The Property Rights of Home-Makers under General Law: *Bryson v Bryant*

1. *The Property Rights of Women*

What rights does a woman really have in her family home, when her male partner is the sole registered owner? After nearly 20 years in force, the *Family Law Act Act* 1975 (Cth) has encouraged a community expectation that women are entitled to a share of family property, even if their contribution is largely domestic labour not easily translated into dollars. The *De Facto Relationships Act* 1984 (NSW) produced similar expectations for women in long term de facto relationships. But are these expectations supported by the general law? Does a woman need to go through divorce (or de facto equivalent) before she has any meaningful property rights in the family home?

The peculiar circumstances of *Bryson v Bryant*[1] provided an opportunity for the New South Wales Court of Appeal to examine whether the general law does concede an equitable interest in the family home to "home-makers", and precisely what the nature of that interest is. Unfortunately, the bench produced three separate and significantly different opinions.

Common to all three, however, was the firm reminder that there is no legal regime of community property in New South Wales (nor in Australia generally).[2] A decade ago the Australian Law Reform Commission considered the pros and cons of the concept of community property for spouses in an extensive enquiry into the economic consequences of divorce.[3]

Strong representations from sections of the women's movement (notably Eva Cox)[4] claimed a community property regime would disadvantage women after divorce because women from asset-poor marriages would be lumbered with a share of debts, and in any case, a 50:50 split of property on divorce would disadvantage whichever party had the least opportunity to earn income post-divorce. As the empirical studies showed, that party was usually the woman.

Whichever system produces the "best" results for divorcees, *Bryson v Bryant* shows that the absence of a community property regime can disadvantage women who wish to assert an interest in family property without going through divorce. This case concerned a woman's wish to bequeath a beneficial interest in her family home to a relative. A more critical situation might be the right of woman to retain a beneficial interest in her home when her husband, the registered proprietor, is declared bankrupt.

Under general law women in such circumstances face considerable obstacles. The orthodox doctrine of resulting trusts is entirely inadequate to find realistic solutions to such problems (as the following argument attempts to

1 (1992) 16 Fam LR 112.
2 Id, per Kirby P at 117, 121; per Sheller JA at 137, 143; per Samuels AJA at 150.
3 See Graycar, R and Morgan, J, *The Hidden Gender of Law* (1990) at 129–139.
4 See Cox, E, "Matrimonial Property Scuttled" (1985) 10 *Leg Serv Bull* 192, quoted in Graycar and Morgan, id at 135.

prove). Constructive trust reasoning offers a more flexible approach, but at its present stage of evolution in Australia, the constructive trust remedy is better fitted to relationships analogous with commercial relationships.[5]

Kirby P[6] cited Patrick Parkinson's conclusion in "Intention, Contribution and Reliance in the De Facto Cases": "The law, then, has come a long way, but there is still further to go. It remains open to the criticism of gender bias to the extent that home-makers are not treated as well as those making financial contributions".[7] Those criticisms remain following the majority decision in *Bryson v Bryant*.

2. *The Facts*

After a marriage spanning 60 years, George and Margaret Moate of Sans Souci died within a few months of each other, each leaving a will. There being no children to the marriage, Margaret left her "real and personal estate whatsoever and wherever" to her brother, John Bryson (the appellant). Shortly after making this will a caveat was lodged in her name asserting an equitable interest against the title of the couple's home of which George was the sole registered proprietor. George's will left a life estate to Margaret and the remainder to the Red Cross Society. Margaret died shortly before George, who was suffering severe dementia in a nursing home. The executors of both wills agreed to remove the caveat so that the property could be sold and the proceeds distributed according to the Court's determination.

One of the difficulties of this case was that many of the assertions of the plaintiff about the extent of Margaret's participation in the purchase and improvement of the family home were not supported by any documentary evidence, nor by any witness other than John Bryson himself. Consequently, not all of these assertions were accepted as fact by the whole bench.

