

When Family Violence Impacts On a Property Division (Another View)

Given Judge Halligan found in **Birkett & Hemsley [2014] FCCA 1568** that the wife was the victim of serious and persistent family violence by the husband, to such an extent that it compromised her parenting capacity, his eventual decision might have come as something of a surprise to both parties.

The parties who were both in their late 40's lived together for 11 years and had two children aged 10 and 8 who following the separation were in the primary care of the wife and spent little time with the husband. The parties' net asset pool totalled \$660K.

The Judge found that while the wife had attempted to provide a safe and stable environment for the children despite the husband's drinking problem and his serious and persistent family violence against her, the independent psychological evidence also indicated that this violence caused the wife's own alcohol use to escalate to a level which at times impaired her parenting of the children. Indeed the Judge found the wife's anxiety and depression reduced her capacity to meet the children's emotional needs resulting in her neglecting the children when she was pre-occupied with her own issues rather than engaging with them.

In the context of the parties' contributions, the wife submitted that her non-financial contributions were made more onerous because of the husband's persistent violence. In the circumstances the wife claimed that their relative non-financial contributions favoured her in the range 55/45 to 60/40.

In relation to the impact of family violence in assessing non-financial contributions, the Full Court said in **Kennon (1997)** :

Where there is a course of conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or to have made his or her contributions significantly more arduous than they ought to have been, that is a fact to take into account in assessing the parties' contributions.

It is essential to bear in mind that these considerations apply to a relatively narrow band of cases. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and has a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass conduct related to the breakdown of the marriage (because it would not have had sufficient duration for its impact to be relevant to contributions).

In this instance the Judge was satisfied that the wife was the victim of serious and persistent family violence throughout the course of cohabitation, sufficient to fall within the above formulation and rejected the husband's submission that there was no medical evidence of the effect of his violence on the wife.

However **Kennon** is not a basis for some sort of compensatory award to a victim of family violence. It requires an assessment of the parties' respective non-financial contributions. The issue was whether the evidence supported the wife's case that her contributions were made more onerous by the husband's violence sufficient to justify a loading in the assessment of the parties' non-financial contributions.

While the Judge was satisfied that the wife's non-financial contributions such as her care of the children were made significantly more difficult by the husband's violence, he ultimately made no additional allowance when assessing the wife's non-financial contributions compared to his.

Instead the Judge somewhat dismissively 'recognised' the seriousness of the violence issues the wife had dealt with during the marriage by electing **not to discount** the value of her non-financial contributions in the circumstances despite 'her relative neglect of the children's needs at times'.