Women's Legal Service

The Secretariat
Senate Legal and Constitutional Committee
Department of the Senate

15th February 2016

Dear Secretariat,

RE: FAMILY LAW AMENDMENT (FINANCIAL AND OTHER MEASURES) BILL 2015

Thank you for the opportunity to be heard at the Public Hearing held on Friday 12 February 2016 in relation to the *Family Law Amendment (Financial and Other Measures) Bill 2015*.

We note that during the course of the submissions presented by Mr Paul Doolan, NSW representative of the Family Law Section, Family Law council of Australia, Senators requested that Mr Doolan comment on Women's Legal Service Queensland (WLSQ) Hypothetical Case Study and WLSQ's proposal that the setting aside provisions as set out in section 90K (and mirroring de facto sections) be extended to include more categories including family violence.

We have taken the opportunity to provide some further clarifying points and ask that you forward a copy to the Senators.

Are the current setting aside provisions sufficient to cover family violence?

WLSQ observed during the course of Mr Doolan's submission that it was put to the Senators that section 90K (and mirroring de facto section) provides a sufficient level of protection due to the existence of subsections (1)(b) and (1)(e). We respectfully disagree.

To assist you in understanding the concepts of "unconscionable conduct" (ss90K(1)(b) and (e)) and "miscarriage of justice in the form of duress" (s79A) and their application in the law to date we have attached two excerpts from CCH, Australian Family Law and Practice Commentary.

In summary "unconscionable conduct" as provided for in subsections (1)(b) and (1)(e) will be found where a person knows or out to know of a disabling condition or circumstance, and its effect on the innocent party, and take advantage of that disabling condition or circumstance. A mere difference in the bargaining power of the parties

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does not constitute a special disadvantage or disability. The disabling condition or circumstances must seriously affect the ability of the weaker party to judge that party's own best interests.

Fullagar J, in Blomley v Ryan (1956) 99 CLR 362 at p. 405 summarised the courts position in relation to "unconscionable conduct" and held:

> ``The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."

In the context of s79A (and its mirror de facto section) applications the test of what amounts to "duress" amounting to a miscarriage of justice has been summarised in the case of SH and DH (2003) FLC ¶93-164:

> "'A person who is the subject of duress usually only knows to well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action. The proper approach in my opinion is to ask whether that pressure went beyond what the law is prepared to countenance as legitimate. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct".

In our searches no case law has been found where a history of family violence has been found to amount to unconscionable conduct, or a miscarriage of justices save for a situation involving an **express threat** to kill the wife by the husband if the wife did not cooperate and sign proposed consent orders in the case of Pompidou & Pompidou [2007] FamCA 879.

In particular we refer you to the following cases:

- Kostomiris [2003] FamCA 274 (unreported but discussed in SH and DH (2003) FLC ¶93-164)
- Benson and Benson [2002] FamCA (unreported but discussed in SH and DH (2003) FLC ¶93-164)
- Riley and Pateman [2000] FamCA (unreported but discussed in SH and DH (2003) FLC ¶93-164)
- Wilderboer v Wilderboer (23 October 1997, (unreported but discussed in SH and DH (2003) FLC ¶93-164)
- SH and DH (2003) FLC ¶93-164

The case law referred to above demonstrates irrefutably that without the addition of family violence amounting to a serious injustice that the current grounds for setting aside financial agreements under section 90k (and the mirror de facto provision) or property settlement orders under section 79A (and the mirror de facto provision) on the

basis of family violence, family violence will not be found to amount to unconscionable conduct or duress.

The courts, in these cases place a lot of emphasis on direct and overt threats made at the time of the signing of the financial instrument and relating to the signing of the financial instrument and the protective influence of obtaining legal advice. As was highlighted in the hypothetical case study provided to the Senators on the day of the hearing, family violence often occurs in a different context, where the perpetrator does not need to make overt or direct threats to get their way and in circumstances sometimes where the obtaining of legal advice is not always a protective influence but can serve the interests of the more powerful party.