The property in dispute was bought in 1935 for 70 pounds. George had an electrical business which, due to prevailing economic conditions, failed in 1930 and he secured no more work until 1935. During those five years, John Bryson claimed that the couple lived off his sister's income as a shoe shop assistant. John also claimed that his sister had received a share of about 75 pounds in his mother's estate in 1941 or 1942, and that this had been spent on improvements and furnishings in the house. Margaret had been a helper about the site while George, John and other friends and relatives had built the house. From the time George secured employment in 1935 until their mutual hospitalisation in 1987, she had been a "dutiful"[8] wife and housekeeper.

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5 The analogy with a joint endeavour, the basis of which had failed, was crucial to the findings of the High Court in *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

6 Above n1 at 122.

7 (1991) 5 *AJ Fam L* 268 at 276.

8 Above n1, per Samuels AJA at 152.

Kirby P alone accepted the inference that Margaret had contributed the money from an inheritance to the family home. He was also the only judge to infer that her period as the sole breadwinner meant she had contributed financially, albeit indirectly to the purchase price.[9]

While Kirby P gave some weight to the fact that Margaret had placed a caveat on the title and made a will,[10] Sheller JA described this evidence as "non probative".[11]

3. *The Decision at First Instance*

Young J held that there was insufficient evidence to prove that Margaret had contributed to the property with the intention of gaining an interest in it which would survive her death. He found there was no constructive trust in favour of her estate, since on the principles espoused by the High Court in *Muschinski v Dodds*,[12] George's executors were not acting unconscionably in retaining the whole property after her death.

He said:

> ... when parties are clubbing together to provide a matrimonial home, it is not unconscionable if one party should die, for the other party to take the whole of the interest himself because, after all, one might very well say that each party contemplated that should one die prematurely then the other would have a roof over his or [sic] head for life.[13]

As it turned out, this observation effectively decided the appeal, since it was the chief reason given by Sheller JA for not finding a constructive trust in Margaret's favour after her death.[14]

4. *The Appeal*

John appealed on three different but related grounds, set out in the judgment of Kirby P:[15]

- On the basis of the doctrine of resulting trusts, the court should infer a common intention on the part of George and Margaret to create an equitable interest for Margaret which was devisable on her death and which would be upheld against the consciences of both Mr Moate during his life and later his executors.
- In the absence of sufficient evidence of intention to establish a resulting trust, the court should nevertheless declare a constructive trust as a remedy for the unconscionable denial by George's executors of Margaret's equitable interest.

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9 Id at 121.
10 Id at 131.
11 Id at 142.
12 (1985) 160 CLR 583.
13 Cited by Kirby P above n1 at 115.
14 Id at 144.
15 Id at 116.

- George's executors should be compelled to make restitution to Margaret's estate to prevent the unjust enrichment that would ensue if they were allowed to retain the benefit of her contributions and labours.

5. *The Resulting Trust, and the "Common Intention" Constructive Trust*

All three judges rejected the first ground, on the basis that there was insufficient evidence of any common intention of the parties that Margaret should have an interest in the matrimonial home.[16]

Strictly speaking, the "intention" required for a finding of a resulting trust is one presumed by the court in the absence of proof of any contrary actual intention of the parties. A resulting trust arises when a party provides funds for the acquisition of property but does not obtain any legal interest in the property. The fact of the contribution gives rise to a rebuttable presumption that the contributor intended to obtain a beneficial interest in the property purchased. The presumption can be rebutted by evidence or inference that the contribution was intended as a gift.

The judgments of both Kirby P and Samuels AJA do not make the distinction between resulting and constructive trusts precisely clear (as Sheller JA does).[17] Kirby P speaks of the requirement of a "common intention" to establish a resulting trust[18] and goes on to consider whether Margaret's conduct throughout the marriage was referable to that common intention.[19] This type of analysis is generally applied to a type of constructive trust, imposed where one party declared an unwritten but nevertheless express intention to give a beneficial interest to the other party, and that other party relied to his or her detriment on that intention. This type of trust is a constructive trust imposed to ensure that there is no unconscionable reliance on the Statute of Frauds requirement for writing. In Australia, this type of constructive trust has been applied in the case of *Green v Green*.[20]

Samuels AJA[21] also discusses this type of trust in the context of an "extended" doctrine of resulting trust. Since two of the judges deal with this type of trust in the context of resulting trusts, I shall deal with it first.

