PROPERTY DIVISION ON SEPARATION: WILL THE MARRIED AND THE UNMARRIED PASS AT THE CROSSROADS?

REBECCA BAILEY-HARRIS*

I. INTRODUCTION

To what extent should the law confer on de facto partners property rights which mirror those of their married counterparts? This question has never admitted of an easy answer. On the one hand in the interests of individual free choice in a pluralistic society, there should not be imposed on couples a regime they may have deliberately chosen to avoid. On the other, the intermingling of financial affairs of an unmarried couple over a period of many years' cohabitation may give rise to very similar problems and demand very similar remedies as if they had been legally married.

This basic policy question is further complicated in Australia in 1985 by a second issue. The consequences of marriage itself in the property field are currently under consideration by the Australian Law Reform Commission, which is to report on the desirability of change to the law, in particular the possible replacement of the present system of discretionary distribution by one involving fixed shares of at least some assets. At a time of such fundamental questioning of models of property division, there is a real danger in the conceptual separation of the reform of de facto relationships from that of marriage. A number of issues must be seen as common to asset distribution between the unmarried and the married. To what extent should partnership ideology be applied? How are financial and non-financial contributions to be evaluated in relative terms? Are future needs to be accommodated? What are the comparative merits of flexibility versus

*M.A., B.C.L. (Oxon), Senior Lecturer in Law, University of Adelaide.

certainty in the law? The conceptual and practical issues under debate in the law of matrimonial property are of crucial significance to those desirous of reforming the property rights of unmarried partners.

II. EQUAL PARTNERS OR UNEQUAL CONTRIBUTORS?

Should property division be based on an evaluation of contributions, or should equal partnership be recognised? It is frequently asserted that the principle of differential equality and partnership is particularly appropriate to marriage.

> Support for the equality principle is found in evidence that married people regard this class of assets as 'ours' . . . These findings provide strong evidence of the commitment of most married people to the *ideal* of marriage as a partnership. In so far as it becomes reflected in law, it represents the antithesis of the so-called male dominated 'traditional legal marriage'.[1]

Yet the present system of property distribution at the end of a marriage in Australia is a discretionary one based on judicial evaluation of past contributions, financial and non-financial, to property and to family welfare, and of future means and needs.[2] Moreover, attempts by the Family Court of Australia to impose the principle of equality through, as it were, the back door recently received an abrupt check from the High Court of Australia.

In *Mallet* v. *Mallet*,[3] the High Court stressed the unfettered nature of the judicial discretion to effect property distribution under the Family Law Act 1975 (Cth), and eschewed any notion of a starting point of half-shares even in relation to family assets such as the home. In each case the Family Court is to evaluate the actual contributions of the parties, as wage-earner and homemaker, and no assumption of equality of contribution between husband and wife in marriages of long duration is to be applied to the facts of a particular case. Whatever the practical effects of *Mallet* may prove to be (and it is too early yet to say), the High Court's decision provided a dramatic and highly symbolic focus for the debate on the future of matrimonial property law in Australia. A fundamental objection to the model of discretionary evaluation epitomised by section 79 of the Family Law Act is that it requires a comparative evaluation of the incomparable: the contributions of wage-earner and homemaker respectively.

In *Mallet*, the parties were married for thirty years. On dissolution of their marriage in 1979, the wife applied for an order under section 79. The jointly owned property of the parties (including the matrimonial home) totalled $240,662. The husband alone owned property worth $261,077 and the wife owned a car worth $5,700. Each party owened 26% of the shares in a family company. Bell J. in the Family Court of Australia ordered that the wife retain half of the value of the jointly owned property (this was in fact a

1 J. Eekelaar, *Family Law and Social Policy* (2nd ed. 1984) 105.
2 Family Law Act 1975 (Cth) s.79.
3 (1984) 52 ALR 193. *Mallet* was decided on the law prior to the amendments effected by the Family Law Amendment Act 1983 (Cth), "although to say that is not to suggest that the result woud have been different under the legislation as it now stands": 194 *per* Gibbs C.J.

recognition of her existing proprietary interests), the value of her shares in a family company, plus 20% of the value of property held in the husband's name. The value of the wife's entitlement under the order rounded off to $260,000, which sum the husband was ordered to pay to the wife in exchange for her transferring to him her shares plus her interest in the jointly owned property. The Full Court of the Family Court allowed an appeal by the wife and substituted a figure of $335,000 for that of $260,000. The Full Court held that the trial judge was in error in awarding the wife no more than 20% of the husband's sole assets.

> His Honour in this assessment appears to have given no real weight to the way in which the assets of the parties were built up and the financial contribution made by the wife particularly in the earlier period, her contribution as a wife over 29 years of cohabitation and her care of the three children of the marriage. There is also to be considered the far greater potential as to financial improvement of the husband compared to that of the wife. It should not be lost sight of that, although the shares are not of a high value at the present time, the potential of the company structure is high and in particular as to non-taxable capital growth.
>
> In addressing his attention to the principal assets separately rather than taking an overall view of all of the relevant matters, while it cannot be said that his approach was wrong, his Honour in our view failed to give proper weight to the matters referred to in the previous paragraph and little if any weight to the relative future financial potential of the parties. In our view the more appropriate and safer approach is to make an overall assessment.[4]

The Full Court held that "a just and equitable result would be to adopt the 50 per cent figure overall".[5] In doing so it stated:

> [i]t is appropriate to point out again that there is no 'principle' in family law that equality is equity. In the first instance with respect to sections such as ss.72 and 79 where the court is given a discretion it cannot lay down principles for to do so would be to fetter its own discretion. In the second place the cases which refer to equality do not lay it down as a principle but merely as a convenient starting point where the matter at issue involves a long marriage.[6]

From this decision the husband obtained special leave to appeal to the High Court.[7]

The resulting reported decision of the High Court came as a surprise to practitioners and commentators. It might have been supposed that the High Court would simply hold that the Full Court was in error in regarding equal division overall as a just and equitable figure. The approach of earlier cases had been to confine the 'equality as a starting point' approach to "a jointly owned property . . . or in respect of a property which has been acquired jointly by such parties"[8] and to base division of other assets (including business assets) more strictly on the evaluation of actual contributions in a particular case, with a resultant award to the homemaker of 20% to 30% of

4 Note 3 *supra*, 205 *per* Mason and Brennan JJ., quoting from the judgment of the Full Court of the Family Court.

5 *Id.*, 206.

