Chapter 5: Domestic violence and family law

This chapter provides guidance to practitioners who are advising victims of domestic violence about parenting arrangements, property division and divorce. It is not a complete guide to family law but focuses on aspects where family violence is relevant.

WATCH THIS SPACE

In 2017, the Commonwealth Attorney General announced Parent Management Hearings (PMH) to provide self-represented litigants with an alternative for resolving parenting disputes to the family court process. The PMH is described as "a fast, informal, non- adversarial dispute resolution mechanism" which will be "given powers to make binding determinations on less complex family law matters, which would otherwise require consideration by the family law courts."

Subject to the passage of the Bill, the PMH will operate from Parramatta and another site still to be announced, commencing late 2018.

Parenting arrangements

Definition of family violence

A broad definition of family violence was introduced into the *Family Law Act 1975* (Cth) (FLA) in 2012 and applies in all cases filed after 7 June 2012. See **Chapter 1: Introduction to Domestic Violence** for the legislative definition of family violence. The definition removed the requirement that the victim's fear be 'reasonable', in recognition of the subjective experience of fear and the psychological impact of violence.

Recent cases on family violence

In *Carra & Shultz* [2012] FMCAfam 930 the father alleged that the mother, by withholding the child from him, was committing family violence by 'preventing the family member from making or keeping connections with his or her family, friends or culture'. The court held that the withholding of time or communication with a child, by itself, does not constitute family violence. The essence of the definition of family violence is behaviour which 'coerces or controls' a family member 'or causes [them] to be fearful' (para 7).

The court went on to say:

> It is possible to envisage a different context within which the withholding of a child may amount to family violence. One can imagine, for example, a scenario in which a parent flees from violence and does not take a child with him or her through lack of opportunity or because they have no immediate arrangements for appropriate alternative accommodation. If the other parent prevents the fleeing parent from spending time or communicating with the child as a means to coerce or control the fleeing parent or to cause them to be fearful about their own or the child's safety, it may well amount to family violence [para 8].

Practitioner tip

Take care not to mask the presence of family violence by using the expression 'high conflict relationship' in family violence matters. 'High conflict' is a subjective term with no common meaning or definition. There can be a tendency to conflate 'high conflict' with family violence or to not acknowledge that 'high conflict' cases may involve a history of family violence. See **Chapter 1: Introduction to Domestic Violence** for more information about domestic and family violence.

In *Maluka & Maluka* [2009] FamCA 647 the court found that as there was a significant history of family violence which the father had no insight into, the mother and children were at an unacceptable risk of physical and emotional abuse and violence now [at 131] and into the future [at 384], which warranted making an order that the children spend no time with their father.

In *Willmont & Halliday* [2012] FamCA 918 Cleary J at [128] – [129] said:

> I am unable to make a positive finding that the father has abused the children. However, I consider that there is, on balance, sufficient evidence of inappropriate conduct, which cannot be explained by exposure to anyone else other than the father. I consider that the father's lack of empathy for the children and his use of them to convey quite hateful messages arising from his own anger, represents a risk to their health and safety that is not outweighed by the benefits that may come from those times when the father enjoys the company of the children and they are cooperating with him. Accordingly, I make orders that place the children in the exclusive care of their mother, with no provision for communication with their father.

Presumption of equal shared parental responsibility (ESPR)

Both parents have parental responsibility for a child until that child turns 18. Parental responsibility is defined in section 61B of the FLA to mean 'all the duties, powers, responsibilities and authority that, by law, parents have in relation to children'.

Section 61DA provides a presumption that it is in the best interests of a child to make an order that provides for the parents to have ESPR**.** This order places an obligation on the parents to consult with each other and make a genuine effort to agree on major long-term decisions about the child including:

- education;
- religious and cultural upbringing;
- health;
- name change; and
- changes to the child's living arrangements which make it significantly more difficult for the child to spend time with a parent (such as moving to a new area).

Section 61DA(2) provides that the presumption does not apply in cases of child abuse or family violence. In these circumstances, the court must consider whether sole parental responsibility or equal shared parental responsibility is appropriate. In *Hutley & Hutley* [2012] FamCA 679, while the mother adduced evidence that the father had been aggressive and intimidating during their relationship and was found guilty of assault, the court still ordered ESPR on the basis that the parties had managed to make joint decisions about the children.

Section 61DA(4) provides that the presumption is rebuttable where there is evidence to show it is not in the best interests of the child for the parents to have ESPR. In *Halston & Halston* [2013] FMCAfam 606 despite the mother adducing evidence of family violence, the court largely discounted this evidence and made orders for sole parental responsibility to the father on the basis that the mother lacked insight into the importance of the children having a relationship with their father and they were unwilling and unable to work together for the children's best interests.

ESPR does not correlate to a child spending equal time with each parent. The decision about ESPR is made separately to any consideration of how much time a child spends with each parent. However, once an order for ESPR has been made, the court must consider whether an order should be made for a child to spend equal time with a parent and if not, whether an order for substantial and significant time should be made, or what other arrangements are in the best interests of the child.

Section 60CG(1)(b) provides that when considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order does not expose a person to an unacceptable risk of family violence.

Primary considerations

Section 60CA of the FLA provides that the best interests of the child are the paramount consideration in deciding whether to make a particular parenting order.

Section 60CC sets out how a court will determine what is in a child's best interests. The best interests of the child are made up of primary and additional considerations. The primary considerations are contained in section 60CC(2):

- the benefit to the child of having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm, and from being subjected to, or exposed to, abuse, neglect or family violence.

The need to protect children from harm is given greater weight in cases where there is family violence, child abuse or risk of exposure to either (s 60CC(2A)).

A & A and the Child Representative [1998] FamCA 25 sets out how a court is to assess the level of risk to a child spending time with a parent. In that case the mother alleged that the father seriously assaulted her in what appeared to be an attempted murder. The mother had no recollection of the events but had a genuine belief that the father was her assailant. She considered that there was a risk to the safety of the children if the father continued to have contact. The Full Court held that:

> The first enquiry is whether there is objectively an unacceptable risk. If there is the Court must take steps proportionate to the degree of risk. If there is not, the Court may then need to consider whether the residence parent has a genuinely held belief that such a risk exists and whether that will have a significant impact on that party's capacity as the resident parent and so impinge on the best interests of the children.

The Court then needs to take steps proportionate to that circumstance.

Section 60D requires solicitors to advise people seeking advice about children about sections 60CA, 60CC(2) and (2A).

Additional considerations

The additional considerations are set out in section 60CC(3) and include:

a) any views expressed by the child;

b) the nature of the child's relationship with parents and others, including grandparents;

c) the extent to which each parent has taken, or failed to take, the opportunity;

d) to participate in making decisions about major long-term issues in relation to the child;

e) to spend time with the child;

f) to communicate with the child;

g) the extent to which each parent has fulfilled his or her obligations to maintain the child;

h) the effect on the child of any changes in the child's circumstances;

i) the practical difficulties and expense involved in spending time with and communicating with a parent, and the impact on the child of maintaining personal relationships and direct contact regularly with both parents;

j) the capacity of each parent and others to provide for the child's needs;

k) the maturity, sex, lifestyle and background of the child and parents;

l) the child's right to enjoy Aboriginal or Torres Strait Islander culture, where relevant;

m) each parent's attitude to the child and to parenting;

n) any family violence involving the child or a member of the child's family;

o) any family violence order;

p) the desirability of making the order that is least likely to lead to further proceedings; and

q) any other fact or circumstance the court thinks relevant.