"Independent legal advice before signing does not necessarily mean the agreement will be fair to a vulnerable party: if a person feels they should sign, even good legal advice is unlikely to change their mind."[1]

In relation to the hypothetical provided, we would also make these further comments which we believe add weight to the need for a setting aside provision in circumstances of 'family violence and serious injustice':

- 'Family violence' is already defined under Section 4AB of the Family Law Act and would have to be proved to the satisfaction of the definition and standard of proof required in these cases. See Section 4AB states *"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."* The mere yelling at your spouse does not of itself amount to family violence, the other elements of the definition would also have to be satisfied.
- Even the victim of violence in the hypothetical (Ann) did have some legal argument to set aside the agreement, it is our belief it would be tenuous, she would not get legal aid to litigate, community legal centres would not be able to act for her and she could not afford a private lawyer. Effectively for all intents and purposes, it is unlikely the matter would be pursued in court and Ann would end up with the amount agreed under the BFA.
  "Although it may be possible for one partner to avoid a financial agreement later on, this involves going to court, which is emotionally and financially costly, especially given the absence of legal aid for FLA financial matters."[2]
- If there was a "family violence and serious injustice" setting aside provision, it would improve the legal merit of her case and this would therefore increase the likelihood of Ann obtaining legal assistance.
- That it is arguable because BFAs can be more easily entered than court orders and without full and frank disclosure, there is argument that the setting aside provision should also be different and the test less stringent.
- It is important that legislation is clear and that 'family violence' be named and not sit behind legalistic terms such as duress, unconscionability and the like.

[1] Fehlberg B and others "Australian Family Law: The Contemporary Context" 2nd edition, Oxford University Press, 2015 at p.595
[2] Ibid.

- Such a setting aside provision assists in the broader community messaging against family violence and encourages nonviolent behaviour in relationships.

Pre-nuptials and family violence

We note that Senator MacDonald acknowledged there may be the need for setting aside provisions covering family violence where the relationship was current or the parties had separated but he could not understand the need in relation to pre-nuptial agreements.

Again, we provide a hypothetical to assist understanding and the reason why the setting aside provisions for family violence should also cover pre-nuptial agreements.

Hypothetical case study

Fran is a 42 year old psychologist who runs her own practice from her home. She married Barry a very wealthy and successful businessman aged 57 years. It was her first marriage but Barry's third. Barry and Fran before marriage entered into a prenuptial agreement where they agreed, if there was a separation before 5 years that both parties would take away the assets they brought into the marriage. Fran was an independent and intelligent woman and was quite willing to enter the BFA on these terms, she wanted Barry to know that she loved him and was not interested in his wealth. It was a sign of her commitment to him that she agreed so willingly. Before the marriage, Barry had never been abusive to Fran. However, on the night of their wedding Barry brutally raped Fran as punishment for her "flirting with other men" at the wedding. Fran was frozen and in shock and was completely confused by the incident. Barry acted like there was nothing wrong which confused Fran more. Fran didn't know what to do so she also continued to act "normally" and they both went on their honeymoon as planned. The violence escalated and continued through their relationship. Fran sought out marriage counselling to assist. The sexual violence also continued and Barry was particularly psychologically malicious which eroded her self-esteem and made her doubt her own decision-making. Eventually after 4 years of marriage, the marriage counsellor took Fran aside and told her that he was concerned for her safety as she was in a dangerous domestic violence situation. Fran separated from Barry. She moved interstate as she was scared of Barry and his possible retribution. She was diagnosed with post-traumatic stress disorder and had to give up her practice as a psychologist. She also suffered ongoing gynaecological problems from the sexual violence. She was unable to work and was forced to live off her savings. She has determined she will need to retrain as it is impossible for her to recover enough to ever go back to being a psychologist. Fran seeks legal advice about setting aside the BFA, as although she willingly entered the agreement and was agreeable to the terms, she never predicted the violence and its impact on her financially. She has lost everything as a result of the violence. However, under the current law and without a setting aside provision for family violence and serious injustice, Fran would be unsuccessful.

It is common for perpetrators of violence to not reveal their true selves to their partner until they have control over her – eg. When they are married, she becomes pregnant

etcetera. It is important that the BFA legislation sufficiently incorporates these known and common dynamics.

If you require any further assistance in relation to the issues we have raised please do not hesitate to contact us.

Kind Regards.

Angela Lynch,
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