6 *Ibid.*

7 This discussion is confined to the appeal concerning the quantum of the order for property distribution under s.79. Other issues on appeal were the correct approach to valuation of the shares, and costs.

8 *Wardman and Hudson* (1978) FLC 90-466, 77,384.

the assets overall.[9] However, the High Court chose to go much further, and delivered an important statement on the nature of judicial discretion in property proceedings under the Family Law Act.

In so doing, the majority of Their Honours (Gibbs C.J., Mason, Wilson and Dawson JJ.) expressly disapproved of the reasoning adopted by the Family Court in a line of authorities over a number of previous years. The High Court approved the Family Court's principle that the wife's contribution as homemaker and parent should be recognised not in a token but in a substantial way, since her role frees the breadwinner for his economic activities.[10] However, as to the evaluation of the contributions of husband and wife in a particular case, the High Court, with the sole exception of Deane J., disapproved of the Family Court's established approach of using equality as a starting point in relation to family assets built up over a marriage of long duration.[11] Henceforth, the quantification of each party's contribution must depend entirely on the facts of a given case.

> [T]he Parliament has not provided, expressly or by implication, that the contribution of one party as a homemaker or parent and the financial contribution made by the other party are deemed to be equal, or that there should, on divorce, either generally, or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorised by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered by the application of supposed rules for which the Family Law Act provides no warrant.[12]
>
> The proposition developed by the Family Court and applied by the Full Court in the present case has two flaws. The first is that it has been elevated to the status of a legal presumption; the second is that it obscures the need to make an evaluation of the respective contributions of husband and wife by arbitrarily equating the direct financial contribution of one to the indirect contribution of the other as homemaker and parent.[13]

This is not to deny that an evaluation of the respective contributions of husband and wife as in fact equal will be the result in many cases. But the result will have been reached "because of the circumstances themselves and not because of the application of any extrinsic principle or presumption".[14] Nor will all assets raise similar considerations:

> [n]o doubt a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements and the marriage is of long standing. It will be otherwise when the property in issue consists of assets acquired by one party whose

9 See *e.g. Aroney and Aroney* (1979) FLC 90-709; *W. and W.* (1980) FLC 90-872; *Albany and Albany* (1980) FLC 90-905.

10 *Rolfe and Rolfe* (1979) FLC 90-629, 78,273 *per* Evatt C.J.

11 *Racine and Hemmett* (1978) FLC 91-277; *Potthoff and Potthoff* (1978) FLC 90-475; *Wardman,* note 8 *supra.*

12 Note 3 *supra,* 196-197 *per* Gibbs C.J.

13 *Id.,* 209 *per* Mason J.

14 *Id.,* 228 *per* Dawson J.

> ability and energy has enabled the establishment or conduct of an extensive business enterprise to which the other party has made no financial contribution and where that other party's role does not extend beyond that of homemaker and parent.[15]

Only Deane J. regarded the Family Court decisions as formulating no principle or presumption unjustified by the legislation. Rather he viewed them as enunciations only of a general counsel of experience.[16]

In the result the majority (Gibbs C.J., Wilson and Dawson JJ.) held that the trial judge's order should be restored, since his decision to award the wife 20% of the husband's sole assets was within the exercise of his discretion. Mason and Deane JJ., dissenting, held that Bell J. had failed to take proper account of the wife's financial contributions to the acquisition of assets in the husband's name through the use of moneys from businesses in which she had a legal interest, and moreover that the valuation of the shares had not been correct. They would have set aside his decision, but allowing for an indemnity granted to the wife in respect of a mortgage, they would have reduced the Full Court's award to the wife by $25,000.

It is too early to assess the practical effects of the High Court's decision on the pattern of orders made under section 79 in the Family Court, and consequently on out-of-court settlements. In *Read*, Nygh J. commented that "[m]uch of the water that has flowed under the bridge of the Full Court since 1976 has now flowed irretrievably into the desert as it would seem".[17] Nevertheless, this may be over-dramatic. The result of post-*Mallet* decisions may in practice not differ from those pre-*Mallet*, the contributions of husband and wife being evaluated as in fact equal in many cases. In *Miller*,[18] the Full Court allowed an appeal from the order of a trial judge who had wrongly applied *Wardman and Hudson*,[19] now overruled by *Mallet*, but the difference between that order and the order the Full Court would have substituted was "so small that it would be wrong for an appeal court to make a minor variation".[20]

It may be that the decision in *Mallet* is of more symbolic than practical significance. The conceptual importance of the High Court's decision lies in its emphasis on the discretionary nature of the section 79 process, and on the actual evaluation of the different contributions of the parties to a marriage. This is a long way from the ideology of marriage as a partnership in which the principle of differential equality should be reflected in the law of property division. For this reason, the High Court's decision has assumed dramatic significance in the eyes of those who advocate the introduction of a community system into Australian matrimonial property law. The criticism levelled against our discretionary system, that it requires comparison of two incomparables, can be met in part by an analysis of the evaluation process

15 *Id.*, 209 *per* Mason J.
16 *Id.*, 222.
17 (1984) FLC 91-527, 79,279. This decision provided no opportunity for a thorough analysis of *Mallet*, note 3 *supra*, since it did not involve a wife who was solely a homemaker.
18 (1984) FLC 91-542.
19 *Wardman*, note 8 *supra*.
20 Note 18 *supra*, 79,394.