Family Dispute Resolution

Family Dispute Resolution (FDR) is the term used in the FLA to refer to mediation or conciliation that is facilitated by an FDR practitioner (FDRP).

Section 10F of the FLA defines FDR as a process (other than a judicial process):

- in which an FDRP helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
- in which the practitioner is independent of all of the parties involved in the process.

Engagement in FDR in relation to disputes about children's issues is mandatory prior to filing, subject to some exceptions (discussed below). This means that a person can only file an application for parenting orders if:

- they have a section 60I certificate; or
- they fall within one of the exceptions.

Parties must demonstrate a genuine effort to resolve the dispute before filing an application in court. The pre-action procedures are set out at sections 60I(7)–(12) of the FLA.

FDR where there is a history of risk of violence

Mediation is predicated on an equal bargaining power between the parties, which is not usually present in relationships of violence, power and control. However some people who have experienced violence would prefer to try FDR rather than rely on the exemptions.

Practitioner tip

Where your client has been a victim of violence and elects to go to FDR, it is important your client is encouraged to give a full disclosure of family violence to the FRC or other FDR service, particularly the FDR practitioner (mediator). This is important to ensure that the FDRP is aware of the safety issues in the case and to ensure that your client is not pressured into agreeing to arrangements that are unsafe or not in the best interests of their children.

Strategies for negotiation that might assist in ensuring safe and just outcomes include:

- staggered arrivals and departures;
- risk assessments immediately prior to, during, and after the FDR session;

- frequently checking in with the victim to see whether they feel able to continue mediation and that they are not feeling intimidated by the other party and/or the process;
- FDR with one or both parties attending by telephone;
- 'shuttle' FDR, where the parties remain in separate rooms and the FDRP moves between the rooms;
  - lawyer-assisted FDR, where one or both parties are represented by lawyers;
  - allowing vulnerable parties to have a support person waiting in another room;
  - taking breaks during the session to privately talk to the victim and check whether they felt understood, respected and able to continue;
  - where agreements are reached, making them short-term in nature with a view to the parties returning for a further FDR session in the following two to three months; and
  - use of frequent case-management meetings, where all professionals involved in the case can come together to collectively analyse the suitability of the case continuing.

Where can your client participate in FDR?

Family Relationship Centres (FRCs) commonly provide FDR services. FRCs are funded by the government to provide a range of services to families but focus on supporting separated parents to reach agreements regarding children without the need for recourse to courts. Services are provided free of charge or on a sliding scale. FDRPs can also assist parties to write parenting plans. See '**Parenting plans**' below for more information.

Some FRCs have partnerships with community legal centres or Legal Aid NSW to provider lawyer-assisted FDR. Lawyers working within the FRC model tend not to take an active role during FDR joint sessions (where all parties are in the room together with the FDRPs) but are there to ensure that a victim of violence does not feel pressured or coerced to agree to unsafe or unworkable arrangements and to provide advice during private sessions.

Legal Aid NSW facilitates FDR (sometimes called a 'family law conference') on a grant of legal aid. If your client is eligible for a grant of aid, you can ask to have that grant allocated to you so that you can represent your client in the conference. You can also act for your client in a conference even if your client is not eligible for a grant of aid.

Private FDRPs also provide FDR services. It is important to check that any practitioner is registered with the Attorney-General's Department as accredited under the FLA to provide FDR services and issue a section 60I certificate.

Confidentiality in FDR

Anything said in the company of a family counsellor or an FDRP when conducting FDR is inadmissible with the exception of an admission by an adult or child that indicates that a child under 18 has been abused or is at risk of abuse, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources (s 10E and s 10J of the FLA).

Section 60I certificates

A section 60I certificate is issued to a party (or parties) where the parties have attempted FDR but have been unable to reach an agreement, where one party failed to attend FDR, or where the FDRP has determined FDR is inappropriate in the circumstances. The section 60I certificate remains valid for 12 months from the date it is issued.

The section 60I certificate will note one of the following:

- one party did not attend;
- the parties attended and made a genuine effort to resolve the dispute;
- the parties attended but one or both did not make a genuine effort to resolve the dispute;
- the FDRP determined the case was not appropriate for FDR; or
- the FDRP determined it was not appropriate to continue partway through the FDR process.

The certificate needs to be attached to the application for parenting orders.

Exceptions to FDR

Section 60I(9) of the FLA sets out the grounds upon which a party can be exempted from FDR. Relevantly, if the court is satisfied there are reasonable grounds to believe there has been or there is a risk of family violence or child abuse, there is no requirement for a party to participate in FDR or to file a section 60I certificate when making an application for parenting orders.

Evidence of violence or abuse or the risk of them is provided by way of completing an Affidavit – Non-filing of a Family Dispute Resolution Certificate form, or by way of the affidavit filed with the Notice of Risk or Form 4.

Options if parents can agree about parenting arrangements

If parents are able to reach an agreement about parenting arrangements they can have:

- an informal agreement;
- a parenting plan; or
- apply for consent orders.

Informal agreement

An informal agreement can be written or oral. The benefits of an informal agreement are that it gives parents the flexibility to change the parenting arrangements when needed. Both parents retain parental responsibility for the child/ren.

An informal agreement is not enforceable, however, and its flexibility can result in uncertainty. Victims of domestic violence often require stricter boundaries around when the perpetrator spends time with their children, to protect their and their children's safety.

Parenting plan

Sections 63C(1) and (2) mandate that a parenting plan is a written agreement made, signed and dated by parents that deals with any of the following:

- the person or persons with whom a child is to live;
- the time a child is to spend with another person or other persons;
- the allocation of parental responsibility for a child;
- if two or more persons are to share parental responsibility for a child, the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
- the communication a child is to have with another person or other persons;
- maintenance of a child;
- the process to be used for resolving disputes about the terms or operation of the plan;
- the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan; or
- any aspect of the care, welfare or development of a child or any other aspect of parental responsibility for a child.

