SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

PRACTICAL CHANGES NEEDED TO THE FAMILY LAW ACT

I am writing to suggest simple amendments to the Family Law Act to ease suffering, improve its fairness and reduce the costs associated with divorce.

I also submit that the combination of the Family Law Act and Child Support Assessment Act are producing unbalanced outcomes, mostly for fathers, after divorce.

As a remedy I suggest that the Courts consider all components of a divorce application at the same time unless there are compelling reasons to do otherwise. In this way the parties involved are given freedom to move on with their lives.

I understand that in the United States, divorce petitions require consideration of all issues. The expense of returning to court is a disincentive for frivolous or vindictive petitions.

In Australia there is no requirement to resolve issues related to the dissolution of marriage such as property, custody and spousal maintenance at the same time.

Under the Family Law Act an application for property settlement can be lodged up to 12 months after the decree absolute. This separation of divorce and property issues generates unnecessary problems, including costs for the taxpayer.

The twelve months that needs to elapse after separation before an application for divorce can be lodged should be sufficient time for preparation, disclosure and for the seeking of advice.

The lodgement of belated property settlement applications can translate into open-ended proceedings and drain pooled family assets through legal costs. In addition such delays create other "opportunities" for legal advisers (or applicants) to make claims to assets accumulated after separation.

A further complication is added in the legislation because the date of effect for any assessment for pooled property assets is vague. Fairness would suggest either the time of separation or when the application for divorce is lodged with the Court. There is too much ambiguity at present and I would assert it is being exploited.

In one sense, Court processes can be manipulated. Legal advisers have a fundamental incentive to drive the applicants apart for as long as possible. If it suits advisers financially, they can protract proceedings, exploit the ambiguity under the Act arising from areas of discretion given to Courts, particularly with property and superannuation, they can complicate disclosure and generate unrealistic settlement expectations. This is not difficult to achieve under a banner of "professionalism" and what might be considered " in the best interests of their clients". Overall the result is a significant fraction of family assets are siphoned-off to legal advisers. The costs for clients are rarely minimal even when consensus is possible.

Unfortunately, it is not possible to reach any settlement under the Act without "independent" legal advisers. There should be an acceptable alternative process to minimise the applicants' costs.

Simple "e-form" agreements should be possible. Exclusions for fraud should provide one of the few triggers to re-open settlements by either party at a later date.

Treatment of pre-marital assets in property settlements

When the Court considers property settlement for marriages of "long" duration I understand it is likely pre-marital real estate assets will be "frozen" at past valuations or purchase prices. This generates a gross distortion and inequity. Typically, the family home is the principal asset a couple accumulates. The equity injected at the commencement of the marriage should not only be excluded from the pooled assets divided by the courts but in fairness, it should reflect its net present value as a proportion of assets at the time of separation.

It is understood a principal objective for the Court in property settlements is to bring finality the financial relationship of the parties, and to ensure the primary carer has sufficient assets to provide for the children up to age 18. However, these dual objectives create a distortion because the primary carer's role is not permanent unlike the decision to divide assets. This creates a bias because the division of pooled assets is nearly always skewed towards the primary carer, even if that role is nearing a legal end- state. This inherent bias can be further distorted by the particular leanings of the presiding Judge. This personalises the outcome far more than is desirable.

A practical solution would be a clear, and prescribed division of property accumulated during marriage (eg. 50:50). If additional assets are needed for the infrastructure for care of children then the Courts objective should only be to prevent a dissipation of critical assets such as the family home until children turn 18. In the same way superannuation is flagged for later splitting, the same principle could be applied to the family home. The primary carer could be given occupancy rights until the children turn 18. Once the primary carer's responsibility has ended the home could be sold and proceeds divided in a way prescribed by a Court Order and a 50:50 rule.

Depending upon the stage of life divorce occurs and if children under 18 are involved, then the current permanent division of property can strip fathers of the bulk of a lifetime of accumulated assets.

The prospect of asset redistribution ratios approaching 85:15 often inflames the motivations of both parties for custody of children. This is a very serious problem generated by the measure of discretion given to the Court. In extreme cases it exposes judiciary members to acts of reprisal for decisions. There needs to be greater certainty on the division of pooled assets prescribed in the Act and to shape community expectations about property outcomes after divorce.

Child Support and Custody

Custody battles are an unfortunate component of divorce. Putting aside issues of equity on the pooled family assets both parents should be given equal opportunity to play a role in the development of their children. The default position taken by the Courts should be equal custody and access unless the welfare and development of the children is potentially at risk. I would contend the father's role model for children is severely inhibited with the current operation of the Family and Child Support Acts.

Child support assessments can strip the after tax salary of parents who are not the primary carer (often the father). When this situation is combined with the transfer of assets from property settlements there is a disproportionate shift in wealth and ongoing financial capacity of the payer. The "loosing" parent's capacity to continue to play an effective role with their children is very seriously undermined.

The "prescribed" percentages applied to gross income (which can include non-salary FBT components) by the Child Support Agency are the subject of substantial complaint and study.

I would assert the levels now prescribed create substantial hardship for the non- primary carer (for example, at the highest marginal tax rate a non- carer parent with two children sees the marginal incentive to work drop to less than 15 cents per dollar).

There needs to be serious reconsideration of what is a reasonable level of child support based on the costs to support children rather than an arbitrary percentage of taxable income plus reportable FBT. There appears to be a serious problem with the methodology currently employed. However, some formula is probably required as a safety net, albeit initially, because the bulk of adults divorcing are often motivated by unbalanced incentives and views.

However, the levels of child support applied her appears to contrast sharply with child support regulations or codes in other countries such as the US.

It is perhaps not suprising there is a social trend away from marriage and the traditional family model. Men appear to be avoiding marriage. I am aware of several cases where the distress caused by the child support formulae led fathers to quit their employment after divorce. This is a highly undesirable outcome for the children and the taxpayer.

Putting aside the stresses from divorce itself, the combined burden of the legal fees, property settlements and the high level of child support payments can drain any incentive to be productive and act responsibly. This is a serious long-term problem for Australia and it is not being addressed.

Yours sincerely

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3 July 2003

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