not as requiring valuation of one type of contribution against the other but rather of each as against an ideal standard in its own sphere. However, those who fear the reintroduction of considerations of fault into Australian matrimonial law will take no comfort from the words of Wilson J. in *Mallet*:

> [h]owever, equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal. The quality of the contribution made by a wife as homemaker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good. She may be an admirable housewife in every way or she may fulfil little more than the minimum requirements. Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party. It follows that it cannot be said of every case where the parties reside together that equal value must be attributed to the contribution of each. That will be appropriate only to the extent that the respective contributions of the parties are each made to an equivalent degree.[21]

Moreover, it is unlikely that that evaluation process is materially affected by the Family Law Amendment Act 1983 (Cth).[22] No longer is the homemaker's contribution to be regarded as a contribution to property, but in its own right as

> the contribution made by a party to the marriage to the welfare of the family contributed by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker and parent.[23]

But this does not solve the basic problem. In what has now become a classic discussion, Gray, envisaging marriage as a partnership of collaborative effort, has argued that

> [i]t is only by acknowledging the differential equality of financial and domestic contributions that the law may effectively recognise not only the intrinsic dignity and personal integrity of both spouses, but also their peculiar interdependence during the period when the matrimonial partnership did indeed function as it should. The attempt to assign a monetary value to domestic effort is usually found to correlate with a view of the marriage relationship as something less than a partnership of equals. It is important moreover that the formula of reallocation should tend towards the enunciation of a fixed rule rather than the conferment of a judicial discretion. To leave the value or extent of domestic contributions to be assessed subjectively on the facts of each case would be fundamentally inconsistent with the ideal of sexual equality.[24]

It remains to be seen whether the Australian Law Reform Commission will come to the same conclusion. Attractive as Gray's thesis may be, it is submitted that equal division of property without the flexibility of adjustment for future financial needs is not the best solution on divorce. The element of need is discussed later in this paper.

By contrast, there has been a marked reluctance to advocate the application of the partnership ideology to the property rights of de facto partners. For example, Eekelaar asserts:

> [t]he ideology of partnership does not apply and indeed there seems to be no reason why it should. While we may, with certain justification, assume such an idelogy

21 Note 3 *supra*, 218.
22 See note 3 *supra*.
23 Family Law Act 1975 (Cth) s.79(4)(c).
24 K. Gray, *Reallocation of Property on Divorce* (1977) 345.

between married people, there is no reason to do so for the unmarried.[25]

In de facto relationships the law has emphasised the financial contributions made by the parties to the acquisition of property. In most jurisdictions in Australia and elsewhere the property rights of de facto couples are governed by the common law and, more importantly, by equitable doctrines. Those doctrines fail to recognise a wide range of contributions, and the problem of relative evaluation encountered in matrimonial law has therefore not yet arisen. Only in New South Wales has statute very recently intervened to remedy the shortcomings of the operation of trust doctrines when a de facto couple separate.[26]

A recent decision of the High Court of Australia nicely illustrates the operation of the resulting trust doctrine. *Calverley* v. *Green*[27] concerned a de facto relationship of ten years' duration. The relevant facts occurred in New South Wales, but of course at a time prior to the enactment of statutory reforms. The judgments thus provide an up-to-date analysis of the operation of the relevant trust principles, which in the absence of legislation remain the operative law in all jurisdictions in Australia other than New South Wales. The decision shows that the registering of a home in the joint names of an unmarried couple does not, in the absence of clear evidence of their common intention, conclude the issue of equal beneficial ownership. Rather, their equitable interests are proportionate to their financial contributions to the purchase price. The decision is of interest for the divergence of opinion amongst members of the High Court on the basic issue of the extent to which the legal model of marriage is appropriately applied to de facto relationships.

Mr Calverley and Ms Green cohabited in a de facto relationship from 1968. First they lived in a house owned by Mr Calverley, who paid Ms Green $10 towards housekeeping expenses. She continued to work and used her earnings to meet the balance of housekeeping expenses. In 1972 they decided to move. In August 1973 a suitable house was found at Baulkham Hills, but Mr Calverley had problems in obtaining finance. Later a loan was forthcoming, but the finance company required the purchase to be in joint names. At Mr Calverley's suggestion, Ms Green signed the application for finance with him. It was approved, and the house was purchased in joint names for $27,250. Mr Calverley provided the deposit of $9,000 with proceeds of sale of his former house. Eighteen thousand dollars was borrowed on mortgage given by both parties, under which they were jointly and severally liable. It seems that the remaining $250 was probably paid by Mr Calverley. From 1973 to April 1978, when Ms Green left the house, Mr Calverley paid all the morgage instalments from his own funds, whilst she met household expenses. Ms Green sued her former cohabitant in the Supreme Court of New South Wales, asserting her title as one of two joint

25 Note 1 *supra*, 145.

26 In South Australia, the Family Relationships Act 1975 and legislation consequential thereon remains confined to property rights on death.

27 (1984) FLC 91-565.

tenants. As co-owner she applied for the appointment of trustees to hold the land on statutory trust for sale. Mr Calverley cross-claimed for a declaration that she held her interest in trust for him, and for an order that she transfer that interest to him. Rath J. dismissed Ms Green's claim, holding that she had no equitable interest in the home, and ordered her to transfer her legal interest to Mr Calverley. The Court of Appeal reversed this decision and held that, subject to the mortgage, the parties were joint owners in equity as well as law. Mr Calverley appealed to the High Court.