Below are 2 examples of parenting plans. Guidance can also be obtained from the 2016 resource "Parenting Orders – what you need to know" produced by the Commonwealth Attorney-General's Department and is available online.[22]

22 www.ag.gov.au/Publications/Pages/Parenting-orders-what-you-need-to-know.aspx

PARENTING PLAN

BETWEEN

[INSERT NAME]

(Mother)

AND

[INSERT NAME]

(Father)

The Mother and the Father agree:

1. The Mother and the Father have [equal shared] parental responsibility for the child [NAME] born [DATE].
2. Each parent is solely responsible for making decisions about the day to day care, welfare and development of [NAME] when she is in their care.
3. [NAME] lives with the [Mother/Father] at all times when she is not living with the Mother.
4. [NAME] [lives with/spends time with] the [Mother/Father] as follows:
    a) During school terms, every weekend from after school on Friday until before school on Monday. On long weekends or pupil free days this time is extended to before school on the next school day.
    b) During school holidays, for half of the public school holidays as agreed between the parents. If there is no agreement, for the first half in even numbered years and the second half in odd numbered years.
    c) For the purpose of this Parenting Plan the school holidays start at the end of the school day on the last day of the school term and the holidays finish before school on the day the school term resumes. [NAME] will be picked up at 4 pm on the day in the middle of the school holiday period.
    d) Other times as agreed between the parents.
5. On special occasions [NAME] will spend time as follows:
    a) On the Mother's birthday and on Mothers Day [NAME] will spend time with the Mother from 10 am until 5 pm, or on school days from after school until 6 pm.
    b) On the Father's birthday and on Fathers Day [NAME] will spend time with the Father from 10 am until 5 pm, or on school days from after school until 6 pm.
    c) On [NAME]'s birthday she will remain living with the parent she is scheduled to be with until 2 pm and then with the other parent from 2 pm until 6 pm, or on school days from after school until 6 pm.
    d) On Easter Sunday [NAME] will remain living with the parent she is scheduled to be with until 2 pm and then with the other parent from 2 pm until 6 pm.
    e) On Christmas Day [NAME] will remain living with the parent she is scheduled to be with until 2 pm then with the other parent until 6 pm on Boxing Day.
    f) Or at times as agreed between the parents.
6. For the purpose of spending time, the [Mother] will pick [NAME] up from school or the [Father's] address at the start of her time and the [Father] will pick [NAME] up from school or the [Mother's] address at the start of his time.
7. The parents will both be entitled to attend all events involving [NAME] including, but not limited to:
    a) Sporting events;
    b) Extra curricula activities that allow parents to attend;
    c) School functions and events that allow parents to attend such as concerts, school assemblies, sports days, parent and teacher interviews, canteen duties and social functions; and

The parent who has [NAME] in their care on the day of the event will be responsible for her day to day care at the event and for transportation to and from the event.

8. The Mother can have reasonable telephone communication with [NAME] when she is with the Father and [NAME] is to be available to receive calls each night between 6 pm and 8 pm on her mobile or on the Father's landline telephone.
9. The Father can have reasonable telephone communication with [NAME] during extended periods with the Mother.
10. Both parents are to give [NAME] privacy during telephone conversations with the other parent.
11. Each parent is to advise the other parent within 7 days if their residential address or contact telephone number changes.
12. Each parent is to notify the other of any medical emergencies suffered by [NAME].
13. Each parent is to ensure that the other parent is kept informed of any social, school or religious functions that [NAME] is to attend.
14. Within 14 days of signing this Parenting Plan, and within 14 days of [NAME]'s subsequent enrolment at any new school, the Father will do everything needed so that:
    a) The Mother's details are recorded by the school as [NAME]'s parent and emergency contact person; and
    b) [NAME]'s school is authorised to send directly to the Mother copies of all school reports, notices and advices concerning [NAME] and any activities that she may be involved in.
15. Within 7 days of receiving order forms for school photographs of [NAME] the Father is to give copies of the forms to the Mother.
16. The parents are not to make rude or critical comments about the other parent to [NAME] or in her sight or hearing.

It is noted that:

- It is the Mother and Father's intention to have further family dispute resolution to review these arrangements in approximately [DATE].

Dated:

Mother [Name] Father [Name]

PARENTING PLAN

BETWEEN

[INSERT NAME]

(Mother)

AND

[INSERT NAME]

(Father)

The mother and the father agree that:

1. The child [NAME] born [DATE] lives with his mother.
2. [NAME] will spend time in the care of his father as follows:
   - 2.1 Each Tuesday and Thursday from 11.30am to 1.00pm commencing 13 July 2010 and each alternate Saturday from 11.30am to 1.30pm commencing 17 July 2010.
   - 2.2 [NAME]'s time with his father shall occur at one of a range of agreed public locations suitable to [NAME]'s developmental needs and comfort and convenient to the parents including: the local swimming centre, [SUBURB] Library, Shopping Centre at [SUBURB] and, subject to the mother's agreement, the [NAME] Father's Centre at [SUBURB].
   - 2.3 On the Monday of each week, the parents will communicate with each other and agree on the locations for [NAME]'s time with the father for the remainder of the week.
   - 2.4 For a period of 3 hours on [NAME]'s birthday and Christmas Day [YEAR] at the father's home.
3. The parties will communicate with respect to [NAME]'s routine and matters concerning [NAME]'s welfare via a parent's communication book, which will be written in by the parent who has most recently had care of [NAME] before each changeover and move from parent to parent with [NAME].
4. In the event of emergencies or variations to plans parents shall communicate with each other using text messages.
5. For the purposes of ensuring that [NAME] is settled during time he spends with the father, the mother shall be able to approach the father and child if the child is unsettled.
6. In the event [NAME] is unsettled in the father's care and he is unable to settle the child that he will telephone the mother and seek her assistance.
7. If the chid is unsettled and distressed the father shall abort his time with [NAME] and return [NAME] to the mother.

It is noted that:

8. The mother and the father consent in principle to the father's name being entered on [NAME]'s Birth Certificate.
9. The mother and the father agree in principle that a passport shall be issued for [NAME] to travel overseas but that [NAME] remain resident in the Commonwealth of Australia.
10. It is the mother and the father's intention that after a period of 6 months from [DATE] the father would be able to have [NAME] in his care at any location at his discretion.
11. It is the mother and father's intention to have further legally assisted family dispute resolution in the Family Relationship Centre in approximately [DATE].

Dated:

Father [NAME]	Mother [NAME]
Witness	Witness

Section 63C(1A) makes clear that an agreement is not a parenting plan unless it is made free from any threat, duress or coercion.

The benefits of a parenting plan are that, like informal arrangements, they are flexible and easily changed by writing a new parenting plan. They provide more certainty than an informal agreement and, while not enforceable, if the parents end up at court regarding their children, a parenting plan is taken into account by the court under section 70NBB of the FLA. The Child Support Agency can also do an assessment regarding parents' liability based on a parenting plan.

Consent orders

If parents want legally enforceable orders they can ask the Family Court to make orders that reflect the agreement they've reached, which are called consent orders under rule 10.15 of the *Family Law Rules 2004* (Cth) (FLR). Parents seeking consent orders need to complete and file the following documents, which are available on the Family Court of Australia website:

- an Application for Consent Orders;
- the orders they are seeking (refer to Consent Orders Supplement Guide); and
- Annexure to Draft Consent Parenting Orders.

The Application for Consent Orders is relatively straight forward, however parents may benefit from a solicitor helping them draft the orders they want. Where there is family violence, parents or their representatives must set out in the Annexure to Draft Consent Parenting Orders how the proposed orders deal with the allegations of family violence.