In establishing this type of trust, women are disadvantaged by a need to rebut a presumption that their contributions of money and domestic services were given purely out of "natural love and affection".[22] Unless there is proof that contributions were made either in exchange for a promise of a proprietary interest (in which case even domestic services may constitute a contribution:

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16 Id, per Kirby P at 122; per Sheller JA at 143; per Samuels AJA at 150.
17 Id at 141–2.
18 Id at 120.
19 Id at 122.
20 (1989) 13 Fam LR 336; (1989) 17 NSWLR 343.
21 Above n1 at 149.
22 Id, per Kirby P at 122; per Sheller JA at 142; per Samuels AJA at 151.

see *Green v Green*)[23] or as part of a partnership or joint venture involving the acquisition of property (as in *Baumgartner v Baumgartner*)[24] a woman's contributions are frequently inferred to be given freely out of love and devotion.

Young J at first instance held that there was "just not enough evidence in this case for the plaintiff to prove that the reasons why [Mrs Moate] put in her contributions was [sic] other than for love and affection that she held for [Mr Moate]".[25] Sheller JA[26] and Samuels AJA[27] both said that Margaret's conduct was as likely to be explained by "natural love" as by any desire to acquire an interest in property. Sheller JA cited Nourse LJ in *Grant v Edwards*[28] for the proposition that to find a resulting trust (or as it should more properly be described, a constructive trust) the woman's conduct must be such as she "could not reasonably have been expected to embark [upon] unless she was to have an interest in the house".

Under this formulation, women in domestic relationships bear a near impossible burden of proving that they had an overriding mercenary motive for joining the relationship. Apparently, the purely commercial transaction of a prostitute who unashamedly demands property in exchange for "love and affection", could come within this formulation. This illustrates a bias in favour of relationships that can be described in commercial terms, and against the purely private, personal relationship.[29]

Surely after nearly 20 years of the operation of the *Family Law Act* 1975, it is reasonable to infer that married women do expect that in addition to sharing "natural love" they are entitled to a share of the tangible assets acquired during the marriage. This doctrine asks the question: "Would she have married him if there was to be no home ownership?" Surely the more realistic question should be: "Did they expect that she would share fully in any property that did happen to be acquired throughout the course of the relationship?". The answer in Margaret Moate's case was clearly "yes". By the time Margaret had made her will she clearly believed that her contributions to the marriage over 60 years gave her an entitlement to an interest in the family home — not only a personal right to live there herself, but a full proprietary right, able to be devised on her death.

Unfortunately for Margaret's intended beneficiary, the fact of her will and the subsequent caveat were discounted as completely irrelevant by Sheller JA and Samuels AJA. Samuels AJA[30] took an historical excursion back to the attitudes of men and women in the 1920s when Margaret and George first eloped. Margaret was fixed with the intention she was assumed to have had in 1927, regardless of the revolution in attitudes over the subsequent 60 years of her life.

This highlights a serious weakness in the resulting trust doctrine as far as application to family property is concerned. According to the orthodox view,

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23 Above n20.
24 Above n5.
25 Above n13.
26 Id at 142.
27 Id at 149.
28 [1986] Ch 638 at 648.
29 See Graycar and Morgan, above n3 at 30–39.
30 Above n1 at 147.

the relevant time for examining both the quantum of the contribution and the intention of the contributor (for the purpose of supporting or rebutting a presumption of trust) is the time of initial acquisition of the property. In the case of family homes, it is unrealistic to assume that only contributions made at the time of purchase reflect the intentions of the parties as far as long term shares in ownership are concerned. The constructive trust, which takes into account later contributions, is clearly more appropriate to determining interests in family property. Nevertheless, counsel for the plaintiff argued for a resulting trust, so all three judges examined the doctrine and dismissed it before considering the constructive trust.