Gibbs C.J., Mason, Brennan and Deane JJ. held that the parties had both contributed, in unequal amounts, to the purchase price. Jointly they contributed $18,000 raised on finance, and the man alone the $9,250 in cash. Their Honours then applied the doctrine of resulting trust:

> [o]nce it was found that both parties had contributed to the purchase price, the conclusion had to conform to the relevant equitable presumption unless it was displaced, rebutted or qualified. When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants the equitable presumption is that they hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions unless their contributions are equal . . .
>
> This is the basic presumption, though it may be displaced in appropriate cases by the presumption of advancement or, perhaps, qualified by an inference . . . that they intended to be joint beneficial owners.[28]

Here Mason and Brennan JJ. held further that the inference "espoused" by Lord Upjohn in *Pettitt* v. *Pettitt*[29] that when a married couple both contribute to the acquisition of property they intend to be joint beneficial owners "is appropriate only as between parties to a lifetime relationship".[30]

> Where the contributors to the purchase price are not husband and wife, the taking of a conveyance in their joint names is less likely to support an inference that they intend the right of survivorship to govern their beneficial interests . . . . An assumption that the parties to such an arrangement intend to maintain independent control of money and property and to retain a testamentary power to dispose of assets in which they have an interest is more likely to coincide with reality than an assumption of joint ownership.[31]

Was the presumption of resulting trust displaced in this case by the presumption of advancement which would if applied have given Ms Green a full half-share in equity? The presumption of advancement has been applied where a husband purchases property in his wife's name, and a father in his child's name (though not vice versa). Mason, Brennan and Deane JJ. held that both the authorities and logic determined that the presumption of advancement has no application to de facto relationships:

> [t]he exclusive union for life which is undertaken by both spouses to a valid marriage, though defeasible and oftentimes defeated, remains the foundation of the legal institution of marriage . . . though it is no necessary element of the relationship of de facto husband and wife. The term 'de facto husband and wife' embraces a wide variety of heterosexual relationships; it is a term obfuscatory of any legal principle except in

28 *Id.*, 79,567 *per* Mason and Brennan JJ.
29 [1970] AC 777, 815.
30 Note 27 *supra*, 79,568.
31 *Ibid.*

> distinguishing the relationship from that of husband and wife. It would be wrong to apply either the presumption of advancement or Lord Upjohn's inference to a relationship devoid of the legal characteristic which warrants a special rule affecting the beneficial ownership of property by the parties to a marriage.[32]

But the Chief Justice took another view, and stressed the similarity between marriage and long-standing de facto relationships:

> [t]he question is whether the relationship which exists between two persons living in a de facto relationship makes it more probable than not that a gift was intended when property was purchased by one in the name of the other. The answer that will be given to that question will not necessarily be the same as that which would be given if the question were asked concerning a man and his mistress who were not living in such a relationship. The relationship in question is one which has proved itself to have an apparent permanence, and in which the parties live together, and represent themselves to others, as man and wife. It is true that in some cases a person may maintain a de facto relationship for the very purpose of preventing the other party to the relationship from obtaining any right or claim to property, but the question now asked arises only when one party has taken the deliberate step of purchasing property in the name of the other. One rejects the test applied in *Soar* v *Foster* as too narrow, and rejects any notion of moral disapproval, such as is suggested in *Rider* v *Kidder* ... as inappropriate to the resolution of disputes as to property in the twentieth century. It seems natural to conclude that a man who puts property in the name of a woman with whom he is living in a de facto relationship does so because he intends her to have a beneficial interest, and that a presumption of advancement is raised.[33]

However, Gibbs C.J. held that the evidence in this particular case rebutted the presumption of advancement. Mr Calverley had no intention of conferring a beneficial interest on Ms Green. The property was put in joint names only after Mr Calverley's difficulties in obtaining finance in his name alone. Hence the Chief Justice considered that in this instance the presumption of resulting trust applied.

Was the presumption of resulting trust in accordance with the parties' respective contributions to the purchase price rebutted or qualified by admissible evidence of a common intention either that Ms Green was to have a full half-share, or that Mr Calverley was to have the whole beneficial interest? This question Gibbs C.J., Mason, Brennan and Deane JJ. answered in the negative. The evidentiary problems in cases involving personal relationships are notorious. In reality the parties may not expressly record or even discuss their proprietary intentions at the time of purchase when the relationship is still a happy one. In *Calverley* v. *Green*, the High Court accepted that admissible evidence includes acts and declarations of the parties at the time of purchase, and the fact of the relationship between them. Was Mr Calverley's payment of the mortgage instalments for a number of years relevant to the determination of the beneficial interests?

> The extent of the beneficial interests of the respective parties must be determined at the time when the property was purchased and the trust created. The fact that the mortgage debt was repaid by the appellant is therefore not relevant in determining the extent of the interests of the parties in the land, although it may be relevant on an equitable accounting between the parties.[34]

32 *Ibid.*
33 *Id.*, 79,563.
34 *Id.*, 79,564 *per* Gibbs C.J.

In the result, the majority held that Mr Calverley and Ms Green held the house in trust for themselves as tenants in common in the proportions to which they had contributed to the purchase price. Adjustments should then be made to take account of his payment of the mortgage instalments and his rent free accomodation.

Murphy J., dissenting, in a short judgment adopted a line of reasoning quite at variance with that of his brethren. He considered the presumtions of resulting trust and of advancement to be outmoded, and that they should be discarded in the resolution of property cases involving personal relationships as no longer reflecting common experience and so actually detracting from the evaluation of evidence.

> Transfer of the title of property wholly or partially to another is commonly regarded as of great significance, especially by those in de facto relationships. The notion that such a deliberate act raised a presumption of a trust in favour of the transferor, would astonish an ordinary person.[35]

His Honour held that the legal title reflects the interests of the parties, in the absence of circumstances displacing the equity. Here there were none; the property was therefore that of the parties jointly.