Before making the orders, the court must be satisfied that the orders sought are in the child/ren's best interests.

Practitioner tip

A client seeking consent orders should be advised that consent orders will compel a parent to make a child available in accordance with the orders unless there is a reasonable excuse. A reasonable excuse may be that there was a need to protect a person's health, safety or well-being or there was a misunderstanding by the person that they were breaching the order. In the absence of a reasonable excuse, your client may be found to be contravening the orders and open to penalty such as make up time, being ordered to attend a parenting program or, in serious cases, a fine or jail. It is possible that the court may change the orders in circumstances where the court considers the orders are unworkable and this may include changing orders in favour of the other parent. Sometimes, consent orders, and in particular the threat of contravention proceedings, are used by a perpetrator of violence to continue to coerce, control and threaten a victim of violence. It is also important to note that a court will not contravene a parent for failing to spend time with a child as per the orders.

Consent orders will remain in effect until one of the following takes place:

- the orders are changed by agreement, by either further consent orders or a by a parenting plan which over-turns all or part of the orders; or
- the orders are set aside or changed by the court, but before doing so, the court must be satisfied there has been a significant change in circumstances – see *Rice v Asplund* (1979) FLC 90-725.

If parents can't agree about parenting arrangements

If parents can't reach an agreement, they can apply to the Federal Circuit Court for parenting orders by completing and filing:

- an Initiating Application;
- a Notice of Risk (*Federal Circuit Court Rules 2001* (Cth) (FCCR), Form 1 to Schedule 2 and rule 22A.02);
- an affidavit setting out the facts relied on (FCCR, rule 4.05); and
- attaching a section 60I certificate given by an FDRP or an Affidavit – Non-filing Dispute Resolution Certificate under 60I(9)(a), (b), (c), (d), (e) or (f) of the Act.

If parents are seeking financial orders they will have to file additional documents (FCCR, Part 24 (financial orders); FCCR, rule 25A.02). See '**Property division**' below for more information.

Parents can only file an application for parenting orders in the Family Court of Australia if the issues in the case are of a complex nature, in which case they would need to file:

1. an Initiating Application;
2. a Notice of Child Abuse, Family Violence or Risk of Family Violence (FLR, Schedule 2);

3. an affidavit if they are seeking interim or procedural orders (FLR, rule 5.02); and
4. a certificate given to them by an FDRP under subsection 60I(9) or an Affidavit – Non-filing Dispute Resolution Certificate if 60I(9)(a), (b), (c), (d), (e) or (f) of the Act applies.

If parents are seeking financial and/or child support orders they will need to file additional documents (FLR, rules 2.02 and 2.05 (financial orders); FLR, rule 4.18). See '**Property division**' below for further information.

Notice of Risk / Notice of Child Abuse, Family Violence or Risk of Family Violence

Parties are required to file a notice in the prescribed form if they allege that:

a) a child has been abused or is at risk of being abused (s 67Z FLA); or
b) there has been family violence or there is a risk of family violence by a party (s 67ZBA FLA)

In the Federal Circuit Court this is a Notice of Risk and in the Family Court this is a Notice of Child Abuse, Family Violence or Risk of Family Violence. Completing the forms assists the court to fulfill its duty to ask the parties about child abuse and family violence, under subsection 69ZQ(aa) of the FLA.

Notice of Risk in the Federal Circuit Court

Part 22A of the FCCR makes it mandatory to file a Notice of Risk when filing an Initiating Application or a Response seeking parenting orders. The Notice of Risk must be in accordance with the prescribed form and can be filed electronically through the Commonwealth Courts Portal (www.comcourts.gov.au).

Instructions for completing the Notice of Risk are included on the form. Essentially the risks must be particularised clearly in the form, as in a pleading, and the evidence in support must be outlined in the affidavit filed with the Application or Response or separately with the Notice of Risk, as applicable.

The Notice seeks information about child abuse and family violence. If family violence is alleged, then consideration needs to be given to whether the family violence constitutes abuse or risk of abuse within the meaning of section 4 of the FLA. In our view the risk of harm to children needs to be a current risk and one that the orders being sought will respond to.

For example

Do you allege that there has been family violence or there is risk of family violence?

Between <date> and <date> the child witnessed domestic abuse of his mother (Anne) by his father (John). Incidents occurred weekly including the father yelling at, threatening to assault and threatening to kill the mother. Incidents included physical violence perpetrated by the father including hitting, kicking, pushing, hair pulling and throwing objects. As a result of the domestic abuse the mother has sought medical attention for injuries on at least one occasion and police have attended the home on three occasions over the last 12 months.

Also see section below on Affidavits for more information about how to describe family violence.

Where Q2 on the Notice of Risk is ticked YES, the information is reported to Family and Community Services (FACS), as required by sections 67Z and 67ZBA of the FLA.

The Notice of Risk also seeks information about mental ill-health; drug and alcohol abuse; parental incapacity; or any other risk posed to the child. The information provided in response must relate to how they pose a risk to the child.

If new facts or circumstances arise after filing a Notice of Risk, a new Notice of Risk and affidavit must be filed in accordance with rule 22A.04 of the FCCR.

Notice of Child Abuse in the Family Court

A Notice of Child Abuse is only required where there are allegations to be made, unlike the requirement to file a Notice of Risk in all matters in the Federal Circuit Court. The prescribed form must be used in accordance with rule 2.04D of the FLR.

The Notice of Child Abuse requires a concise summary of the allegations and details of each of them including dates they occurred, and any other particulars, which reflect the contents of the affidavit evidence. See '**Affidavits**' below for more information about how to describe domestic violence.

Rule 2.05(1) of the FLR requires a copy of any family violence order affecting the child or a member of the child's family to be filed when a case starts or as soon as practicable after the order is made. If a copy

of the family violence order is not available, rule 2.05(2) of the FLR require the party to file a written notice containing:

- an undertaking to file the order within a specified time;
- the date of the order;
- the court that made the order; and
- the details of the order.

The Notice of Child Abuse does not specifically seek additional information about the risk to a child from mental ill-health, drug and alcohol abuse or parental incapacity. In other respects, the substance of the information to be provided is the same as required for a Notice of Risk.

Affidavits

A well-prepared affidavit is often the most useful contribution you can make as a legal practitioner to the preparation of your client's case. This is not a complete guide to drafting affidavits in family law proceedings. Practitioners need to also use their general skills in good affidavit drafting including understanding the rules of evidence, and the application of the *Evidence Act 1995* (Cth).

Section 69ZT of the FLA states that the rules in relation to hearsay, opinion, tendency and coincidence, and credibility and character do not apply, unless there are exceptional circumstances. Judicial discretion applies to determine the weight the evidence is given. Note, however that the relevance rule still applies in family law.

Keeping informed of reputable research on domestic and family violence and its impact on children will help you to understand the context in which to seek instructions for the preparation of affidavits in family law cases. Also refer to **Chapter 1: Introduction to Domestic Violence** and **Chapter 2: Domestic Violence Clients for further guidance**.