Kirby P[31] appears to have merged resulting and constructive trust doctrine, by citing Lord Bridge in *Lloyds Bank PLC v Rosset*,[32] as authority for the proposition that there may be exceptional cases where a common intention formed after acquisition may be relevant to a finding of a resulting trust. Sheller JA cited the same passage[33] in respect of the "common intention" constructive trust discussed above. Generally, subsequent declarations of intention are only admissible in any finding of a resulting trust "as admissions against interest".[34]

Samuels AJA cited Gibbs CJ in *Calverley v Green*[35] to justify a strict view that "[t]he relevant time at which the situation of the parties must be examined is the date of purchase of the property".[36]

This orthodox requirement may have been appropriate to property transactions of wealthy gentry in the 18th and 19th centuries in England, but it has little bearing on the acquisition of the peculiar asset that is the working Australian family's home. Commonly, family homes are initially acquired with a very modest deposit and a 30 year mortgage. Over the course of a marriage, the asset is often improved and extended dramatically. The value represented by the asset at the end of a long marriage is substantially greater than the initial contribution on acquisition. Indeed, it is hardly realistic to describe the initial 10 per cent deposit on a block of land as the "acquisition" of a home when it will take 30 or 40 years to acquire an unencumbered interest. It is hardly fair to attribute the whole of the funds borrowed on a mortgage to the person whose name happens to be on the bank's documents, when in reality, families pool resources to enable the official mortgagor to meet mortgage repayments. It makes no common or legal sense to ignore the additions of value over the course of acquiring that unencumbered interest. This seems particularly unfair given that the Australian family home, being one of the few assets exempt from capital gains tax, is often the family's principal vehicle for saving.

Time is not the only weakness in the orthodox doctrine. Applying the doctrine strictly, Samuels AJA[37] and Sheller JA[38] held that contributions must be

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31 Id at 120.
32 [1991] 1 AC 107 at 132ff.
33 Above n1 at 136.
34 Id, per Sheller JA at 137.
35 (1984) 155 CLR 243.
36 Above n1 at 149.
37 Id at 149.
38 Id at 142.

financial to find a resulting trust. Kirby P was more willing to ascribe an economic value to Margaret's domestic services[39] but since he was the only one of the three to accept any of the inferences that Margaret had contributed financially, his comments on her non-financial contributions were not essential to his decision. Kirby P alone inferred that since Margaret was the sole breadwinner for the five years immediately before the house building began her earnings were likely to have contributed, albeit indirectly, to the purchase price.[40] The fact that only George's name was on the title reflected no more than the customs of 1932. "[I]f the mercantile obsessions of our law require us to focus exclusively on financial contributions, they are readily to be found in this case," Kirby P said.[41]

Sheller JA rejected this inference. He said the property "was registered in the name of Mr Moate because he paid for it".[42] In the course of argument, no evidence was led as to where George got the 70 pounds. Samuels AJA also held that Margaret had made no proven financial contribution to the purchase price of the property, so no resulting trust could be found in her favour.

Women's non-financial contributions which effectively free up their partners to earn outside income and thereby acquire property, will not warrant any grant of an equitable interest in that property under the resulting trust doctrine. This too ignores the way in which a great many Australian families acquire family assets. In many traditional relationships the partners set out to maximise family income by dividing up responsibilities. He works outside the home for money. She keeps house and cares for children (and perhaps takes on part-time or casual work) and exercises all the economies necessary to enable mortgage payments to be met and home improvements to be made. Her labour is often vital to the acquisition and improvement of the home, yet the resulting trust doctrine is not equipped to recognise it.