The judgments in *Calverley* v. *Green* aptly illustrate how differing conceptions of the relationship between marriage and de facto relationships could be crucial in the judicial determination of a given case. The fact that the house had been put in joint names only after Mr Calverley had experienced difficulty in obtaining finance was regarded as highly significant by all members of the High Court except Murphy J. Suppose a fact situation where that motive for the transfer into joint names was not apparent. Would Gibbs C.J., stressing the similarity between marriage and de facto relationships, apply the presumption of advancement and therefore arrive at the conclusion of equal half-interests in equity? Mason and Brennan JJ. (and to some extent Deane J. also) stress instead their perceived essential distinction between the two institutions, consider the presumption of advancement therefore inapplicable to de facto relationships, and apply the resulting trust presumption. If not qualified by other evidence, this would not lead to half-shares in equity on the supposed facts. Murphy J. would achieve the half-shares result, but by a different route. His Honour apparently considers the 'false presumptions' equally inapplicable to de facto relationships and to marriage in modern times.

Apart from Murphy J., the emphasis of the judgments in *Calverley* v. *Green* is on the quantification of financial contribution to the initial acquisition of property. Accepting for the present, for argument's sake, that the equal partnership ideology has no application to de facto relationships, one may question whether the law of trusts as applied in the case leads to a result corresponding to the ordinary person's conception of relevant contribution. It is held (quite correctly, by trust doctrines) that the extent of

35 *Id.*, 79,571.

the parties' proprietary interests must be determined at the time of purchase. Mortgage repayments made subsequently are irrelevant to that determination, and relevant only to equitable accounting. In the instant case, Ms Green did not contribute to the deposit nor to the mortgage repayments. Yet because the mortgage was given by both parties, the majority considered she had a 9,000/27,250 interest in the home. Would this accord with the ordinary person's conception of her contribution? Equitable accounting would not allow for rise in property values, and in any case it was admitted that on the particular facts the parties' respective credits might cancel each other out.

> In taking accounts between the parties it will become necessary to consider that the appellant has been making the payments under the mortgage but that on the other hand he has been for some time in sole occupation of the property. Although the appellant may be entitled to credit for the amount of the mortgage payments which exceeded his share of the amount payable the respondent may, on the other hand, be entitled to receive an occupation rent in respect of the period during which the appellant had sole occupation of the house: see *Bernhard v. Josephs* (1982) Ch. 391, at pp 401, 405 and 409. Perhaps these credits may cancel out; at any rate it is to be hoped that the parties can agree on the accounts (if any) between them without further litigation.[36]

On the other hand, Ms Green paid most of the household expenses throughout the parties' relationship. Couples commonly arrange their financial affairs in this way. Yet the law of resulting trusts does not regard such contributions as giving rise to an interest in the property in which the expenses are used to support a common life. Again this may astonish the ordinary person. The doctrines of equity may not be "frozen in time"[37] nor "ossified in history",[38] but their recent development has not proved satisfactory as the means of effecting legal reform of social institutions in the modern world. Legislation is necessary, although, as will be argued later, the desirable form and content of such legislation is far from clear.

In *Calverley* v. *Green*, both parties were in outside employment and earned wages. What of de facto relationships where one party has acted solely as homemaker throughout the cohabitation? The doctrine of resulting trusts cannot regard such non-financial contributions as giving rise to any proprietary interest in the home. Legislation now enacted in New South Wales is aimed to remedy this, but the problem remains in other jurisdictions in Australia in the absence of legislative reform. In a few reported cases, the courts have employed trusts other than the resulting trust to achieve an apparently socially just result, but the operation of the doctrine is unpredictable. In such cases emphasis has been placed on the actual common intention of the parties, inferred from words and conduct, that the homemaker should have a beneficial interest in property held in the other party's sole name. The trust is usually described as an implied trust. In two reported cases, the homemaker was held to be entitled to a half share in the

36 *Id.*, 79,564 *per* Gibbs C.J.
37 *Id.*, 79,562 *per* Gibbs C.J.
38 *Id.*, 79,568 *per* Mason and Brennan JJ.

home (the equal partnership result). In *Hohol* v. *Hohol*,[39] the parties began to cohabit in 1945 in Germany, migrating to Australia in 1951. They lived together in various houses in Victoria until 1970 when they separated. The plaintiff, who took the defendant's name, had four children by him. Throughout the cohabitation she cared for the children and carried out domestic duties. The defendant was employed, and out of his earnings certain real property was bought and sold. The plaintiff claimed, inter alia, a half-interest in a house registered in the plaintiff's name. O'Bryan J. held that she was an equal owner in equity of the house in question, because of a common intention at the time of purchase. The property was purchased as a vacant block in 1961; the defendant had a garage erected on it which was used as a home until a bungalow was built in 1963. Prior to the purchase of the block the family lived in rented accommodation. The defendant involved the plaintiff in the purchase; the whole family went out to see it and to test the soil. Moreover, the plaintiff gave evidence of a conversation with the defendant before the property was purchased, in which he said "[i]t's for all of us, it's for you and me".[40] O'Bryan J. concluded:

> [h]ad the defendant intended to exclude the plaintiff from beneficial ownership when he purchased Lot 180, I would have expected him to have said something to her to that effect. Apparently he did not. Further, he was inviting her to join him in a new venture in rather primitive living conditions. I am satisfied there was an inducement to the plaintiff to join the defendant on the new property underlying the words which she said he used at the time: "It's for all of us, it's for you and for me". That is the evidence of the defendant's intention to share ownership of Lot 180 with the plaintiff. It was the common intention of the parties to share in acquiring Lot 180. The common intention of the parties in relation to the ownership of Lot 180 is, therefore, to be found partly in the conversation which I am satisfied took place between the parties at a relevant time. It may also be inferred from the general circumstances I have described. The plaintiff was induced to leave the security which she enjoyed in a rented home where she lived with her four children and move to Lot 180 to live in a garage in most primitive circumstances. In fact, she had to live in the garage with few comforts for a number of years. She had to manage the needs of her family and help improve the property by her own industry. In giving up the security and comfort of the home she had known for some four years, and in undertaking the new tasks, she clearly suffered some real and substantial detriment. Love and affection for her family took her to Lot 180, coupled with the promise which I find was made to her by the defendant that together they would become the owners of the property. It would be a fraud on the plaintiff for the defendant now to deny her part ownership of Lot 180.[41]