The civil standard of proof must be met, but it is important to remember that although useful, independent corroboration of allegations of family violence is not required. The Full Court in *Amador & Amador* [2009] 43 FamCAFC 196 provided:

> Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage and possibly their children. We cannot accept that a Court could never make a positive finding that such violence occurred without their being corroborative evidence from a third party or a document or an admission. The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some face, to have their evidence of assault accepted.

Domestic violence is contextual. Although domestic violence is often described by incident, the experience of domestic violence is as a continuum of violence, usually including a high prevalence of low levels of everyday violence. Portraying the details of domestic violence, including the day to day lived experience of clients, is important, as good quality evidence is one of the objectives when drafting an affidavit on family violence.

Sample Affidavit History of Family Violence

1. *When we first met, F was very protective of me, wanting to know what I had been doing, who I was seeing when we weren't together, and ringing me often. I found this endearing at first, since our relationship was new and I thought he was just very keen. However, after we moved in together and I was pregnant with C, his behaviour became more intense. F rang me dozens of times most days. He said words to the effect of:*

   'Hi, what are you up to?'
   'Who are you meeting with today?'
   'How come you're meeting with Greg again. Didn't you meet with him on Tuesday?'
   'How come you're going out for coffee with your boss this afternoon?'

2. *If I went out with friends, he would insist on knowing all the details of where we were going, who would be there and how long we were going to stay. During one lunch with friends he rang me four times to check up on how it was going. He said words to the effect of:*

   'Hi. How's it going? Who's there for lunch?'
   'Hi. Haven't you finished lunch yet?'
   'Are you on your way home soon?'
   'How come you aren't home yet?'

3. *On 14 April 2015 when I was out with friends he followed me to the café and stopped by our table. He said words to the effect of:*

   'Hey babe. How long you gonna be? We've got stuff to do.'

   We had no previous plans to do anything that date. I felt humiliated in front of my friends.

4. *Soon after I became pregnant F elbowed me really hard in the belly. He said, 'I'm sorry, that was an accident', but it didn't feel like an accident to me.*
5. *About three weeks after that, we were in the kitchen and he was drunk and trying to make out with me. I said I didn't feel like sex and he got very angry. He pinned me against the kitchen wall and said, 'Well that's too bad.' He dragged me by the arm to the bedroom and had sex with me anyway.*
6. *I started to feel afraid of F and tried not to do anything that would upset him. I stopped seeing my friends.*
7. *F insisted on coming to all my antenatal visits at the hospital. I felt stifled as though I couldn't see anyone else alone.*
8. *After C was born, nothing I did was good enough for F. He criticised how I looked after C. He said words to the effect of:*
   'You're just as useless as your mother.'
   'Stop pandering to him, he'll just end up a sissy like you.'
   'You've just become a whinging bitch.'
9. *I gave up work when I was 32 weeks pregnant and after that I had no money to call my own. F gave me just enough cash for the groceries and he paid all the bills. When I needed a haircut I had to ask him for $50 and he came with me and sat in the salon.*
10. *On 20 June 2015 we argued over the phone bill. F pulled the bill out of my hand and shouted words to the effect of, 'Give it here. How can you run up such a huge bill? You're just bloody useless.' He slapped me hard across the face while I was holding C. C started to cry. F ran out of the house, slamming the door and punching a hole in the fly screen. As he left the house he yelled, 'I fucking hate you, you bitch!'*
11. *I rang the police. There is an Apprehended Domestic Violence Order against F as a result. Annexed and marked 'A' is a copy of the Final Apprehended Domestic Violence Order dated 29 June 2015.*
12. *The AVO was just the mandatory orders and we kept living together. F promised to change. F was OK for a while after this but on 2 November 2015, C's first birthday, he flipped out. I had invited friends over for C's birthday party and F was furious. We had a huge fight. At about 11 am F grabbed C and left the house and didn't come back until 6 pm. He didn't tell me where he was going and he didn't return any of my mobile phone calls. I was beside myself with worry.*

Safety at court

Family Violence Best Practice Principles

The Family Court's Family Violence Best Practice Principles (last updated in December 2015) are intended to guide decision makers, lawyers and parties in parenting disputes where family violence or abuse is alleged or where a risk of family violence is raised and are applicable to all proceedings before courts exercising jurisdiction under the FLA.

The Best Practice Principles recognise:

i) the harmful effects of family violence and abuse on victims;

ii) the place accorded to the issue of family violence in the FLA; and

iii) the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

Safety plans

The *Family Violence Plan 2014–16: Family Court of Australia and Federal Circuit Court of Australia* gives high priority to safety at court and provides assistance to any client who has fears for their safety at court.

Safety plans for court can include, but are not limited to:

a) staggered arrival times;

b) separate entry and exit points;

c) security guards; and

d) safe rooms to wait in.

Let the court know your client has fears for their safety at court as early as possible before a court appointment or appearance. The registry prefers at least five days' notice, but urgent arrangements can also be made.

Practitioner Tip

Contact the court about safety fears by:

- using Live Chat at www.familycourt.gov.au or www.federalcircuitcourt.gov.au
- emailing enquiries@familylawcourts.gov.au
- calling 1300 352 000
- contacting the case coordinator if the matter has been filed in the Family Court

Division 12A Principles for conducting child-related proceedings

The principles for conducting child-related proceedings contained in Division 12A, Part VII of the FLA include that the court is to actively direct control and manage the conduct of proceedings, and to conduct them in a way that will safeguard parties to proceedings against family violence (s 69ZN(5)(b)).

Where a party to family law proceedings has experienced family violence and is affected by trauma, the prospect of facing direct cross-examination by the other party (and perpetrator of the alleged abuse) can be very daunting and stressful. In 2015, 330 women responded to a Women's Legal Services Australia (WLSA) survey of survivors of domestic and family violence to gather evidence about the extent and impact of the experience of being directly cross-examined in family law courts. High levels of violence were reported, including 64% of women reporting sexual violence. Thirty nine per cent (39%) of matters settled before judgment and 45% of these respondents said that the prospective fear of personal cross-examination by their abuser was a significant factor in their decision to settle.

One hundred and forty-four (144) respondents made comments about the effect the cross examination had on them:

> I felt he had the privilege to continue his intimidation and threats yet in a confined legal space. It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing him yet we are 'thrown to the wolves' when we enter the court room. It made me feel all the feelings over again, it made me sick to the core.
>
> Couldn't speak very well, frozen.
>
> Terrifying. I could not look at him. The judge later said in his submission that I hated the man cause I couldn't look at him. The man terrorised me for years and to this day is still making me paranoid that he will carry out his death threat.

WATCH THIS SPACE

In July 2017 the Commonwealth Attorney-General's Department consulted on the Family Law Amendment (Family Violence and Cross Examination of Parties) Bill 2017 however to date the bill has not been introduced in to Parliament.