In his concluding remarks on resulting trusts Kirby P cited Parkinson for the proposition that this doctrine ought nevertheless not lightly be abandoned "in the rush to confer broad discretions on judges".[43] In my view, the doctrine of the resulting trust has no useful role to play in Australian family property law. Its anachronistic requirements render it an entirely inappropriate tool for finding just and equitable solutions to family property disputes. The more flexible remedy of the constructive trust is clearly a more appropriate avenue for examining and resolving family property disputes. Nevertheless, as the judgments in *Bryson v Bryant* reveal, and as it will be argued here, the constructive trust in its present state of evolution still exposes the homemaking partner of a relationship to significant disabilities in establishing full proprietary rights in the family home.

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39 Id at 122.
40 Id at 121.
41 Id at 126.
42 Id at 142.
43 Id at 122, citing Parkinson, above n6.

6. *The "New" Constructive Trust Based on Unconscionability*

Each member of the Court moved on to examine the "new" constructive trust[44] which, according to Deane J in *Muschinski v Dodds*[45] is:

> ... a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.

The retention or assertion of legal title must be "unconscionable" before a constructive trust will be found. The notion of "unconscionability" in this context is not precisely defined. Deane J emphasised that it must not be made an excuse for "the indulgence of idiosyncratic notions of fairness and justice".[46] This warning was picked up by Kirby P where he said that Australian courts would not engage in "palm tree justice".[47] Sheller JA[48] and Samuels AJA[49] also referred to this warning. They cited the statement of Windeyer J in *Hepworth v Hepworth*[50] that the court "has no discretion to disregard existing legal and equitable rights and to make such order as may seem to it fair in the circumstances existing when it is considering the case".[51] With that warning a unanimous voice from the Australian courts joins the authors of *Jacobs' Law of Trusts in Australia*,[52] in firmly denouncing the "heresy" of Lord Denning's new model of constructive trust expounded in *Heseltine v Heseltine*[53] and *Cooke v Head*.[54]

But what is "unconscionability" in this context? Detriment or loss to the claimant is an essential element,[55] and there must be some conduct of the person denying the claim which can be described as unconscionable. The denial itself may be the unconscionable conduct (as it was in *Baumgartner* and also in *Muschinski*). Precisely how this formulation differs from a judicial assessment of what is fair and just is, with respect, difficult to discern. In criticising the above mentioned Denning decisions, the authors of *Jacobs'* highlight discrepancies between the actual contribution made by the claimant and the proportionate interest granted. This suggests that detriment is the crucial factor. Yet, as Kirby P said,[56] the new unconscionability principle

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44 Id, per Kirby P at 122–7; per Sheller JA at 139–142, 144; per Samuels AJA at 150–153.
45 (1985) 160 CLR 593 at 614.
46 Id at 615.
47 Above n1 at 118, 119.
48 Id at 137.
49 Id at 150.
50 (1963) 110 CLR 309 at 319.
51 Above n1, per Sheller JA at 137; per Samuels AJA at 150.
52 Meagher, R P and Gummow, W M C, *Jacobs' Law of Trusts in Australia* (5th edn, 1986).
53 [1971] 1 All ER 952.
54 [1972] 2 All ER 38.
55 Above n1, per Kirby P at 124.
56 Id at 126.

> should not lead the court back to family property law of twenty years ago by the back door of a preoccupation with contributions, particularly financial contributions, made by claimants of beneficial interests and at the time of the acquisition of the property in question.

Kirby P cited *Muschinski*[57] as authority for the proposition that constructive trust reasoning may provide a remedy where the contributions of the parties included not only "direct contributions in money or labour" but also "indirect contributions in other forms such as support, home-making and family care".[58] (He did not, however, refer to the finding of a "failed joint venture" which provided the rationale for taking all contributions into account in *Muschinski*.) Kirby P supported the inclusion of non-monetary contributions with evidence that such contributions had been taken into account by the High Court in *Baumgartner v Baumgartner* and *Mallett v Mallett*[59] and several other marriage and de facto relationships cases heard in New South Wales and Victoria.[60] (It must be remembered, however, that some of these decisions were based on application of statutory provisions, not general principles of the common law.)