His Honour held that the parties were equal owners of Lot 180, that being their common understanding. A very similar approach was taken in *Zaborskis*,[42] a case decided in New South Wales prior to legislative reform. Here, the plaintiff and defendant lived in a de facto relationship for thirty-six years, arriving in Australia after the war from Lithuania. At that time they had no money nor possessions. Throughout their relationship, the plaintiff acted as homemaker and the defendant as breadwinner. The plaintiff

39 [1981] VR 221.
40 *Id.*, 227.
41 *Ibid.*
42 (1983) 8 Fam L R 632.

claimed a half-interest in the last home in which they cohabited, registered in the defendant's name. Kearney J. found a common intention that any property the parties acquired would be equally shared. This common intention was established by expressions of understanding and conduct from 1951. For example, when land was bought in 1951 in the defendant's name in Sydney, the plaintiff alleged that the defendant remarked "[w]e will live in our house; your house and my house".[43] The defendant denied this and other evidence, but Kearney J. believed the plaintiff and declared that the house was held in trust for both parties in equal shares.

The principal difficulty in such cases is obviously evidentiary. Few couples record their intentions. When evidence is disputed at the time of trial (as it was in *Zaborskis*), the case may simply become a question of who is more credible in his or her description (or fabrication) of conversations allegedly taking place many years before. This is hardly a rational basis for property division at the end of a long-standing relationship.[44]

The New South Wales Law Reform Commission's *Report on De Facto Relationships* concluded that the common law governing property rights of de facto couples has "one overriding deficiency", in that it often "does not recognise substantial indirect contributions to the well-being of the family, whether in the form of sharing household expenses, services as a homemaker or parent, or other contributions".[45] Whilst rejecting the notion that the legal consequences of de facto relationships should be equated wholesale with those of marriage, the *Report* favoured reform through the remedy of injustices and anomalies in specific areas, including property rights. "We therefore recommend that the law governing property disputes between de facto partners be changed to allow the court to take into account a wide range of contributions . . ."[46]

The resulting De Facto Relationships Act 1984 (N.S.W.) which came into operation on 1 July, 1985, provides for an adjustive jurisdiction "to follow broadly the approach enacted by the Family Law Act in relation to married couples":[47]

> 14(1) Subject to this Part, a de facto partner may apply to a court for an order under this Part for the adjustment of interests with respect to the property of the de facto partners or either of them or for the granting of maintenance, or both.
>
> (2) An application referred to in subsection (1) may be made whether or not any other application for any remedy or relief is or may be made under this Act or any other Act or any other law . . .
>
> 20(1) On an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them, a court

43 *Id.*, 634.

44 In *Allen* v. *Snyder* [1979] 2 NSWLR 685, in contrast with the two abovementioned decisions, the woman plaintiff in a de facto relationship of some thirteen years received no interest in the home, it being held that there was no common intention. Of significance was held to be a will made by the defendant prior to the purchase in which he left real property to her.

45 New South Wales Law Reform Commission, *Report on De Facto Relationships* (1983) para. 7.31.

46 *Id.*, para. 7.44.

47 *Id.*, para. 7.51.

> may make such order adjusting the interests of the partners in the property as to it seems just and equitable having regard to –
> (a) the financial and non-financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and
> (b) the contributions, including any contributions made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following, namely:
> (i) a child of the partners;
> (ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners.
> (2) A court may make an order under subsection (1) in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

In general an application can be made only when a de facto relationship has lasted for two years, with exceptions where the parties have a child or where serious injustice would otherwise result.[48]

However, the model adopted in New South Wales does not mirror exactly that of the Family Law Act, for under section 79 of that Act both past contributions and future needs are relevant in making a property order. Why was a distinction drawn here between marriage and de facto relationships? The relevance of future needs in property distribution is discussed below.

III. RETROSPECTIVE AND PROSPECTIVE CONSIDERATIONS

The Family Court of Australia, in effecting a just and equitable distribution of property between married persons, must consider two different things: past contributions (financial and non-financial, to property and to family welfare),[49] and the parties' present and future needs and general financial situations.[50] The dual nature of the provision was explained in *Sieling*:

> [t]he provision of s.79 enables the Court to overcome the inequity of determining the interest of husband and wife in their property according to the strict rules of law. Those provisions have both a retrospective and a prospective element. They look back to see how property was acquired, who contributed to it and in what form. They look ahead to ensure that the Court considers the means and needs of each spouse and their children.[51]

The role of the "prospective element" was further elucidated in *Pastrikos*:

> [t]he second part of the exercise is to consider the financial resources, means and needs of the parties and the other matters set out in sec.75(2) so far as relevant . . . Without excluding other significant factors from consideration, any disparity between the parties' financial resources and the obligation of either to provide a home for the children may make it just and equitable for the Court to increase the share of a party beyond that amount which would be justified solely by the contribution of that party

48 De Facto Relationships Act 1984 (N.S.W.) s.17.
49 Family Law Act 1975 (Cth) s.79(4)(a), (b), (c).
50 *Id.*, s.79(4)(d), (e), (f). Here, s.79(4)(e) incorporates the matters referred to in s.75(2), which are also relevant to a maintenance claim.
51 (1979) 5 Fam L R 713, 727 *per* Evatt C.J. and Marshal S.J.