Although there are no specific legislation provisions in the FLA to enable the prohibition of direct cross-examination (as there is in the *Criminal Procedure Act 1986* (NSW) for victims giving evidence in sexual assault trials), practitioners need to be aware of and use wherever appropriate the existing provisions to conduct child-related proceedings in a way that recognises and responds to the prospect of direct cross-examination of victims of family violence by their alleged perpetrators.

Section 69ZX outlines the court's general duties and powers relating to evidence and provides that the court can limit or not allow cross-examination of a particular witness (s 69 ZX(2)(i)). For example, an unrepresented perpetrator (or victim) may be required to submit questions they want to ask the victim (or perpetrator) in writing to the judge, who vets them before they are put to the relevant party either orally or in writing; or, the Independent Children's Lawyer may be allowed to cross-examine the victim first and then be given an opportunity to cross-examine the victim again after the unrepresented parties. See '**Independent Children's Lawyer**' below for more information.

The court can also enable vulnerable persons to give testimony by video or in closed court (s 69 ZX(1)(c)).

In child-related proceedings, section 69ZX(3) allows the court to receive the transcript of evidence in other proceedings into evidence, to draw conclusions of fact from the transcripts that it thinks proper, and to adopt any of the recommendations, findings, decisions or judgments from those proceedings. Rule 15.75 of the FLR provides that a transcript of a hearing or trial may be received in evidence as a true record of the hearing or trial. This may include evidence from criminal or AVO proceedings.

Division 1 of Part XI of the FLA outlines general matters about procedure and evidence in family law

proceedings. Section 101(1) provides that the court shall forbid the asking of, or excuse a witness from answering, offensive, scandalous, insulting, abusive or humiliating questions unless it is essential in the interests of justice that the question be answered. This is a useful provision but it can be very difficult to notice whether a particular question is offensive or abusive – it may be that a certain look is what is devastating and brings back the immediacy of the family violence experienced. Further, it is the whole experience of direct cross-examination that is the problem, not just an individual question that may to the judge appear to be offensive, scandalous, insulting, abusive or humiliating.

Provisions relating to the use of video link, audio link or other means of giving evidence are found in Division 2 Part XI of the FLA. Section 102D provides that the court may for the purposes of any family law proceedings direct or allow a person to appear before the court by video or audio link or other appropriate means. This power may be exercised on application of a party to the proceedings or on the court's own initiative.

Also relevant is Division 3 of Part 2.1 of the *Evidence Act 1995* (Cth), which sets out the general rules about giving evidence (sections 26 to 36). Section 41 relates to improper questioning. It requires the court to disallow a question or inform the witness that the question need not be answered if the court is of the opinion the question is:

- misleading or confusing;
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- has no basis other than a stereotype.

Section 84 relates to the exclusion of admissions influenced by violence and certain other conduct. It states that the evidence of an admission is not admissible unless the court is satisfied that the admission and the making thereof were not influenced by:

- violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- a threat of conduct of that kind.

Section 69ZQ(1)(aa) requires the court to actively enquire into whether there are any allegations or concerns by the parties about family violence or child abuse.

Section 69ZW empowers the court to make an order for a state or territory agency (such as police or FACS) to provide the court with documents or information that may assist the court with its consideration of allegations.

Court to take prompt action in relation to allegations of child abuse or family violence

When a Notice of Child Abuse has been filed, section 67ZBB requires the court to:

1. consider making interim or procedural orders;
2. act expeditiously in relation to the allegations raised in the Notice of Child Abuse (ideally within eight weeks);
3. consider whether it is appropriate for the court to make a personal protection order or orders under section 68 and
4. consider whether it is appropriate for the court to obtain documents from welfare and law-enforcement agencies.

Confidentiality and subpoenas

Victims of family violence may be concerned about their personal records being subpoenaed and used in family law proceedings and it is indeed common practice in disputes about parenting arrangements for subpoenas to be issued to a range of services and professionals, including counsellors and medical practitioners as well as police, child welfare services, health services and schools.

In many cases little consideration may be given to whether they are all required or if the information can be obtained from only one or two sources. For example, if the fact in issue is whether there has been family violence, police records may be sufficient without the need to also pursue therapeutic notes.

Objections to subpoenas are rarely made because the process of objecting to a subpoena can be very onerous and daunting for the service provider or the subject of the notes. Even in the limited cases where objections are raised, orders are generally made to produce the material with restrictions such as inspection by legal representatives only and not

parties, or on rare occasions an order may be made for the material to be viewed by the judge only, who will determine relevance and weight at a later stage in the proceedings.

Generally the decision about the inclusion of sensitive material into evidence and the weight to be given to it is one for judicial discretion. In the family law jurisdiction this can be an even more significant judicial role given the wide discretion that can be exercised, particularly in matters relating to children, where the rules of evidence do not apply unless the court decides they are required in the individual case (s 69ZT of the FLA).

However there are protections in place regarding the subpoenaed material.

The FCCR rule 15A.01 defines medical records as, 'for a person … the histories, reports, diagnoses, prognoses, interpretations and other data or records, written or electronic, relating to the person's medical condition, that are maintained by a physician, hospital or other provider of services or facilities for medical treatment.' According to rule 15A.14 of the FCCR and rule 15.31 of the FLR the subject of medical records may give written notice before the production date that they wish to inspect the records to decide whether to object. If they wish to object they must then provide grounds in writing within seven days of the production date. Unless otherwise ordered the records cannot be inspected until seven days after the production date or the determination of the objection, whichever is later. Parties in the Federal Circuit Court can also seek a right of first inspection for medical records pursuant to FCCR rule 15A.14(2).

FCCR rule 15A.12 and rule 13.07A of the FLR state that documents produced must be used for the purpose of the case only and a person must 'not disclose the contents of the document or give a copy of it to any other person without the Court's permission'. Copies can be made of all subpoena material except child welfare records, criminal records, medical records and police records (FLR 15.30(2)(b); FCCR 15A.13(2)(b)).

Self-represented litigants in Family Court proceedings must obtain the registrar's permission before issue of subpoena according to FCR rule 15.18.

Further, anything said in the company of a family counsellor or an FDRP when conducting FDR is inadmissible with the exception of an admission by an adult or child that indicates that a child under 18 has been abused or is at risk of abuse, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources (s 10E and s 10J of the FLA).

Independent Children's Lawyer (ICL)

Section 68L of the FLA allows a court to order, of its own initiative or on application of the child, an organisation concerned with the welfare of the child, or any other person, that a child's interests in the proceedings be independently represented by a solicitor, if it appears to be in their interests to do so.

Section 68LA of the FLA sets out the role of an ICL:

(2) The independent children's lawyer must:

> *(a) form an independent view, based on the evidence available to the independent children's lawyer, of what is in the best interests of the child; and*
>
> *(b) act in relation to the proceedings in what the independent children's lawyer believes to be the best interests of the child.*

(3) The independent children's lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

(4) The independent children's lawyer:

> *(a) is not the child's legal representative; and*
>
> *(b) is not obliged to act on the child's instructions in relation to the proceedings.*

(5) The independent children's lawyer must:

> *(a) act impartially in dealings with the parties to the proceedings; and*
>
> *(b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and*
>
> *(c) if a report or other document that relates to the child is to be used in the proceedings:*
>
> > *(i) analyse the report or other document to identify those matters in the report or other document that the independent children's lawyer considers to be the most significant ones for determining what is in the best interests of the child; and*
> >
> > *(ii) ensure that those matters are properly drawn to the court's attention; and*

(d) endeavour to minimise the trauma to the child associated with the proceedings; and

(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.

