis and the effect of that condition on your client's ability to function and provide for themselves and any children. If your client has a physical disability, then you will require medical evidence to that effect, showing the injury/illness and the impact on your client.

Often material from a client's treating psychologist will set out the trauma incurred and impact of that trauma. However, it may be that you need to find a specific family violence worker who can provide the evidence required. Discretion needs to be used as to what is the best evidence to support your client's case as not all experts are created equally.

It is important when drafting affidavits that you put your strongest evidence up front, don't bury it at page 8 of your affidavit. You need to quickly identify for the Court, what the issues are and what it needs to pay attention to. This can often mean going against the general chronological drafting method which can result in significant issues being buried in the body of the affidavit and their importance being lost.

Consider drafting an affidavit with an 'issues format', with headings. Set out the various issues with the most serious and powerful evidence first in your affidavit. Given we often only have 10 pages, don't waste them. The procedural history of the matter often fills up a large portion of an affidavit and is unnecessary. The Court has all the Orders and can be taken in submissions to the most relevant, for example - where there has been non-compliance. Only refer to significant procedural history if it is relevant to the matter to be determined by the Court.

It is also important to test your client's evidence and discuss the relevance of their evidence. It is often the case that the "thing" our clients feel is the most important for the Court to know is not relevant to the Courts determination of the issues before it. Unfortunately, family violence can sometimes fall into this category. Whilst it may have been the most significant thing that has occurred during parties' relationship, unless it has an effect on contributions and future needs, it is not relevant to the Courts consideration in a property matter. It is our job to advise

a client of the relevance of evidence and not include irrelevant evidence, even if it is extremely important to your client.

The *Evidence Act 1995* (Cth) is the other consideration when drafting an affidavit. Whilst it now does not always apply in property cases, the best evidence and the most compelling evidence is usually compliant with the Evidence Act. If you are not familiar with the Evidence Act, read the legislation, talk to Counsel or attend a CPD, it is important to have a basic understand of how it works and you will likely find it changes the way you draft material for the better.

However, where the “best evidence” is not available, we now have section 102NL, which provides that certain sections of the Evidence Act do not apply in property and parenting proceedings, unless otherwise determined by the Court. The explanatory memorandum<sup>11</sup> to the Amendment Act<sup>12</sup> provides the reason for the amendment:

“by ensuring that relevant evidence of family violence that may be inadmissible under the technical rules of evidence provided in the Evidence Act, can be considered by the family law courts in property and spousal maintenance proceedings, in certain circumstances [at the court’s discretion or with the consent of the parties], this promotes the rights of victim-survivors of family violence to a fair hearing by ensuring all relevant evidence can be considered by the family law courts when determining just and equitable property settlements, or when considering what order would be proper in relation to spousal maintenance.”<sup>13</sup>

It is critical when drafting an affidavit and advising your client that you are analytical and use your discretion in relation to allegations. When preparing a case which relies on the family violence provisions, advise your client on a case that has merit and equally, on a case that does not. This can be difficult to communicate with a client, but it is our job to advise them - not to tell them what they want to hear. It can be extremely helpful for a client with very strong views on how their case should be run, to have a conference with Counsel regarding the merits of the case they wish to run prior to filing documents with the Court.

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<sup>11</sup> The Parliament of the Commonwealth of Australia, House of Representatives, Family Law Amendment Bill 2024, Explanatory Memorandum.

<sup>12</sup> Family Law Amendment Act 2024

<sup>13</sup> Above n11.

Be careful when annexing documents relating to other Court proceedings to your affidavit, particular Further and Better Particulars which have been created pursuant to an Order of the Magistrates' Court. Ensure you are familiar with the concept of the Harman undertaking. In essence, the core of this undertaking is that you cannot use documents produced through a compulsory court process (court order, disclosure etc) in another set of court proceedings. For further reading see chapter 15 of the Foley's Property book and paper by Mary Young of Blackwood Family Lawyers "Can I use documents received in my family matter for other purposes."<sup>14</sup>

### **What Happens Now?**

As indicated earlier, at the time of writing this paper there are no published cases which consider the new sections relating to family violence in any significant detail. This makes it difficult to know exactly how the new legislation is going to be interpreted by a trial judge and the Full Court.

Many are concerned that these new sections may increase the volume of litigation and material filed and may prevent matters from settling. There is concern that it is unlikely that a party who's committed family violence will concede the other should have an adjustment in their favour due to family violence they endured and that a contested final hearing will be required. Whether this will indeed increase the number of cases running to final hearing remains to be seen.

I personally do not think that family violence or Kennon adjustments are going to become routine or that the "floodgates" will open. I suspect that only in limited circumstances will a Kennon argument be successful but watch this space!

Sarah Damon

September 2025

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<sup>14</sup> Can I use documents received in my family matter for other purposes by Mary Young <https://www.blackwoodfamilylawyers.com.au/insights/can-i-use-documents-received-in-my-family-law-matter-for-other-purposes/>