> to the property. Although the exercise is a dual one, it has only one result. Nevertheless, that result reflects a party's contribution to property, a party's maintenance needs or a combination of both factors.[52]

An applicant may be able to establish a claim to a particular asset to which he or she has not contributed, by virtue of needs. The prospective element of section 79 has proved particularly useful in enabling the Family Court to take account of accommodation needs of a custodial parent in the distribution of property, and also in making an overall capital distribution which makes allowance for the lesser financial potential (through income or property ownership) of one party. Moreover, an applicant's failure to establish an entitlement to maintenance (under section 72 of the Family Law Act) will not necessarily preclude an entitlement under the prospective element of section 79. Thus in *Dench*[53] the Full Court said:

> [t]he factors under sec.75(2) may be relevant under sec.79(4)(d) even where a spouse has not been able to establish an entitlement to maintenance. A party may be in a position to make a reasonable provision for his or her own maintenance and yet remain at an overall disadvantage when the financial resources of the parties are compared.
>
> In the present case the wife has a need for accommodation for herself and her daughter. She may have to pay increased outgoings if she changes her accommodation. She has no home of her own and no capital to fall back on other than her interest in the former matrimonial home. Her obligation to provide a home and support for her daughter . . . is one which arose from the marriage. She is, of course, under an obligation to contribute to her daughter's maintenance to the extent of her ability. Nevertheless the main burdern of providing a home for and supporting the daughter now falls on the wife. The resources available to her are not extensive, whereas the husband is in a stronger position. Whether he is considered as a single man, or whether his remarriage is taken into account, in neither case does he have the same immediate need for capital as the wife.
>
> It appears that [the judge at first instance] may have made insufficient allowance for the fact that the wife must provide accommodation for the child and that the husband is in a position where he can provide some help in the form of capital . . . [T]he result of his Honour's order [which was a 50/50 split of the former matrimonial home] is such that it must be concluded that he did not give adequate consideration to its overall effect and to the relative position of the parties. We would allow the appeal and vary [the order] by providing for the net proceeds of sale [of the former matrimonial home] to be divided between the parties in the proportions of 60% to the wife and 40% to the husband.[54]

In practice, the accommodation needs of the custodial wife, together with her poorer earning capacity, can lead to a property order of greater quantum than if her contributions only were considered in a particular case.[55] How else could such accommodation and other needs be met? The trend in recent years is away from long-term awards of periodic maintenance, the enforcement problems of which are well known. Moreover, ideologically

52 (1980) FLC 90-897, 75,653.
53 (1978) FLC 90-469.
54 *Id.*, 77,406.
55 Although there is no "rule" that 10% over and above equality should be added to the share of property to be awarded to the custodian of infant children: *Miller*, note 18 *supra*.

modern matrimonial law encourages post-divorce economic independence wherever possible, and a clean break in financial relations.[56]

Why does the De Facto Relationships Act 1984 in (N.S.W.) exclude a prospective element from property distribution between de facto partners? The Law Reform Commission recognised that the recommended statutory provisions involved an approach differing from the Family Law Act, and said "[w]e repeat that we contemplate a clear distinction between the grounds on which an order for adjustment of property may be made and those on which an order for maintenance may be made."[57]

Also following the Commission's recommendation, entitlement to maintenance between de facto partners under the new legislation is more restricted than between their married counterparts. Generally, there is to be no maintenance entitlement between de facto partners.[58] Maintenance can be awarded only if a party is unable to support herself or himself adequately by reason of child care responsibilities towards a child under twelve, or where the relationship itself has affected the applicant's earning capacity and retraining or further education is therefore necessary.[59] Hence the De Facto Relationships Act looks only to factors attributable to the relationship itself, whereas under the Family Law Act, factors unconnected with the marriage (such as illness) can ground the entitlement to maintenance. The New South Wales Law Reform Commission considered this distinction justified because

> marriage involves a public commitment that is not a necessary part of a de facto relationship. That commitment may justify a continuing obligation on a married person to support his or her spouse, where the spouse is not able to earn an income.[60]

Does this argument apply equally as a justification for omitting prospective considerations from property distribution between de facto couples? Arguably not, since continuing maintenance obligations are distinguishable from capital adjustment the object of which is to allow for overall disparities in the parties' financial situations. It is submitted that no adequate explanation is offered in the Commission's Report for this distinction drawn in property division between de facto partners and married couples. The underlying assumption must be that de facto partners should have a lesser entitlement to both property and maintenance than their married counterparts. Yet this highlights the problems inherent in drawing shades of legal distinctions between the two institutions. Post-separation maintenance obligation (other than those relating to children) are difficult to justify not only in de facto relationships but also in marriage where divorce is no longer regarded as a remedy for breach of obligation and the wronged party no longer as being entitled to be placed in the same financial position as she or he would have been had the marriage continued. However, in a society with a real commitment to the post-separation needs of the custodial parent

56 Family Law Act 1975 (Cth) s.81.
57 Note 45 *supra*, para. 9.31.
58 De Facto Relationships Act 1984 (N.S.W.) s.26.
59 *Id.*, s.27.
60 Note 45 *supra*, para. 8.26.

(usually the woman), whether married or unmarried, the restriction of property orders to considerations of past contributions in the New South Wales legislation may be unjustified. The Commission envisaged that accommodation needs be met through maintenance orders:

> [f]or example, a woman with the care of young children of the relationship might be held entitled to an order, in her own right, against her former de facto partner for maintenance of $60 per week for a period of three years. It should be open to the court to determine that this entitlement will be satisfied by an order permitting the woman to occupy premises owned by the man (having a rental value equivalent to $60 per week) for that period. To give effect to this determination, the man could be ordered to vacate the premises and to refrain from disposing of them or interfering with the woman's possession during the three year period.[61]

However, this is very different from permitting the actual alteration of property rights to satisfy future needs and take account of general financial disparity.

In passing it should be noted that in systems of deferred community of property in marriage, the entitlement to half the property in the community is based on the notion of the parties' equal contributions as partners in marriage. In such systems no account may be taken of future need in making a property order. Is the law of maintenance adequate to take account of such need? There are those who argue, for example, that the accommodation needs of children after divorce should be recognised for what they are – an entitlement of the children to maintenance – and so should result only in a periodic maintenance order. But this might not in practice enable the immediate purchase of adequate accommodation by the custodial parent. Half-shares in a capital asset such as the home may not enable either party to purchase a substitute. It is to be hoped that the Australian Law Reform Commission will give full consideration to the retention or otherwise of future needs as a consideration relevant to distribution of property on the breakdown of marriage.