(6) Subject to subsection (7), the independent children's lawyer:

(a) is not under an obligation to disclose to the court; and

(b) cannot be required to disclose to the court;

any information that the child communicates to the independent children's lawyer.

(7) The independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child.

(8) Subsection (7) applies even if the disclosure is made against the wishes of the child.

Family consultants

Clients involved in family law proceedings can be ordered to attend an appointment with a family consultant under section 11E(1)(c). Section 11A sets out the functions of family consultants:

(a) assisting and advising people involved in the proceedings; and

(b) assisting and advising courts, and giving evidence, in relation to the proceedings; and

(c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and

(d) reporting to the court under sections 55A and 62G; and

(e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings.

The Family Court and the Federal Circuit Court have family consultants who conduct assessments and provide advice to judges about separated families. The *Child Dispute Services Family Violence Policy* sets out how family consultants should respond to allegations of family violence. Your clients may be ordered to participate in a:

- Child Dispute Conference;
- Child Inclusive Conference;
- Child Responsive Program.

In each of the above, the family consultant will conduct separate interviews with each parent. Your client can bring a support person with them to the interview. The meeting is not confidential and all the information gathered by the family consultant is admissible and can be reported to the court.

Section 11G mandates that a failure to attend a meeting with a family consultant will be reported to the court and the court may make any orders it considers appropriate.

Child Dispute Conference

In a Child Dispute Conference (CDC) each of the parents meet with a family consultant. The main purpose of the CDC is to conduct a brief assessment of the family situation and the issues in dispute. There is no cost to the parties.

Child Inclusive Conference

In a Child Inclusive Conference (CIC) each of the parents and the children meet with a family consultant. CICs are intended to give the court an understanding of the family situation, particularly of the child/ren's experiences. There is no cost to the parties.

Child Responsive Program

The Child Responsive Program involves a series of meetings between a family consultant, the parents (or other carers), and usually the child/ren. The program focuses on the child/ren's needs and the aim is to help parents and the court understand what the child/ren need and how the court can best deal with the matter. There is no cost to the parties.

Single Expert Witness

In some circumstances, such as where an appropriately qualified expert is required to report on a particular issue in a case, parties will be seen by a single expert witness such as a psychiatrist or clinical psychologist agreed upon by the parties. The expert meets with the parties and the children and writes a detailed report which will include a set of recommendations to the court.

The Magellan List

The Magellan program was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. An individual judge closely manages each Magellan matter and the court aims to finalise the case quickly. The court can request relevant documentation from FACS, includ-

ing a Magellan Report, which outlines the involvement FACS have had in relation to the child and/or their family. Section 91B of the FLA allows the court to invite, but not compel, FACS to intervene in the proceedings. Also see *Secretary, Department of Health and Human Services v Ray and Others* (2010) 45 Fam LR 1.

Practitioner tip

An order for sole parental responsibility does not give a parent authority to change the name of a child through the NSW Registry of Births, Deaths and Marriages (BDM). So, check with your client about whether they want to change the name of their child and seek family court orders that authorise BDM to register a change of name at the same time as your client is seeking other parenting orders. If that is not practical, the District Court also has jurisdiction to deal with the change of a child's name under section 28 of the Births, Deaths and Marriages Registration Act 1995.

Overseas travel

If there are court proceedings underway or there are parenting orders already in place which do not provide for overseas travel, it is an offence under section 65Y of the FLA, to travel overseas with a child without the written consent of the other party or without court orders allowing overseas travel.

Obtaining a passport for a child

Section 11of the *Australian Passports Act* 2005 (*Cth*) sets out the provisions relating to the issuing of a passport to a child. Section 11(1) states that a passport should not be issued for a child unless each person who has parental responsibility for a child consents or there is a court order which provides for the issuing of a passport. Section 11(5) sets out the definition of who has parental responsibility for the purposes of the section 11. Section 11(2) sets out the 'special circumstances' of the matter warrants the issuing of a passport notwithstanding the consent of all persons who have parental responsibility for a child.

Property division

Victims of domestic violence may need assistance negotiating with perpetrators about how to divide the property of their relationship.

Property of the relationship

Section 4 of the FLA defines property of a marriage or a de facto relationship as any assets or debts brought into the relationship, or acquired during the relationship, in either or both party's names including superannuation, gifts, inheritances, assets and goodwill that a party has built up in a business, compensation awards, redundancies, lottery winnings and prospective inheritances, if there is a level of certainty that the party will receive the inheritance.

Alteration of property interests

Sections 79(1) and 79(2) and 90SM(1) and 90SM(3) of the FLA allow the court to alter the parties' interests in the property of the marriage or de facto relationship, only if the court is satisfied that, in all the circumstances, it is just and equitable to make the order.

Section 79(4) states that when considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:

a) financial contributions made by both parties;
b) non-financial contributions made by both parties; and
c) the parties' current and future needs.

Section 90SM(4) requires the court to consider the above when considering altering the property interests of parties in a de facto relationship.

Property settlement adjustment and family violence

The leading case of Kennon and Kennon established that an adjustment in a property settlement case can be made on the basis of family violence. Kennon and subsequent cases indicate that a small adjustment will be made but only in exceptional circumstances.

Kennon and Kennon [1997] FamCA 27; (1997) 22 Fam LR 1

In ***Kennon,*** the Full Court of the Family Court recognised family violence as a relevant issue in assessing the adjustment that should be made in a property settlement case. In that case there was a 4-year marriage and no children and a history of domestic violence assaults.

The Full Court held:

> Our view is that where there is a course of violent conduct by one party toward the other during the marriage which is demonstrated to have had a significant adverse impact on that parties contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties respective contributions.

Devon & Devon [2014] FCCA 1566

In ***Devon***, the parties were married for 31 years and had 4 adult children, including one with an intellectual disability. There were no significant assets at the start of the marriage and it was accepted that the husband ran the family business and the wife was the homemaker and main carer of the children.

The Court accepted that the wife had experienced family violence over their entire relationship. Her Kennon argument reflected a loading in terms of contribution but also in terms of her heath and future employability. She successfully proved that the domestic violence made her homemaker and parenting role even more difficult and evidence was before the Court of the wife's major depression and high levels of anxiety and stress making her unable to obtain employment.

Judge Burchardt held:

> In view of the very lengthy relationship between the parties, and the relatively workaday nature of their contributions while they lived together, it would ordinarily have been appropriate to assess the parties' contributions as equal. I would be prepared to give the wife, as she seeks, a five per cent loading (a modest one, as it should be) for the *Kennon* factors.