He concluded that Margaret's financial contributions on their own gave her an equitable interest which the Court would protect by a declaration of a constructive trust. But he added: "I would for myself add the very considerable economic value of the domestic services provided over such a long time by Mrs Moate in the very house in question".[61]

Most importantly, Kirby P held that the trust survived her death and inured to the benefit of her estate, and that it was consequently unconscionable for George's executors to take the entire estate in disregard of her wishes.[62] In other words, Kirby P found that George held the legal estate as a trustee for them both as tenants in common — not as joint tenants.

Samuels AJA disagreed entirely. He drew support from a Canadian decision, *Rathwell v Rathwell*,[63] for the proposition that there must be a causal connection between Margaret's contributions and the acquisition of the property before the Court can determine "whether the 'spouse with title' is to be accountable as a constructive trustee".[64] He found no such connection in this case.

A requirement of causality is at least as stringent as the requirement for financial contributions at the time of acquisition under the resulting trust doctrine. According to this formulation, the constructive trust does no more than the resulting trust to address the concerns expressed above about the way in

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57 Above n45 at 622.
58 Above n1 at 123.
59 (1984) 9 Fam LR 449.
60 Above n1 per Kirby P at 125–6 citing *Hibberson v George* (1989) 12 Fam LR 725 (NSW CA); *Lipman v Lipman* (1989) 13 Fam LR 1; *Ryan v Hopkinson* (1990) 14 Fam LR 151 (SC NSW); *Conn v Martusevicius* (1991) 14 Fam LR 751 (SC Vic); *Miller v Sutherland* (1990) 14 Fam LR 416 (SC NSW); *Scott v Briggs* (1991) 14 Fam LR 661 (NSW CA) re domestic services of a man dependent on a woman.
61 Above n1 at 127.
62 Id at 133.
63 (1978) 83 DLR (3d) 289.
64 Above n1 at 152.

which Australian families acquire family assets. Such a requirement reinforces the predominance of financial contributions and so could be seen to perpetuate inequalities between men and women in our society. Consider, for instance, the High Court's solution in *Baumgartner*. Since the woman's contribution to the pooled income was 45 per cent and the man's 55 per cent, those were the shares each received on dissolution of the relationship (after some adjustments in the man's favour for a deposit and mortgage payments made after the break-up). Despite the advances made in ensuring equal wage rates for the same work, average weekly earnings of women in Australia continue to fall short of the average weekly earnings of men.[65] This reflects a continuing tendency to pay lower rates for "feminised" occupations than for predominantly "male" occupations, combined with a persistence of these employment patterns.[66] While this situation persists, women generally will continue to be disadvantaged in the acquisition of property.

Also, while the domestic services women provide continue to be ignored in calculations such as these, there is no scope for compensation for the impediment the provision of those services places on their ability to earn outside dollars — other than through a property adjustment on divorce. Proportionate calculations such as those supplied in *Baumgartner* suggest a mathematical accuracy in the result, but this is entirely illusory. Income earned and pooled is not necessarily all applied to acquiring assets. Disparities between consumption by partners should also be calculated if the Court wishes to claim a disinterested precision. For example, should a person who earns $1,000 per week, but withdraws $500 to spend on purely personal indulgences each week (gambling, partying or privately enjoyed hobbies, for instance), be entitled to twice as big a share of the family assets as a partner who leaves an entire salary of $500 per week in the kitty? Critics may complain that this proposal would be ridiculously complicated. So it would. So let us not pretend that we can determine actual financial contributions accurately merely by comparing the respective incomes of the parties.

Sheller JA reviewed Australian authority on the nature of constructive trusts[67] and, alone of all three judges clearly distinguished the constructive trust from the resulting trust, and clearly laid aside notions of any requirement for an intention to create either category of trust. He described the resulting trust as that which "may be presumed in the absence of contrary intention from the contribution of a party to the means of acquisition",[68] and the constructive trust as arising as a remedy for unconscionable conduct, "regardless of intention proved or presumed".[69] On the facts he held that even if the pooling of the parties' resources, "both financial and otherwise", did warrant the finding of a constructive trust, there was nothing unconscionable in George's executors seeking to retain all the property, because Margaret had died first.