IV. FLEXIBILITY VERSUS PREDICTABILITY

The De Facto Relationships Act creates a new financial adjustment jurisdiction between de facto couples. The Court has power to make such order adjusting property interests as it thinks just and equitable.[62] Allowing for the differences outlined above, this adopts the discretionary model of the Family Law Act. Yet at this very time, the Australian Law Reform Commission is undertaking a full review of Australian matrimonial property law, and will report on the desirability of changes to the law concerning property rights during marriage and upon dissolution. In particular, the Commission is to consider the desirability or otherwise of the introduction of a system of fixed shares of at least some assets.

The arguments for and against both fixed and discretionary systems will

61 *Id.*, para. 9.30.
62 S.20.

no doubt be thoroughly canvassed by the Australian Law Reform Commission and have already been the subject of a considerable literature.[63] In *Mallet*, Gibbs C.J. noted the merits of a discretionary system in a pluralistic society:

> [t]he Family Law Act was passed at a time when great changes had occurred, and were continuing to occur, in the attitudes of many members of society to marriage and divorce, but when it was (as it is now) difficult, if not impossible, to say that any one set of values or ideas is commonly accepted, or approved by a majority of the members of society. Conflicting opinions continue to be strongly held as to the nature of marriage, the economic consequences of divorce and the effect, if any, that should be given to the fault or misconduct of a party when a court is making the financial adjustments that divorce entails. It is not surprising that given this diversity of opinions the Parliament did not require the power conferred by s.79 to be exercised in accordance with fixed rules. On the contrary, it has conferred on the court a very wide discretion to make such order as it thinks fit when it is satisfied that it is just and equitable that an order should be made . . .[64]

By contrast, Deane J. pointed out the dangers:

> [i]t is plainly important that, conformably with the ideal of justice in the individual case, there be general consistency from one case to another of underlying notions of what is just and appropriate in particular circumstances. Otherwise, the law would, in truth, be but the "lawless science" of a "codeless myriad of precedent" and a "wilderness of single instances" of which Lord Tennyson wrote in his poem "Aylmer's Field". It is inevitable and desirable that the need for such consistency should lead the judges of the Family Court to look to what has been said and decided in prior cases for assistance and guidance in determining what is just and appropriate in the differing circumstances of subsequent cases and that shared experience and accumulated expertise should lead to the emergence of generally accepted concepts of what is prima facie just and appropriate in particular types of cases.[65]

If, as has already occurred in New South Wales, the property rights of de facto partners are increasingly to become the subject of legislation, it seems inevitable that the discretionary versus fixed system debate will arise in this context in the same way as in relation to marriage. Problems of evaluation of the respective contributions of wage-earner and homemaker will be unavoidable, here as in marriage. Will judges of the Supreme Court of New South Wales develop starting points in the application of the De Facto Relationships Act similar to those developed by the Family Court in the Family Law Act, and if so will they receive a check from the High Court similar to that delivered on the Family Court in *Mallet*?

It will be somewhat ironic if, the New South Wales legislation having followed broadly the model of the Family Law Act, that model in matrimonial law becomes itself the subject of drastic change, perhaps to a community scheme. Given the issues common to property division between the married and the unmarried, it is submitted that no other State or Territory should introduce legislation governing the property rights of de

63 *E.g.* Gray, note 24 *supra*; R. Bailey, *Community of Property* (1980); J. Scutt, *For Richer, for Poorer* (1984).
64 Note 3 *supra*, 194-195.
65 *Id.*, 222.

facto partners until the future direction of matrimonial property law in Australia has become clearer.

V. CONCLUSION

> In a case where a man and woman are cohabiting though unmarried there is no presumption, either of equity or human experience, that they intend their relationship to have the same consequences upon their individual property rights as marriage has upon the property rights of spouses.[66]

The most basic problem confronting future law reform in the regulation of property rights between de facto partners is to know how widespread or otherwise is the view expressed by Their Honours. On the contrary, it may be thought that many ordinary men and women would, if anything, expect that de facto relationships should look, legally, more like marriage.

If de facto relationships are to be distinguished, legally, from marriage (as the New South Wales Law Reform Commission advocated), the difficulty lies in defining the nature and extent of that distinction. It is essential to identify, on the one hand, financial circumstances common to both institutions which lead to comparable injustices and require similar solutions in reform of the law relating to property divisions. On the other hand, it is essential to consider what really distinguishes marriage from a de facto relationship, in fact and in ideology. In a complex pluralistic society this is no simple task, and some entrenched earlier assumptions may have to be questioned. If the equal division of at least some assets at the termination of marriage is justified (and required) by reason both of the concept of differential equality in the marriage partnership and that of equality of status between men and women generally, why should not the same apply in the case of stable de facto relationships? The distinction between the two institutions cannot, it is submitted, be based on the supposed life-long nature of the commitment made in marriage; such a view savours of unreality in a society where divorce is readily available, where many marriages do not in fact last a lifetime and indeed where many de facto relationships last as long or longer than many marriages. In *Seidler* v. *Schallhofer*,[67] Hutley J.A. in the Supreme Court of New South Wales remarked that "[t]he marriage which the law now provides . . . is an arrangement terminable by either party on one year's separation . . ." [68]

Moreover, many persons choose to live in de facto relationships for reasons other than that they wish to avoid the legal consequences of the institution of marriage. It is by no means clear that entry into a de facto relationship involves a lesser degree of commitment for many couples than does marriage. The magic of the formal certificate should not be exaggerated.

66 Note 27 *supra*, 79,568 *per* Mason and Brennan JJ.
67 (1982) FLC 91-273.
68 *Id.*, 77, 551.

Reform of the law governing property rights of de facto partners can and must learn from the experience of matrimonial property law. The need to do so has never been more pressing than in 1985, when the property consequences of marriage may themselves be returned to the drawing-board.