There was an additional loading in the wife's favour of a further 15 per cent based on future needs. Ultimately the wife received 70% of the asset pool and retained her superannuation (as did the husband), a percentage which included her claim for spousal maintenance.

Scott & Scott [2015] FCCA 2394

In ***Scott*** the parties had 3 children aged 16,17 and 20 years. The wife argued family violence by the husband and for an adjustment of the property in her favour between 65% and 80% which included a Kennon adjustment.

The wife gave evidence of family violence. She was isolated from her family and friends and the husband did not allow her to return home to spend time with her dying mother. The husband had physically assaulted her and there was verbal and physical abuse throughout the marriage witnessed by the children. The husband unsuccessfully argued that the wife's evidence of family violence was not corroborated.

Judge Harland stated that corroboration of family violence is not required. At paragraphs 46 and 47:

> It is also necessary to point out corroboration is not necessary in order for the court to make findings about family violence. Family violence tends to take place behind closed doors. Often there are not witnesses apart from those directly involved.
>
> In this regard I refer to the Family Violence Best Practice Principles, Third Edition, October 2012, page 6:
>
> > Importantly, the FLA does not require independent verification of allegations of family violence (such as police or medical reports) for a court to be satisfied that it has occurred. As the Full Court of the Family Court said in Amador & Amador [2009] FamCAFC 196; (2009) 43 Fam LR 268:
> >
> > Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.
> >
> > The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.

Although Judge Harland was willing to apply the Kennon principle, she had difficulty doing so, because the wife did not prove how the domestic violence made her contributions more arduous. An adjustment of 15% was made in favour of the wife for other reasons but not an adjustment based on the Kennon claim. From paragraphs 94 – 97 Judge Harland gave the following reasons:

> 94. The wife seeks an adjustment in her favour taking into account the family violence and relies on the Full Court decision of Kennon and Kennon (1997) FLC 92 – 757. The Full Court said:
>
> > our view is that where there is a course of violent conduct by one party toward the other during the marriage which is demonstrated to

> have had a significant adverse impact on that parties contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties respective contributions within s79.

95. I am satisfied that during the relationship the husband was violent towards the wife. However as the extract from *Kennon* makes clear more than this must be established. The wife did not lead evidence as to how the violence made her contributions significantly more arduous. The Court is not entitled to assume that the husband's violence has made her contributions more arduous. The comments of the Full Court in the unreported decision of *S & S* [2003] FamCA 905 are also applicable here:

> There is no doubt that domestic violence may be a relevant factor in assessing contribution. The difficulty as presented in this case and many others is that inadequate evidence makes a proper assessment by the trial Judge either very difficult or impossible.
>
> An insufficiency of evidence in the present case leaves the Court with a limited ability to deal with allegations in the context of section 79 proceedings. As Kennon has established, it is necessary to provide evidence to establish:
>
> - The incidence of domestic violence;
> - The effect of domestic violence; and
> - Evidence to enable the court to quantify the effect of that violence upon the parties' capacity to "contribute" as defined by section 79(4).
>
> We do not agree that the evidence in this case could properly have led to an adjustment pursuant to section 79. There was no suggestion by counsel of the wife that his Honour did not correctly summarise the evidence in relation to this topic. The particular deficiency apart from those referred to by the trial Judge is the complete absence of evidence as to how the husband's conduct affected her ability to contribute.

96. In this case the wife's evidence did not address the issue of how her contributions were made more arduous because of the husband's violence. She gave very limited evidence about how the violence has impacted on her. I am unable to be satisfied that she lost her job and is unable to work as a child care worker because of it.

Spousal maintenance

Section 75(2) refers to matters to be taken into consideration in relation to spousal maintenance. Section 72(1) states that a party to property proceedings may be liable to financially support the other party if they are reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

1. by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
2. by reason of age or physical or mental incapacity for appropriate gainful employment; or
3. for any other adequate reason.

Section 90SF(4) requires the court to take account of the same circumstances when considering making a maintenance order in favour of a member of a de facto couple.

Options if parties can agree about property division

If parties can agree about how to divide the property of their relationship, they can have:

- an informal agreement;
- a binding financial agreement (BFA); or
- consent orders made.

Informal agreement

An informal agreement is appropriate when there is only limited property of the relationship, for example, only household items. A victim of domestic violence may still need a property recovery order if the perpetrator refuses to allow them to pick up their property. See **Chapter 3: AVOs** for more information about property recovery orders.

Victims of domestic violence who are renting with the perpetrator, particularly those who are co-tenants on a residential tenancy agreement, will also need advice about how to end their or the perpetrator's liability under the lease. See **Chapter 11: DV and Housing** for more information.

Binding financial agreements

Under sections 90D and 90UD of the FLA, a BFA should sets out how all or any of the property or financial resources that either or both of the parties had or acquired during the relationship is to

be dealt with, and/or outlines the maintenance of either of the parties.

Consent orders

If parties want legally enforceable orders they can ask the Family Court under rule 10.15 of the FLR to make orders that reflect the agreement they have reached, which are called consent orders. Parties seeking consent orders need to complete and file the following documents, which are available on the Family Court of Australia website:

- an Application for Consent Orders; and
- the orders they are seeking (refer to Consent Orders Supplement Guide); and
- complete the Superannuation Information Kit (if seeking superannuation splitting orders).

The Application for Consent Orders is relatively straightforward, however parties may benefit from a solicitor helping them draft the orders they want. Before making orders the court must be satisfied that the orders sought are just and equitable in the circumstances.

There are advantages to applying for consent orders rather than entering into a binding financial agreement:

- while it is recommended that parties applying for consent orders obtain independent legal advice before filing, it is not compulsory, whereas both parties need to employ a solicitor to draft and advise them on a BFA;
- there is also no judicial oversight of BFA, so they do not have to be just and equitable;
- consent orders can also deal with parenting arrangements, whereas BFAs can only deal with property division.

When parties can't agree about property division

If parties cannot reach an agreement, they can apply to the Federal Circuit Court for financial orders by completing and filing:

- an Initiating Application;
- an affidavit setting out the facts relied on (FCCR, rule 4.05):
- a financial statement; and
- a Superannuation Information Kit (if they are seeking superannuation splitting orders).

Parties are required to make a full and frank disclosure of all their assets and liabilities. The court can draw conclusions that a party has not made a full disclosure. The court ultimately decides whether it is just and equitable to alter the financial positions of each of the parties.

Parties must seek financial orders and/or maintenance orders within 12 months of a divorce becoming effective or seek leave of the court (s 44(3A)). De facto couples must seek financial orders and/or maintenance orders or within two years of separating (s 44(5)).

Divorce

The Federal Circuit Court will make a divorce order if:

a) a marriage has broken down irretrievably (s 48(1) FLA); and

b) the parties have separated and thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order (s 48(2) FLA); and

c) if there are children of the marriage, proper arrangements in all the circumstances have been made for the care, welfare and development of those children (s 55A FLA).

Both spouses do not need to consent (agree) to divorce. Under section 49(1), the court can make a divorce order on the basis that one spouse has told the other spouse they want to separate.