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65 Graycar and Morgan, above n3 at 83 cite *Woman at Work: Facts and Figures* published by the Women's Bureau in the Department of Employment, Education and Training, for the fact that in 1987 and 1988 women earned on average 67 per cent of men's wages.

66 Id at 84.

67 Above n1 at 139–141.

68 Id at 141.

69 Ibid.

"There seems to me to be nothing unconscionable in one party retaining all that property on the inevitable dissolution of that relationship when the other dies".[70]

In the circumstances of this case, where both parties to the relationship had died, Sheller JA's findings make practical sense. It is common, after all, for couples to own property as joint tenants, so that there is a right of survivorship. If Margaret had been a joint registered proprietor with George, her share in the home would automatically go to George on her death, so that her will purporting to leave her "real and personal estate" would not have passed any interest in the Sans Souci home to her brother. It would be a strange result indeed if by establishing an equitable interest in the property Margaret would be in a better position than a woman who was a legal joint tenant.

Sheller JA therefore did not have to decide whether Margaret's non-financial contributions did give rise to an equitable interest, so this case offers no majority on the issue of whether, under general law, home-makers can acquire an equitable interest in their homes.

It is impossible to construe what Sheller JA's decision might have been had George died first. He said:

> In such circumstances assuming no intention could be proved, her contributions to the relationship may have called for the imposition of a constructive trust at least to the extent of a beneficial interest in the subject property for life.[71]

An equitable life estate would have given Margaret a personal right to use the property herself, but it would not have given her the full proprietary right enjoyed by her husband to devise the property according to her own wishes.

7. *Unjust Enrichment*

Since the appellant raised an argument for unjust enrichment, two of the judges took time to deal with it particularly, but in the result both Kirby P and Sheller JA found that the principles of unjust enrichment (if any such principles can be said to exist in Australian law at this point in time) would not offer a different solution in this case from those of the constructive trust. So in this respect, *Bryson v Bryant* takes Australian law no further down "the endless road to unattainable perfection in the law"[72] than Toohey J's suggestion in *Baumgartner*[73] that unjust enrichment "is as capable of remedy and certain application as is the notion of unconscionable conduct".

8. *Conclusion*

The majority decision in *Bryson v Bryant* shows a continuing reluctance by the NSW Court of Appeal to till the ground broken by Deane J in *Muschinski*

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70 Id at 144.
71 Ibid.
72 Kirby P above n1 at p113, citing Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 488.
73 Above n5 at p153.

v Dodds. The peculiar facts of the case — Mrs Moate was effectively claiming her equitable estate from the grave — may excuse the caution shown by the majority on this occasion. Nevertheless, the clear inference from the case is that women still face considerable obstacles in proving an equitable interest in family assets under general law, because under general law, there is no concept of "family assets".

To establish a resulting trust they must show a financial contribution at the time title to the property was acquired. To establish a "common intention" constructive trust they must prove a mercenary motive for their relationship. To establish a constructive trust based on unconscionability they must prove a relationship analogous to a commercial venture which had among its aims the acquisition of property. Proving that any non-financial contributions to this partnership warrant consideration in determining shares remains a major obstacle to the home-maker.

In his concluding remarks, Samuels AJA said that there was no principle of law which was capable of producing the result that "a wife would become entitled to any property acquired by the husband merely because she had carried out her role as the home-maker".[74] He said "[t]o produce such a conclusion would ... carry the court beyond the furthest confines of judicial activism. ... It is a matter for the Parliament".[75]

That precisely is the problem. Parliament has indeed addressed the inadequacies of the general law as far as property settlements on divorce are concerned by the enactment of section 79 of *The Family Law Act* 1975. After almost 20 years of operation, this legislation has encouraged women to believe they have rights in the family home, but these "rights" arise only by operation of statute. They are not yet recognised in equity except where women can bring themselves within the restrictive requirements of anachronistic and in many respects artificial equitable doctrines.

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74 Above n1 at 153.

75 Ibid.

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